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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Monday, 28 August 2000

Members: Mr Andrew Thomson *(Chair)*, Senator Cooney *(Deputy Chair)*, Senators Bourne, Coonan, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senators Coonan, Cooney, Ludwig and Tchen and Mr Adams, Mr Baird, Mrs Elson, Mr Andrew Thomson and Mr Wilkie

Terms of reference for the inquiry:

Review of treaties tabled on 15 August 2000.

WITNESSES

BALTUCK, Dr Miriam, National Aeronautics and Space Administration's senior representative in Australia and South-East Asia, United States National Aeronautics and Space Administration 11

BROUWHUIS, Mr Stephen, Senior Legal Officer, Office of International Law, Attorney-General's Department 2

DOWNING, Ms Susan, Senior Legal Officer, Office of International Law, Attorney-General's Department 2

DUNN, Mr John, Director, National Aeronautics and Space Administration, Administration and Finance, CSIRO, Telecommunications and Industrial Physics 11

KELLY, Ms Patricia, Head of Division, Services and Emerging Industries, Department of Industry, Science and Resources 11

LEASK, Mr Andrew, Assistant Secretary, Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade 19

MANNING, Mr Michael Grant, Senior Legal Officer, International Branch, Criminal Law Division, Attorney-General' Department 2

MARSHALL, Mr Steven, Assistant Secretary, International Branch, Criminal Law Division, Attorney-General' Department 2

PEPPINCK, Mr Winfred, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade 2

PRICE, Ms Julie-Anne, Project Officer, Department of Industry, Science and Resources 11

TYSON, Mr Robert James, Assistant Secretary, Nuclear Policy Branch. Department of Foreign Affairs and Trade 19

Committee met at 10.11 a.m.

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties. Today, as part of the committee's continuing review of our international obligations, we are to look at three agreements: the extradition treaty with Latvia; amendments to the Space Vehicle Tracking and Communications Facilities Agreement with the United States; and amendments to the agreement with Japan establishing and implementing arrangement for cooperation in the peaceful uses of nuclear energy. All these actions were tabled in both houses of parliament on 15 August this year.

MOTION (BY SENATOR COONAN**) AGREED TO:**

THAT THE SUBMISSION FROM THE ATTORNEY-GENERAL'S DEPARTMENT, CRIMINAL LAW DIVISION, BE RECEIVED AND APPROVED FOR PUBLICATION FORTHWITH.

CHAIR—The submission is for immediate publication, so if there are any members who would like to take a quick look at it, they can by all means.

[10.11 a.m.]

Treaty on Extradition between Australia and the Republic of Latvia

PEPPINCK, Mr Winfred, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

BROUWHUIS, Mr Stephen, Senior Legal Officer, Office of International Law, Attorney-General's Department

DOWNING, Ms Susan, Senior Legal Officer, Office of International Law, Attorney-General's Department

MANNING, Mr Michael Grant, Senior Legal Officer, International Branch, Criminal Law Division, Attorney-General' Department

MARSHALL, Mr Steven, Assistant Secretary, International Branch, Criminal Law Division, Attorney-General' Department

CHAIR—Welcome. We will not require anyone to give evidence on oath this morning. We do not usually do that. I have to formally advise that these hearings are legal proceedings of the parliament, as if they were taking part in the House of Representatives or the Senate, so any giving of false or misleading evidence is a very serious matter and may be regarded as a contempt of the parliament. Could one of your number please make an introductory statement, and then we will have some questions?

Mr Marshall—Speaking on the extradition treaty between Australia and the Republic of Latvia, there are some brief points I would like to make by way of introduction. The treaty itself has been the subject of an uncharacteristic degree of public attention because of the particular context in which the negotiations have taken place. I would like to speak briefly on the treaty and attempt to set it into context.

THE TREATY ITSELF IS A FAIRLY TYPICAL, MODERN AUSTRALIAN EXTRADITION TREATY. IN MOST RESPECTS IT FOLLOWS AUSTRALIA'S MODEL TREATY QUITE CLOSELY. FOR EXAMPLE, IT DEFINES EXTRADITABLE OFFENCES AS THOSE CARRYING A MAXIMUM PENALTY OF AT LEAST ONE YEAR'S IMPRISONMENT IN BOTH COUNTRIES. IT ALSO INCLUDES ALL OF THE STANDARD MANDATORY GROUNDS FOR REFUSAL OF EXTRADITION, INCLUDING THOSE FOR POLITICAL AND MILITARY OFFENCES AND THOSE FOR CASES WHERE CONCERNS ARISE ABOUT DISCRIMINATION ON THE GROUNDS OF RACE, RELIGION, NATIONALITY OR POLITICAL OPINIONS. IT ALSO INCLUDES A NUMBER OF DISCRETIONARY GROUNDS FOR REFUSAL. FOR EXAMPLE, WHERE THE DEATH PENALTY IS APPLICABLE IN THE REQUESTING COUNTRY, UNLESS THERE IS AN UNDERTAKING GIVEN THAT THE DEATH PENALTY WILL NOT BE CARRIED OUT; WHERE THE FUGITIVE IS A NATIONAL OF THE REQUESTED STATE AND IN SUCH CIRCUMSTANCES THE REQUESTING STATE MAY REQUEST THAT THE REQUESTED STATE GIVE BONA FIDE CONSIDERATION TO PROSECUTING THE FUGITIVE IN LIEU OF EXTRADITION;

FOR HUMANITARIAN CONSIDERATIONS, WHICH INCLUDE THE POSSIBILITY OF CRUEL, INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT; AND ALSO CIRCUMSTANCES SUCH AS THE AGE AND HEALTH OF THE PERSON SOUGHT FOR EXTRADITION.

LIKE MOST OF AUSTRALIA'S MODERN EXTRADITION TREATIES, THIS ONE TREATS THE DETERMINATION OF GUILT AS FUNDAMENTALLY A MATTER FOR THE COURTS OF THE REQUESTING COUNTRY—THAT IS, THE REQUESTING COUNTRY IS NOT REQUIRED TO PRODUCE ADMISSIBLE EVIDENCE; RATHER, A DETAILED STATEMENT OF THE ALLEGED FACTS FROM WHICH IT WILL BE APPARENT WHETHER THE OFFENCE IS AN EXTRADITABLE ONE. THE TREATY ALSO INCLUDES STANDARD SAFEGUARDS AGAINST THE FUGITIVE BEING TRIED FOR OTHER OFFENCES ONCE BACK IN THE REQUESTING COUNTRY.

THE BACKGROUND TO THE NEGOTIATION OF THIS TREATY IS ONE OF FAIRLY CONSTANT PUBLIC INTEREST, PARTICULARLY SINCE LATE LAST YEAR IN THE WORLD WAR II WAR CRIMES ISSUE AND IN PARTICULAR THE KONRAD KALEJS CASE. THIS HAS HAD RELATIVELY LITTLE EFFECT ON THE CONTENT OF THE TREATY, BUT IT HAS CERTAINLY INFLUENCED THE TIMING AND THE PACE OF NEGOTIATIONS. A MODERN TREATY WITH LATVIA WOULD ALMOST CERTAINLY HAVE BEEN NEGOTIATED AT SOME TIME IN THE NEAR FUTURE AS PART OF OUR ONGOING PROGRAM OF ESTABLISHING EXTRADITION RELATIONS WITH EASTERN EUROPEAN COUNTRIES. HOWEVER, THE RECEIPT BY AUSTRALIA OF A REQUEST FOR MUTUAL ASSISTANCE FROM LATVIA IN CONNECTION WITH WORLD WAR II WAR CRIMES IN LATE 1997 ALERTED US TO THE POSSIBILITY OF AN EXTRADITION REQUEST AND TO THE PROBLEMS IN THAT REGARD WHICH WOULD BE POSED BY THE WAR CRIMES ACT 1945. SINCE 1989 THE WAR CRIMES ACT HAD INCLUDED A SPECIAL REQUIREMENT FOR A REQUESTING STATE TO ESTABLISH A PRIMA FACIE CASE AGAINST A FUGITIVE IN WORLD WAR II WAR CRIMES EXTRADITION CASES. THIS WOULD EFFECTIVELY PREVENT EXTRADITION TO A CIVIL LAW COUNTRY IN SUCH A CASE. THE MINISTER FOR JUSTICE AND CUSTOMS, SENATOR VANSTONE, DECIDED IN EARLY 1998 THAT STEPS SHOULD BE TAKEN TO OPEN EXTRADITION RELATIONS WITH LATVIA AND THE OTHER BALTIC STATES AT THE SAME TIME AS AMENDMENTS WERE MADE TO THE WAR CRIMES ACT TO ELIMINATE THIS SPECIAL REQUIREMENT.

INITIALLY LATVIA DID NOT TREAT THIS AS A HIGH PRIORITY, AND WE SAW LITTLE POINT IN PRESSING THE MATTER WHILE THE WAR CRIMES ACT REMAINED UNAMENDED. HOWEVER, WITH THE ENACTMENT OF THE WAR CRIMES ACT AMENDMENTS IN DECEMBER 1999 AND THE SIMULTANEOUS FOCUSING OF ATTENTION ON THE KALEJS CASE, THIS POSITION CHANGED RAPIDLY. THE VIEW GAINED WIDE ACCEPTANCE THAT THE BEST WAY TO DEAL WITH THE KALEJS CASE WAS FOR LATVIA TO INVESTIGATE THE MATTER AND IF IT FOUND GROUNDS FOR PROSECUTION TO SEEK KALEJS'S EXTRADITION FROM AUSTRALIA.

AT THE PLURILATERAL MEETING ON THE KALEJS CASE AND ASSOCIATED MATTERS IN RIGA IN FEBRUARY THIS YEAR LATVIA FORMALLY AGREED TO COMMENCE NEGOTIATIONS, AND THE PROCESS HAS PROCEEDED RAPIDLY EVER SINCE. BOTH COUNTRIES FELT THAT IN SUCH A SERIOUS MATTER IT WOULD HAVE BEEN MOST UNSATISFACTORY IF AN EXTRADITION REQUEST BY LATVIA HAD FAILED SIMPLY BECAUSE THERE WAS NO RELATIONSHIP IN PLACE. I SHOULD MAKE THE POINT THAT THIS DOES NOT MEAN THAT AUSTRALIAN AUTHORITIES ARE DETERMINED TO EXTRADITE KALEJS. ANY REQUEST WOULD BE CONSIDERED ON ITS MERITS AND RELEVANT

CIRCUMSTANCES WOULD BE TAKEN INTO ACCOUNT, BUT A REQUEST SHOULD NOT FAIL FOR REASONS IRRELEVANT TO THE CASE.

THE ONLY EFFECT OF THE WAR CRIMES ISSUE ON THE CONTENT OF THE TREATY IS THAT THERE IS NO REQUIREMENT IN THE TREATY THAT THE OFFENCE WITH WHICH THE FUGITIVE HAS BEEN CHARGED MUST HAVE BEEN AN OFFENCE UNDER THE LAW OF THE REQUESTING COUNTRY AT THE TIME OF THE ALLEGED CONDUCT. THIS APPROACH IS CONSISTENT WITH SEVERAL OF OUR OTHER TREATIES, INCLUDING THOSE WITH GERMANY AND ITALY, AND IS ALSO CONSISTENT WITH AUSTRALIA'S RETROSPECTIVE CRIMINALISATION OF WORLD WAR II WAR CRIMES IN ITS LEGISLATION.

THERE WERE SOME SUGGESTIONS IN JUNE THIS YEAR THAT LATVIA COULD SEEK KALEJS'S EXTRADITION BEFORE ENTRY INTO FORCE OF THE TREATY. IN RESPONSE THE GOVERNMENT MADE IMMEDIATE ARRANGEMENTS FOR THE EXTRADITION ACT TO BE APPLIED TO LATVIA ON A NON-TREATY BASIS WITH EFFECT FROM 12 JULY THIS YEAR. THESE NON-TREATY REGULATIONS, ALTHOUGH FULLY LEGALLY EFFECTIVE, ARE INTENDED SOLELY AS AN INTERIM MEASURE, PENDING ENTRY INTO FORCE OF THE TREATY. THAT IS ALL BY WAY OF INTRODUCTORY STATEMENTS, MR CHAIRMAN. WE ARE HAPPY TO ANSWER ANY QUESTIONS.

Mr BAIRD—Thanks, Mr Marshall, for your extensive briefing on the background. It was very helpful to us. Why were the existing provisions not able to be used effectively? I heard part of the reason, but were the existing arrangements with Latvia insufficient to be able to provide the impetus? Could you just go over those reasons again?

Mr Marshall—Certainly. Prior to the arrangements for the Extradition Act to be applied on a non-treaty basis, the position was that at international law Australia was party to an inherited treaty with Latvia which required the production of documents to satisfy a prima facie case. The authorities in civil law countries such as Latvia have consistently found it very difficult to provide evidence in an admissible form in Australian courts to satisfy that particular requirement. So the old inherited treaty relationship was unsatisfactory. Furthermore, because Latvia had been within the Soviet bloc up until the late 1980s that particular treaty had not been applied for the purposes of Australia's law. So we really had a dual problem. Fundamentally, in order to have a workable extradition relationship with a civil law country we needed to have an arrangement which allowed for extradition in circumstances not requiring the production of prima facie evidence against the person sought.

Mr BAIRD—So in terms of the evidence to be provided, it would be more word of mouth evidence from those who were there at the time?

Mr Marshall—It doesn't really even go that far. What is required is a statement of facts or a statement of acts and omissions which are alleged to constitute the offence. But the function of the magistrate under Australia's extradition law, under all of our modern extradition relationships, is not to determine the adequacy of evidence against the person sought. Once we enter into an extradition relationship with a country we take it as given that their judicial systems are such that the person will be given a fair trial and that it is not part of the magistrate's or Australia's functions to determine the guilt or otherwise of the accused person.

Mr BAIRD—So in providing this particular provision in relation to Latvia, is this then consistent with other treaty arrangements we have with other countries?

Mr Marshall—Yes, it is. It does appear in our model treaty, which is used as the basis for all of our modern extradition negotiations. I would say that, of the 31 or so modern treaties which we have, the majority of those would be what we would call no-evidence extradition treaties.

Mr BAIRD—Why does it take this amount of effort when you have a particular issue to actually stimulate it? Why can't we have a generic treaty arrangement with all countries that is simultaneously negotiated with our various ambassadors of the countries involved so that we do not have this problem emerging and then we individually negotiate through? Why do we not have this going on in terms of extradition arrangements with most countries?

Mr Marshall—I am not quite sure as to the import of your question. Are you suggesting perhaps a multilateral extradition arrangement applicable for all countries?

Mr BAIRD—Yes.

Mr Marshall—I suspect that would be very hard to do for a number of reasons. The first reason would be that different countries choose to enter into extradition relationships with other partners for specific reasons. Australia, for example, focuses on the countries with which we have strong people-to-people links. So the first cab off the rank would have been the United States, because we have very strong links with them—also, New Zealand and the Commonwealth countries. There are multilateral arrangements in some contexts, but I think it would be very difficult to have a large number of countries agree on very specific provisions for extradition in that sort of context.

BY WAY OF EXAMPLE, WE DO NEGOTIATE MULTILATERAL TREATIES ON SPECIFIC SUBJECT MATTER, SUCH AS TRAFFICKING IN DRUGS OR CERTAIN TERRORIST ACTIVITIES AND SO ON. WHAT WE FIND IS THAT, BECAUSE THAT IS A MULTILATERAL NEGOTIATION WITH MANY PARTNERS, IT IS VERY DIFFICULT TO REACH AGREEMENT ON THE SPECIFIC CONDITIONS BY WHICH EXTRADITION SHALL BE GRANTED, WHEREAS A ONE-ON-ONE TREATY NEGOTIATION IS FAR MORE LIKELY TO REACH AGREEMENT WITH A GREATER DEGREE OF SPECIFICITY.

AS FAR AS I AM AWARE, MOST INTERNATIONAL PRACTICE IS TO HAVE BILATERAL EXTRADITION RELATIONS WITH THOSE COUNTRIES WITH WHOM YOU ARE EXPECTING TO DO A LOT OF EXTRADITION BUSINESS WITH. THEY CAN BE SUPPLEMENTED BY MULTILATERAL TREATIES ON SPECIFIC MATTERS, BUT AS A MATTER OF CHOICE I THINK IF AUSTRALIA WERE TO CHOOSE EXTRADITION EITHER UNDER A BILATERAL ARRANGEMENT OR A MULTILATERAL ARRANGEMENT THE GOVERNMENT WOULD ALMOST CERTAINLY PREFER TO PROCEED UNDER THE BILATERAL ARRANGEMENT BECAUSE THE TERMS OF THAT ARRANGEMENT WOULD BE FAR MORE SPECIFIC.

Mr BAIRD—Is the treaty we are going to put in place with Latvia the same as the one we have with Spain?

Mr Marshall—It is based on the same model. There are some differences, but it is broadly similar to the treaty we have with Spain.

Senator TCHEN—Mr Marshall, I am afraid I have to ask you to guide me through some of these legal structures. I understand the way the Extradition Act works is that, particularly with a provision like this one, through treaties basically the requesting country, regardless of their legal system, will come to Australia and ask for a certain Australian citizen or non-citizen to be extradited from Australia and that this matter will go before a magistrate and the magistrate will then look at the request and approve on the basis of whether he believes there is sufficient substance in the request. Is there an appeal right? Can the person involved appeal the decision by the magistrate?

Mr Marshall—Yes. There is a structure under section 21 of the Extradition Act in which an appeal may be made to a single judge of the Federal Court, then to the full court. Then application for special leave to appeal may be made to the High Court.

Senator TCHEN—On the basis of evidence?

Mr Marshall—No, not on the basis of evidence. It would depend upon the particular relationship we had. In some circumstances, some of our extradition relationships do still require prima facie evidence. The principal countries to which that applies are Commonwealth countries, because we have an arrangement called the London Scheme, whereby the production of prima facie evidence is contemplated. That does not cause all that many difficulties in the Commonwealth context because, being Commonwealth countries, they are broadly familiar with the concepts of what we would regard as a prima facie case.

IN OTHER CIRCUMSTANCES, HOWEVER, THERE ARE FEWER MATTERS OF WHICH THE MAGISTRATE HAS TO BE SATISFIED IN ORDER TO DETERMINE WHETHER THE PERSON IS EXTRADITABLE. THE MAGISTRATE WOULD GO TO LOOKING AT ISSUES SUCH AS WHETHER THE DOUBLE CRIMINALITY REQUIREMENT IS SATISFIED; THAT IS, WHETHER THE OFFENCES WOULD BE PUNISHABLE BY ONE YEAR OR MORE IN PRISON IN EACH STATE. THERE WOULD BE A NUMBER OF OTHER ISSUES, SUCH AS THE EXISTENCE OF A VALID ARREST WARRANT AGAINST THE PERSON. THERE ARE A RANGE OF MATTERS WHICH THE MAGISTRATE SHOULD BE SATISFIED OF, BUT IN A MATTER SUCH AS A TREATY LIKE THIS ONE EVIDENCE WOULD NOT BE ONE OF THEM.

Senator TCHEN—Say the requesting country is a civil law country. Then, as you indicated, the substance of evidence required may be different from a common law country such as Australia. In that situation with a treaty arrangement, I understand from what you said that basically there is a fundamental assumption from Australia's point of view that this person would get a fair trial and that the requesting country has a fair judiciary system in place. Is that a fundamental assumption?

Mr Marshall—Yes. Australia would not enter into an extradition relationship with a country in circumstances where we thought that its judicial processes were manifestly unfair or where there were strong concerns about those particular processes.

Senator TCHEN—I would assume that is the case. I am not too concerned in the case of Latvia. I am prepared to take that as read. I was just looking through the list of non-treaty extradition relations, because some of these countries I am not too sure about, particularly in the instance of recent court decisions—fairly prominent ones. For example, I refer you to page 10 of the Attorney-General's submission.

Mr Marshall—Are you referring—

Senator TCHEN—I do not want to name any of the countries.

Mr Marshall—No, exactly. I should make the point that a number of the countries identified here are Commonwealth countries and we do not have an extradition treaty per se with those countries. The act is applied to them and as a matter of international law Australia is not obliged to extradite to those countries. So where we receive a request from a country with whom we do not have a binding treaty, extradition is ultimately a matter of discretion.

I SHOULD ALSO MAKE THE POINT THAT OUR EXTRADITION ACT AND THE TREATIES DO INCLUDE CERTAIN PROTECTIONS FOR PERSONS WHO ARE SOUGHT FOR EXTRADITION, OR GUARANTEES THAT IT WILL OPERATE IN FAVOUR OF A PERSON SOUGHT. THUS, FOR EXAMPLE, IF IT IS CONSIDERED THAT EXTRADITION IS BEING SOUGHT FOR POLITICAL REASONS OR THAT THE PERSON WILL BE PREJUDICED AT TRIAL OR IN CUSTODY AS A RESULT OF POLITICAL OPINIONS OR OTHER ISSUES IRRELEVANT TO THE GUILT OR OTHERWISE OF THE OFFENCE, WE HAVE A DISCRETION TO REFUSE EXTRADITION ON THAT BASIS. NORMALLY WITH OUR EXTRADITION TREATIES WE TRY TO ENSURE THAT WE DO HAVE CERTAIN GUARANTEES WHICH THE MINISTER CAN APPLY IN CONSIDERING WHETHER EXTRADITION SHALL BE GRANTED.

Senator COONAN—Just as a preliminary point, on what we have heard about Mr Kalejs I think it is very tempting for us to do everything to facilitate his extradition to Latvia, but we are of course examining a treaty and we need to have regard to the standard safeguards and be sure that this really will apply generically to any person for whom Latvia may seek extradition. Can you remind me, please, of the difference between the civil law standard and the common law standard that led to us changing the regulations and now to entering into a treaty?

Mr Marshall—Broadly speaking, in civil law countries it fundamentally relates to the system by which they administer justice. Civil law countries tend to operate on an inquisitorial basis, as opposed to an adversarial system, and they have less stringent requirements for admissibility of evidence because, I would imagine, the inquisitor in such cases is vested with more authority and discretion in determining the adequacy of information and material put before the relevant body for the purposes of determining guilt.

IN AUSTRALIA, AS WITH OTHER COMMON LAW SYSTEMS, THERE HAS BEEN, I WOULD IMAGINE, AN EVOLUTION OF STANDARDS WHICH, IN TERMS OF THEIR APPLICABILITY FOR EVIDENCE, ARE CONSIDERED QUITE ALIEN BY CIVIL LAW COUNTRIES. I CANNOT REALLY DEFINE IT IN TERMS OF A BALANCE. ONE EXAMPLE WOULD BE THE HEARSAY RULE. AUSTRALIAN COURTS TRADITIONALLY HAVE BEEN VERY STRONG ON THE HEARSAY RULE, WHEREAS IN CIVIL LAW COUNTRIES THEY DO NOT GIVE THAT THE SAME

DEGREE OF WEIGHT AS WE WOULD. IN FACT THEY WOULD NOT, IN MY EXPERIENCE, CALL IT A RULE. THEY ARE PREPARED TO ACCEPT HEARSAY EVIDENCE SUBJECT TO OTHER PARTICULAR TESTS.

Senator COONAN—So it is in effect relaxing our standard to a degree in looking at the civil law standard to apply to a request?

Mr Marshall—In part, yes. I think a decision was taken by the parliament in around 1987 to enable application of the Extradition Act to countries based upon a no-evidence standard. The decision was then taken—it was debated at some considerable length—to endorse the principle that the extradition process is not regarded as one in which a determination of guilt of the accused shall be made.

Senator COONAN—What about, though, a prima facie case?

Mr Marshall—I would imagine that is what a prima facie case is intended to do, which is to find out whether there is a certain standard met in determining whether the person is guilty or not. It is obviously a less stringent standard than beyond reasonable doubt; nonetheless, it does direct the magistrate to make an investigation relevant to the issue as to whether the person is guilty or not.

Senator COONAN—How do the standard safeguards then work, particularly the discretionary safeguards? I do not really want to concentrate on any particular case, but how do we then take into account and properly evaluate things such as the scarcity of records in the requesting country or somebody's age? We have concern in our system about someone very, very old or about where events are in the distant past. How do all of those discretions and safeguards work if we have a different standard anyway? Do we apply hearsay to that or do we apply divine intervention? How do we get records that would indicate that there is sufficient there to extradite somebody? Do we just simply allow it to be an allegation on the part of the requesting country?

Mr Marshall—I suppose there are two separate issues there in terms of the question of mandatory discretions. There have been cases in which the person sought for extradition has suggested that the request was motivated for other considerations. The person is able to claim that before the magistrate as well as claim that, assuming a decision is made that the person is extraditable, when it is up to the minister to determine whether the person shall be surrendered. The minister is required to take relevant considerations into account but in terms of the finding of guilt, because the position is reflected in the legislation that extradition is not a process by which guilt or otherwise of the accused is to be measured, strictly speaking that issue for the no-evidence countries is not a relevant one.

Senator COONAN—I understand all of that. I accept that. What concerns me is that, without having some schmick about whether there is likely to be a maintainable case, how do you know whether or not to exercise all of these discretions and safeguards? You do not do it in a vacuum. If somebody comes up and says, 'I am 96 and I am in poor health', presumably that is relevant. Do you take evidence about that? I refer to, say, the records in Latvia relating to World War II. Is that something we should have regard to or are we not at all concerned about the fact that it might be impossible for someone to have a fair trial? Don't worry about their guilt or innocence; I am looking at fairness and process. How do we know this if we extradite

somebody to somewhere such as Latvia? I am not making a comment about Latvia per se, but do we have some idea about whether or not there are records there that will enable somebody to defend themselves?

Mr Marshall—If extradition were sought in a specific case and questions were raised about the adequacy of records against them, Australia could follow that up with the authorities of the requesting country. Quite frequently in cases in which persons seek to resist extradition on one ground or another those sorts of issues come up. There is also under our extradition legislation a general discretion for the minister to refuse extradition. The minister is required to take into account certain factors. One of the factors would be the humanitarian considerations, because there is a discretionary obligation under the treaty to refuse on those grounds. Equally so, the minister does have a general discretion to refuse.

IN PRACTICE, WHAT TENDS TO HAPPEN IS THAT, IF THE PERSON SOUGHT FOR EXTRADITION WISHES TO RESIST, THAT PERSON WILL PUT SUBMISSIONS EITHER TO THE MAGISTRATE AT THAT LEVEL, IN WHICH CASE THEY MAY BE TESTED PROVIDED THEY ARE RELEVANT TO THE MAGISTRATE'S ROLE, OR TO THE MINISTER, WHICH HAPPENS QUITE FREQUENTLY. THOSE SUBMISSIONS MAY THEN BE TESTED WITH THE AUTHORITIES OF THE REQUESTING COUNTRY BEFORE A DETERMINATION IS MADE AS TO WHETHER OR NOT THE PERSON SHALL ACTUALLY BE SURRENDERED TO THAT COUNTRY. IF THERE IS EVIDENCE PUT FORWARD TO THE EFFECT THAT THE EXTRADITION WOULD BE INCOMPATIBLE WITH HUMANITARIAN CONSIDERATIONS ON THE BASIS OF HEALTH OR ON OTHER BASES, THE MINISTER WOULD BE REQUIRED TO TAKE THAT INTO ACCOUNT.

Senator COONAN—So on a government-to-government level, if a requesting country simply asserted that they had a range of records would that be sufficient? Do we test any of this sort of stuff? I am just interested to know how the actual process works if some of these discretions actually work and the safeguards are actually meaningful.

Mr Marshall—Again, I would see the records question as slightly distinct from other issues. If it came down to a question of health, for example—

Senator COONAN—That is a contemporary issue. I am looking at perhaps something—

Mr Marshall—Well, other sorts of issues could be, for example, if—

Senator COONAN—Just stay with records.

Mr Marshall—Sure. If the question as to the adequacy of records fundamentally went to the person saying, 'There is no evidence of my guilt here', then we come back to the same issue I identified previously. If the government were put on notice that persons extradited were not going to receive a fair trial, I imagine that would be something the minister would wish to look at in the context of the exercise of her discretion.

Senator COONAN—But put on notice by the person sought to be extradited or would we raise it as an issue anyway? Everybody knows that there may be difficulty with records that go back into the mists of time. In the Kalejs case it is almost notorious that he has been bouncing around in various countries and no-one has had sufficient basis to charge him.

Mr Marshall—In an instance like that, if charges were laid and a prosecution anticipated, I suppose the starting point for the government would be to accept that there were records and that a fair trial would proceed. In a case in which an Australian citizen were ever extradited, it would be something the government would be in a position to monitor, because an Australian who is subject to trial overseas is entitled to consular assistance, including various forms of assistance. I would imagine that any trial conducted in Latvia would be one which it would be possible to monitor in such circumstances.

Senator COONAN—As these things are, it is a fairly fluid situation, depending on each case.

Mr Marshall—Yes.

CHAIR—I have a question on a matter of policy. In the list of the countries with which we have various arrangements for extradition, in many cases in the comments column it specifically says that extradition of the nationals of that counter-party country is prohibited. Why is that so often the case with country-parties, that they will not allow extradition of their own nationals under these arrangements with us? Does Australia have the same prohibition in any of our agreements? What is the policy reason behind that?

Mr Manning—Essentially this is part of the distinction between common law and civil law countries. It is very commonly the case that civil law countries regard their nationals as being subject to their criminal jurisdiction, even in respect of acts done outside the country as a normal matter of course. In Australian law we occasionally extend our jurisdiction to acts by Australians overseas, but in civil law countries it is pretty common that, at least in a case where the act done is criminal in the country where it is done, they regard themselves as having jurisdiction over their nationals, wherever they are, for criminal purposes.

THE CONCOMITANT OF THAT IS THAT IF THEIR NATIONAL IS IN THEIR COUNTRY THEY REGARD THEMSELVES AS HAVING THE FIRST RIGHT TO TRY THEM IN RESPECT OF A CRIME COMMITTED OVERSEAS AND FOR THAT REASON THEY REFUSE TO EXTRADITE THEIR NATIONALS. IT IS COMMONLY A FEATURE OF THEIR CONSTITUTIONS, ALTHOUGH SOMETIMES IT IS MERELY AN ORDINARY STATUTE. IT IS VERY UNCOMMON AMONG COMMON LAW COUNTRIES.

I GUESS IT ALSO LINKS INTO THE WHOLE ISSUE ABOUT EVIDENCE IN A SENSE. BECAUSE OF OUR FAIRLY STRICT RULES OF EVIDENCE, IT IS RATHER MORE DIFFICULT TO TRY A PERSON IN A COMMON LAW JURISDICTION FOR AN OFFENCE COMMITTED OUTSIDE THE JURISDICTION THAN IT IN A CIVIL LAW JURISDICTION, ALTHOUGH I THINK WE HAVE HAD SOME RECENT EXPERIENCE THAT SUGGESTS THAT EVEN IN CIVIL LAW JURISDICTIONS IT CAN BE QUITE DIFFICULT. BASICALLY, IT IS CONNECTED WITH THEIR CLAIM TO JURISDICTION.

CHAIR—I thank the witnesses for their contribution on that agreement.

[10.45 a.m.]

Agreement concerning space vehicle tracking and communication facilities

KELLY, Ms Patricia, Head of Division, Services and Emerging Industries, Department of Industry, Science and Resources

PRICE, Ms Julie-Anne, Project Officer, Department of Industry, Science and Resources

BALTUCK, Dr Miriam, National Aeronautics and Space Administration's senior representative in Australia and South-East Asia, United States National Aeronautics and Space Administration

DUNN, Mr John, Director, National Aeronautics and Space Administration, Administration and Finance, CSIRO, Telecommunications and Industrial Physics

CHAIR—Welcome. Again, there is no requirement to give evidence under oath, but these are legal proceedings of the parliament, so they warrant the same respect as if they were taking place in the House of Representatives or the Senate. Would one of your number please make an introductory statement, and then we will have questions from the committee.

Ms Kelly—Thank you. I would like to briefly outline for the committee the rationale for renewing the agreement between the government of Australia and the government of the United States of America concerning space vehicle tracking and communication facilities. As this agreement primarily covers the Canberra Deep Space Communication Complex at Tidbinbilla, I would ask the secretariat to circulate to the committee the information that we have provided on that complex.

COOPERATION BETWEEN THE TWO COUNTRIES HAS BEEN IN PLACE SINCE 1957, WITH THE ESTABLISHMENT OF FACILITIES AT WOOMERA IN SOUTH AUSTRALIA TO RADIOTRACK US SATELLITES. THIS WAS BROADENED TO INCLUDE ADDITIONAL SCIENTIFIC FACILITIES SET UP BY THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, NASA, IN 1960. SINCE THAT TIME THE RELATIONSHIP BETWEEN NASA AND AUSTRALIA HAS BEEN STRENGTHENED BY A SUCCESSION OF TREATIES BETWEEN THE TWO COUNTRIES. THE TREATY ACTION CURRENTLY UNDER CONSIDERATION FURTHER AMENDS AND EXTENDS THE LATEST AGREEMENT, THE 1980 PROGRAM AGREEMENT, FOR A FURTHER 10 YEARS AND PROVIDES FOR THE ESTABLISHMENT, OPERATION AND MAINTENANCE OF NASA'S FACILITIES IN AUSTRALIA.

THE FACILITIES CURRENTLY OPERATING IN AUSTRALIA ARE THE CANBERRA DEEP SPACE COMMUNICATION CENTRE, LOCATED AT TIDBINBILLA IN THE ACT, AND A TRACKING AND DATA RELAY SATELLITE RANGING SYSTEM FACILITY, LOCATED AT ALICE SPRINGS IN THE NORTHERN TERRITORY. THESE FACILITIES, AND THEREFORE THIS TREATY, ARE IMPORTANT TO BOTH COUNTRIES. AUSTRALIA HAS PROVIDED NASA WITH AN IDEAL LOCATION TO TRACK ITS SPACECRAFT. ITS SCIENTIFIC INVESTIGATIONS OF THE SOLAR SYSTEM ARE ACCOMPLISHED PRIMARILY THROUGH THE USE OF ROBOTIC

SPACECRAFT. ITS DEEP SPACE NETWORK PROVIDES TWO-WAY COMMUNICATIONS LINKS FOR THE GUIDANCE AND CONTROL OF SPACECRAFT AND THE RELAY OF DATA AND IMAGES.

MANAGED AND OPERATED BY NASA'S JET PROPULSION LABORATORY, THE DEEP SPACE NETWORK CONSISTS OF THREE COMPLEXES STRATEGICALLY LOCATED AROUND THE WORLD—IN CALIFORNIA, IN SPAIN AND THE AUSTRALIAN FACILITY AT TIDBINBILLA. THE DEEP SPACE NETWORK IS ALSO USED TO PERFORM RADIO ASTRONOMY, RADAR AND RADIO SCIENCE EXPERIMENTS TO IMPROVE KNOWLEDGE OF THE SOLAR SYSTEM AND THE UNIVERSE. IT PROVIDES INFORMATION TO ASSIST IN SELECTING LANDING SITES FOR NASA SPACE MISSIONS, DETERMINING THE COMPOSITION OF THE ATMOSPHERES AND THE SURFACES OF THE PLANETS, STUDYING THE STAR FORMATION PROCESS, AND IMAGING AND INVESTIGATION OF ASTEROIDS AND COMETS.

AS PART OF ITS OPERATIONAL FACILITIES IN AUSTRALIA, NASA HAS SPENT IN EXCESS OF $A470 MILLION ON SPACE RELATED ACTIVITIES SINCE 1960. COOPERATION HAS ALSO FACILITATED THE TRANSFER OF TECHNICAL AND SCIENTIFIC KNOWLEDGE AND SKILLS BETWEEN AUSTRALIA AND THE US. FOR EXAMPLE, IN THE COMING DECADE AUSTRALIAN SCIENTISTS CAN BENEFIT FROM HUNDREDS OF HOURS OF ANTENNA TIME FOR USE IN RADIO ASTRONOMY EXPERIMENTS. NASA IS SEEKING TO INCREASINGLY INVOLVE THE HIGHLY SKILLED TECHNICAL WORK FORCES LOCATED AT ITS OVERSEAS FACILITIES IN SYSTEMS ENGINEERING DESIGN AND DEVELOPMENT WORK FOR THE DEEP SPACE NETWORK. THE AUSTRALIAN FACILITIES HAVE THE OPPORTUNITY TO CAPTURE SUCH WORK, WHICH WILL GENERATE ADDITIONAL REVENUE, SIGNIFICANTLY ENHANCE SCIENTIFIC AND TECHNICAL CAPABILITIES, PROVIDE POSSIBLE SPIN-OFFS TO AUSTRALIAN INDUSTRY AND OPEN ADDITIONAL OPPORTUNITIES FOR LOCAL STAFF IN AUSTRALIAN BASED NASA FACILITIES.

ALL ACTIVITIES CONDUCTED IN AUSTRALIA UNDER THIS AGREEMENT ARE MANAGED TO ENSURE THAT THEY ARE CONSISTENT WITH AUSTRALIA'S INTERESTS. THE COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION, CSIRO, MANAGES THE FACILITIES ON BEHALF OF NASA, WITH OPERATIONAL AND MAINTENANCE ACTIVITIES CONTRACTED OUT TO AUSTRALIAN INDUSTRY. CURRENTLY THERE ARE AROUND 135 ENGINEERS, TECHNICIANS, OPERATORS AND SUPPORT STAFF LOCATED AT THE TIDBINBILLA FACILITY. NASA FUNDS THE TOTAL COST OF THE FACILITIES, INCLUDING THE SALARIES AND ADMINISTRATIVE COSTS OF AUSTRALIAN GOVERNMENT PERSONNEL INVOLVED IN THE AGREEMENT'S MANAGEMENT THROUGH ITS CONTRACTUAL ARRANGEMENTS WITH CSIRO. NASA IS ALSO RESPONSIBLE FOR REMEDIATION WORKS IN RELATION TO ITS FACILITIES. ANY ADDITIONAL ACTIVITIES OR THE SET-UP OF NEW INFRASTRUCTURE UNDER THE PROGRAM AGREEMENT AS FURTHER AMENDED WOULD NOT IMPOSE ANY COSTS ON THE AUSTRALIAN GOVERNMENT OR THE RESPECTIVE STATE AND TERRITORY GOVERNMENTS.

THE 2000 AMENDMENT DOES NOT INCREASE THE SCOPE OR OPERATION OF THE PROGRAM AGREEMENT, NOR DOES IT IMPOSE NEW OBLIGATIONS ON AUSTRALIA. RATHER, IT UPDATES AND FORMALISES THE EXISTING ARRANGEMENTS, INCLUDING THE EXCHANGE OF SCIENTIFIC DATA, FACILITATING THE ENTRY AND EXIT OF US PERSONNEL THROUGH IMMIGRATION BARRIERS AND THE DUTY-FREE IMPORT OF PERSONAL AND HOUSEHOLD EFFECTS FOR US PERSONNEL. TAXATION OF US PERSONNEL

CONTINUES TO BE GOVERNED BY A 1982 DOUBLE TAX CONVENTION BETWEEN THE AUSTRALIA AND THE US. THE AGREEMENT EXPLICITLY PROVIDES FOR FURTHER ARRANGEMENTS BETWEEN NASA AND THE CSIRO AS THE COOPERATING AGENCIES IN RESPECT OF THE ESTABLISHMENT AND OPERATION OF FACILITIES. THESE ARRANGEMENTS ENCOMPASS FINANCING, CONSTRUCTING AND INSTALLING NEW FACILITIES AND DISPOSING OF OR REMOVING INFRASTRUCTURE AND REMEDIATION WORK IF A FACILITY IS SURPLUS TO REQUIREMENTS.

UNDER THE 1980 PROGRAM AGREEMENT THE AUSTRALIAN GOVERNMENT IS OBLIGED TO GRANT NASA AN EXEMPTION FROM DUTIES, TAXES AND LIKE CHARGES, INCLUDING WHOLESALE SALES TAX. THE 2000 AMENDMENT UPDATES THIS TO ACCOUNT FOR CHANGES TO AUSTRALIA'S TAXATION SYSTEM, IN PARTICULAR THE INTRODUCTION OF THE GOODS AND SERVICES TAX. WHERE THE GOVERNMENT IS UNDER AN EXISTING OBLIGATION, SECTION 62C OF THE TAX ADMINISTRATION ACT 1953 ENABLES THE COMMISSIONER OF TAXATION TO REFUND THE INDIRECT TAX, IN THIS CASE THE GST. THE TAX ADMINISTRATION AMENDMENT REGULATIONS 2000 NO. 4 HAVE BEEN APPROVED BY THE FEDERAL EXECUTIVE COUNCIL AND CAME INTO FORCE ON 1 JULY 2000. THESE REGULATIONS PROVIDE A MECHANISM FOR NASA TO CLAIM A REFUND OF GST.

IT IS IMPORTANT TO NOTE THAT THERE ARE NO ADDITIONAL COSTS TO AUSTRALIA AS A CONSEQUENCE OF THIS TREATY ACTION. IN THE PROCESS OF DRAFTING THIS TREATY AMENDMENT, ALL RELEVANT COMMONWEALTH DEPARTMENTS WERE CONSULTED. STATE AND TERRITORY GOVERNMENTS WERE ADVISED THROUGH THE STANDING COMMITTEE ON TREATIES' SCHEDULE OF TREATY ACTION, AS WELL AS INDIVIDUAL CONSULTATIONS BEING HELD WITH THE TWO HOST GOVERNMENTS, THE ACT AND THE NORTHERN TERRITORY GOVERNMENTS. THE CONSULTATION PROCESS ALSO INCLUDED THE AUSTRALIAN SPACE INDUSTRY CHAMBER OF COMMERCE, THE ACT AND REGION CHAMBER OF COMMERCE, THE CANBERRA TOURISM AND EVENTS CORPORATION AND THE TIDBINBILLA BUSHFIRE BRIGADE. ALL PARTIES ARE SATISFIED THAT THE PROPOSED AMENDMENT IS BENEFICIAL TO AUSTRALIA AND ACCEPTABLE FOR RATIFICATION. TOGETHER WITH MY COLLEAGUES I AM HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE ON THE AGREEMENT.

Mr ADAMS—What is the extra benefit of Australia's added involvement? What is the gain for Australia? Australia is taking a bigger involvement. What are the benefits to us? Why are we doing that?

Ms Kelly—I think there are a number of benefits. There are benefits in terms of our scientists' access to equipment which allows them to further scientific study. There is an exchange of data with NASA in certain circumstances. There are also benefits in terms of simply the money that NASA spends in maintaining the facilities. There are spin-offs for the local area, which includes something like 70,000 tourists who visit this facility every year. Also, there are Australian industry benefits in terms of contracts let to industry and skills that are developed in Australia that would not otherwise be available to us.

Mr ADAMS—So there is technological change. We are gaining some knowledge in this? Our people are gaining knowledge in their role?

Mr Dunn—That is true. NASA and JPL are now in the business of more and more asking the overseas complexes, of which Tidbinbilla is one, to take a greater role in the engineering development of the equipment that comes to the station, whereas in the past it sometimes turned up and there it was and you used it.

Mr ADAMS—So there is a change of intellectual property basically?

Mr Dunn—Yes.

Mr ADAMS—Now, the change of the Australian agency. What is behind that and why are we doing that?

Ms Kelly—Changing the Australian agency basically relates to the government's decisions about the organisation of its space activities in 1996. In 1996 it basically closed the space office. It gave responsibility for project and operational space issues to the CSIRO and responsibility for space policy issues to the Department of Industry, Science and Resources. Since this is an operational space issue and CSIRO is in effect the agency that is managing the contracts, et cetera, and the agreement with NASA, it has been replaced in the agreement as the cooperating agency.

Mr ADAMS—I refer to the redefining of the US nationals. I think we define them now as nationals of the United States of America instead of as civilian citizens. What does that actually mean?

Ms Kelly—I understand that that is a decision the US government has taken, that it wishes to standardise the references to its citizens in all treaties in that manner.

Dr Baltuck—It is a standard terminology that is used in US treaties now to refer to its representatives as nationals. I believe it includes green carded or legal residents as well as citizens.

Senator LUDWIG—In the national interest analysis there was a dialogue between the state and territory agencies, but particularly the chief minister's department, about the penultimate paragraph. It says that the Department of the Chief Minister, Northern Territory, did not comment on the proposed amendments. Was that the end to it? It started with the Chief Minister's department requesting the scope of refunded taxes to be defined such that state taxes not be affected. Are state taxes affected? Does the Department of the Chief Minister no longer have an interest, even if they are?

Ms Kelly—I think the issue was that the GST is paid to state authorities and the ACT Chief Minister's department had an interest in where the refund of GST was to be paid from. We satisfied them that GST was a Commonwealth tax so the refund would be paid from the Commonwealth. I think that was the issue of interest regarding taxation that the ACT Chief Minister's department was pursuing in the ACT Treasury.

Senator LUDWIG—Surely they would have known that.

Ms Kelly—It was the issue that was asked.

Senator LUDWIG—So they no longer have an interest? Apart from the GST, are there any other state taxes that are likely to be affected?

Ms Kelly—I understand not, no.

Senator LUDWIG—And the only states that have been formally involved in the communication process are the ACT and the Northern Territory?

Ms Kelly—All states have been informed of the intention to renew this treaty through the normal schedule of treaty actions, which is circulated to the states. The only formal face-to-face consultation took place with the two governments that actually have host facilities in their territory.

Senator MASON—I was saying to Mr Baird earlier that space and space travel is a very romantic topic. I grew up at the time of the Apollo missions and it brings back great memories. Of Honeysuckle Creek, Orroral Valley and Tidbinbilla, two of those have now been closed. Honeysuckle Creek was quite important to the first moon landings. This is outside direct questioning, but what has been done with that? Has that been preserved as a shrine to man landing on the moon or something?

Dr Baltuck—I am very pleased to say that ACT Environment, which stewards Namadgi National Park, is in the process of developing a display at Namadgi National Park, at the Honeysuckle Creek location. In fact, it is planning an inauguration ceremony during World Space Week, on the morning of 6 October.

Mr BAIRD—Are there any problems in us visiting the facility?

Ms Kelly—The Tidbinbilla facility? Not at all.

Dr Baltuck—We would be delighted to set up a VIP tour any time.

Mr BAIRD—I note that the Orroral Valley Tracking Station has been removed from the program agreement. Are there any outstanding issues related to that? What is the reason for its removal and what has been the local implication?

Ms Kelly—NASA has consolidated its facilities so that the facilities that were once provided by Honeysuckle Creek and Orroral are now being provided through Tidbinbilla.

Dr Baltuck—In addition, the satellite laser ranging facility that was on Orroral peak, run under the auspices of Auslig, has been closed down. Those satellite laser ranging functions are performed at a new facility established by Auslig on Mount Stromlo.

Mr BAIRD—Are there any implications locally in terms of the closure of Orroral?

Mr Dunn—That was actually closed back in 1985 and the people transferred over to Tidbinbilla, where the current site is now. They integrated the move and redundancies and that sort of thing were offered.

Mr BAIRD—So this happened long ago in the past?

Mr Dunn—Absolutely.

Senator TCHEN—Ms Kelly, this facility is described as the Canberra Deep Space Communication Complex. You also refer to this as deep space communication. Can you confirm that 'deep space' means space vehicles beyond the earth's orbit or does this refer to low earth orbits?

Ms Kelly—The agreement says that the purpose of the facility is for space vehicle tracking and communication. The agreement does not specify that. Dr Baltuck might tell you about what the facility can actually do. It is actually designed to be a deep space communications and tracking facility rather than looking at anything in low orbit.

Dr Baltuck—That is right. The station is designed to track all of our satellite missions that leave earth orbit, including lunar missions. It does, on a case-by-case basis, provide launch and early orbit support for satellites that launch into a geostationary orbit. That is done subject to the approval of Industry, Science and Research, which coordinates with the Commonwealth government to obtain that approval.

BY FAR AND AWAY THE MAJORITY OF OUR ACTIVITIES ARE TRACKING SATELLITES LIKE THE SOLAR AND HELIOSPHERIC OBSERVATORY IN ITS SOLAR OBSERVATIONS. I MADE A LIST OF WHAT WE ARE ACTUALLY DOING TODAY. WE ARE TRACKING THE ULYSSES EXPERIMENT ON OUR 34-METRE DISH. ULYSSES LOOKS AT THE SOLAR ACTIVITIES OF THE SOLAR POLES. THE CLUSTER 3 IS ANOTHER SOLAR INSTRUMENT PACKAGE THAT WE ARE TRACKING OFF OUR 26-METRE DISH, DSS 46. THE NEAR EARTH ASTEROID RENDEZVOUS EXPERIMENT IS BEING TRACKED RIGHT NOW ON OUR 34-METRE DISH, DSS 34. IT IS EXPERIMENTS OF THAT NATURE—SOLAR SYSTEM EXPLORATION. LATER ON TODAY, AFTER 3 O'CLOCK, OUR 34-METRE DISH, DSS 45, WILL BE TRACKING VOYAGER, WHICH WAS LAUNCHED IN 1977 AND IS WORKING ITS WAY TO THE EDGE OF THE SOLAR SYSTEM RIGHT NOW.

Senator TCHEN—It is still active, is it?

Dr Baltuck—It is still active. It should get to the heliospheric edge in 2004.

Senator COONEY—Over the years that it has been operating what have been its greatest discoveries? What are the Olympian achievements we have got as a result of the station?

Dr Baltuck—I think historically the most significant artefact that we have is the Honeysuckle Creek antenna, which captured the first sights and sounds of Neil Armstrong stepping onto the moon. When Honeysuckle Creek was closed down, that antenna was moved to Tidbinbilla and it is still functioning today.

Senator COONEY—It captured the glorious moment?

Dr Baltuck—That is right.

CHAIR—I wish to clarify something. Under the agreement, communications and messages from space vehicles are received at Tidbinbilla and then passed back to the United States or to NASA. In relation to the content of those communications, what they deal with, experiments and so forth, does Australia have any role in that or does this agreement simply grant permission for those communications to be received?

Dr Baltuck—Basically, the station serves as a grand post office. It receives the messages and forwards them on to the Jet Propulsion Laboratory, where they are turned into scientific signals.

CHAIR—So if, for example, in future any vehicles launched into space from the United States were to play a role in the proposed national missile defence system—an excellent idea, I think—communications involved in that activity would go through Tidbinbilla, would they not?

Dr Baltuck—I am sorry? Could you repeat your question?

CHAIR—If the proposed national missile defence system were to involve vehicles in space—for example, satellites—and they were to communicate back to earth, according to this agreement any communications involved in that sort of activity would come through this facility, would they not?

Dr Baltuck—No. This facility is devoted to civilian site operations. There are other facilities I can think of in this country that exist —

CHAIR—Pine Gap?

Dr Baltuck—Yes. I presume if there were anything developed along those lines it would be the facility.

CHAIR—What provision in the treaty limits the content of the communications? My first question was: what do we have to do with the content? You said it was simply a post office. Now the post office is regulating the content of the mail. What provision of the treaty regulates the content of the mail?

Ms Kelly—I am not sure that the treaty has a provision about content. As I said, the treaty specifies that the facilities are for space vehicle tracking and communications. The protocol surrounding the administration of the treaty is such that, if there is any desire to use the facility for non-NASA missions, the government of the United States has to put a request to the government of Australia and the government of Australia responds.

CHAIR—I hear what you are saying. There is another step, in a sense. I am not saying it would ever be done surreptitiously. I hope it would be done with the fulsome support of this government that something launched from NASA or wherever was able to make a contribution to that national missile defence, because it is as much in our interests as I think it is in the interests of the United States. If this facility is capable of receiving scientific communications and so forth and we have an agreement to regulate that, that is excellent; it can be used for other things as well. You say there is a protocol. By that do you mean an informal arrangement or a protocol in the formal sense?

Ms Kelly—No, I think it is an understanding between the two governments.

CHAIR—That is understood.

Dr Baltuck—The other point I would make is that the facilities are only able to communicate in certain parts of the electromagnetic spectrum which have been set aside specifically for space science activities. Under protocols established by the International Telecommunications Union, we are simply not able to serve the functions that you are thinking of now.

CHAIR—You cannot really specify what those functions will be until the national missile defence program is, in a sense, elaborated, can you?

Dr Baltuck—That is true, but I would not expect them to be using parts of the electromagnetic frequency set aside for space science communications, and those are the frequencies that we are set up to communicate in. So at this point we are physically unable to.

CHAIR—That is fair enough. Do not think I am being hostile. I am a big supporter of the idea. We have to stop those missiles and all of the weapons of mass destruction they carry. Thank you very kindly for the evidence this morning. We will try to make time to visit the facility some time in the future.

Dr Baltuck—Please let us know. We would be delighted.

[11.11 a.m.]

Agreement between the government of Australia and the government of Japan for cooperation in the peaceful uses of nuclear energy

LEASK, Mr Andrew, Assistant Secretary, Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade

TYSON, Mr Robert James, Assistant Secretary, Nuclear Policy Branch. Department of Foreign Affairs and Trade

CHAIR—There is no requirement for evidence to be given under oath, but I have to formally advise you that these are legal proceedings of the parliament—as if they were taking place in either chamber. Hence the giving of any false or misleading evidence is a very serious matter. Could one of you please make an opening statement and then we will have some questions?

Mr Tyson—The treaty action under consideration relates to the use by Japanese utilities of MOX—that is, mixed uranium and plutonium oxide—power reactor fuel. The Japanese utilities propose to have MOX fuel elements fabricated at European fuel fabrication facilities and so seek to add four European MOX facilities to the facilities covered by the 1982 Australia-Japan Nuclear Cooperation Agreement. The proposed amendment would streamline the operation of the agreement for Australia and for Japan, as Japan would be able to use European MOX fuel fabrication facilities without seeking case-by-case approval from Australia. We support the addition of the MOX facilities in Europe, as we recognise that the use of MOX is an important part of the Japanese nuclear fuel program and that for commercial reasons Japanese power facilities use facilities in Third World countries.

THE EXCHANGE OF NOTES BEFORE THE COMMITTEE TODAY SEEKS TO ADD THE FOUR FACILITIES TO THE DELINEATED AND RECORDED JAPANESE NUCLEAR FUEL CYCLE PROGRAM, KNOWN AT THE WORKING LEVEL AS THE CAPSULE, WHICH IS INCORPORATED IN THE IMPLEMENTING ARRANGEMENT ATTACHED TO THE 1982 AUSTRALIA-JAPAN NUCLEAR COOPERATION AGREEMENT. THE IMPLEMENTING ARRANGEMENT SETS OUT DETAILS OF HOW THE AGREEMENT WILL OPERATE, INCLUDING THE FACILITIES AT WHICH JAPAN MAY PROCESS, USE OR REPROCESS AUSTRALIAN NUCLEAR MATERIAL. IT ALSO STIPULATES THAT WHEN JAPAN WISHES TO ADD TO THE CAPSULE A PARTICULAR CLASS OF FACILITY FOR THE FIRST TIME IN A PARTICULAR STATE, AS IT IS SEEKING TO DO WITH THE ADDITION OF THE MOX FACILITIES IN EUROPE, THIS IS TO BE EFFECTED BY 'AGREEMENT OF THE TWO GOVERNMENTS'.

THE EFFECTIVE OPERATION OF THE AUSTRALIA-JAPAN NUCLEAR COOPERATION AGREEMENT BENEFITS AUSTRALIA, AS THE AGREEMENT FACILITATES SIGNIFICANT TRADE IN URANIUM. JAPAN IS THE WORLD'S THIRD LARGEST PRODUCER OF NUCLEAR POWER, BEHIND THE USA AND FRANCE, AND IS AN IMPORTANT MARKET FOR AUSTRALIAN URANIUM. IN 1999 AUSTRALIA SOLD 2,300 TONNES OF URANIUM TO JAPAN VALUED AT APPROXIMATELY $129 MILLION, WHICH WAS 30 PER CENT OF OUR TOTAL URANIUM EXPORTS. AUSTRALIAN EXPORTS ARE LIKELY TO GROW, AS FOR

REASONS OF ENERGY SECURITY AND TO LIMIT ITS GREENHOUSE GAS EMISSIONS JAPAN IS STRONGLY COMMITTED TO NUCLEAR POWER FOR ELECTRICITY GENERATION AND ITS POWER REQUIREMENTS ARE EXPECTED TO INCREASE OVER THE NEXT 15 YEARS.

AUSTRALIAN OBLIGATED NUCLEAR MATERIAL PROCESSED AT THE EUROPEAN MOX FACILITIES AS A RESULT OF THIS AMENDMENT WILL BE SUBJECT TO STRICT SAFEGUARDS UNDER THE 1982 AUSTRALIA-JAPAN NUCLEAR COOPERATION AGREEMENT AND WILL BE MONITORED BY THE AUSTRALIAN SAFEGUARDS AND NON-PROLIFERATION OFFICE. THE AUSTRALIA-JAPAN AGREEMENT IS ONE OF 15 BILATERAL NUCLEAR SAFEGUARDS AND COOPERATION AGREEMENTS WHICH CONTROL THE USE OF AUSTRALIAN URANIUM AND ENSURE THAT AUSTRALIA'S SECURITY INTERESTS IN THE NON-PROLIFERATION OF NUCLEAR WEAPONS ARE STRICTLY PROTECTED. THE AGREEMENTS PROVIDE FOR THE APPLICATION OF INTERNATIONAL ATOMIC ENERGY AGENCY SAFEGUARDS AND PRIOR AUSTRALIAN CONSENT FOR RE-EXPORT OF HIGH ENRICHMENT OR REPROCESSING OF AUSTRALIAN OBLIGATED MATERIAL. IN CONCLUSION, GIVEN THAT THE PROPOSED ADDITION OF THE FOUR EUROPEAN MOX FACILITIES IS FULLY CONSISTENT WITH AUSTRALIA'S URANIUM EXPORT AND SAFEGUARDS POLICY AND IN VIEW OF THE FACT THAT MOX IS AN ESSENTIAL PART OF THE JAPANESE FUEL PROGRAM, WE SUPPORT THIS PROPOSED AMENDMENT. THAT IS A PRELIMINARY STATEMENT.

Senator LUDWIG—To put this into perspective, this is adding these to the French and Belgium companies that process the mixed oxide fuel under the treaty. That is the import of it. Have those companies requested the addition or is it from the Japanese side?

Mr Tyson—From the Japanese side.

Senator LUDWIG—Were these companies consulted and did they go through the process as to how it would happen or the import of the bilateral treaty?

Mr Tyson—That would be a commercial arrangement between Japan and those companies. The Japanese have no doubt nominated those companies because they intend to have them available as MOX fabricators for use in their industry.

Senator LUDWIG—Have we contacted them to see whether or not they understand the treaty and the treaty obligations that we have with Japan in relation to the use of uranium?

Mr Tyson—No, we have not contacted them ourselves, but they are covered not only in relation to this treaty but also with our safeguards agreement with EURATOM.

Senator LUDWIG—Why would you not contact them or is there no need to?

Mr Tyson—No, there is no need to. This is a commercial arrangement between Japan and companies, in this case, in Europe. There is no particular need for us to contact them.

Senator LUDWIG—Will there now be a requirement for uranium to be transferred from Australia to those four plants?

Mr Tyson—If the Japanese proceed with contracts with those companies, yes, and the export of material to those companies would be covered fully under our safeguard arrangements with IAEA and, under this agreement, with Japan also.

Senator LUDWIG—So there would be transportation requirements for protection of the uranium between Australia and those four plants; is that correct?

Mr Tyson—Yes, indeed. The material exported to those plants would be covered under the normal IAEA and IMO regulations and safety requirements for the protection of nuclear material being shipped.

Senator LUDWIG—So you would not satisfy yourself ahead of time that those four companies do have the capability, because of the distance involved, to fully protect the uranium transferred under the agreement?

Mr Tyson—As companies operating within EURATOM, they will be required to meet the IAEA standards that all companies in this business will be required to meet. We would not necessarily follow that up with the companies ourselves, although we monitor the material that goes to those companies. ASNO has the responsibility for monitoring the export of that material. Andrew might like to add something at this point.

Mr Leask—ASNO tracks Australian obligated nuclear material through the nuclear fuel cycle. In the case of facilities in Europe, our interests are managed by the EURATOM department of safeguards and we liaise directly with them in regard to tracking information and reporting the whereabouts and quantities of the material that is shipped to European consortia.

Senator LUDWIG—Yes, I think you have outlined that before to us in relation to another treaty. But my question goes back to why would you not satisfy yourself, given that those four companies will now be on the list and shipments of uranium could go to those companies, that the uranium will be protected and that those companies are, and can satisfy you that they are, secure and can provide secure commercial arrangements? Why would you not do that? It would stand to reason that you would do that. It is one of the things that I would do. But maybe I am missing something. Perhaps you could fill in that missing link?

Mr Tyson—I think the point is that they are required to meet standards which we as members of the international community subscribe to. They are required to meet standards laid down by the IAEA and, in their case, by EURATOM. We are satisfied that those standards are adequate and we have no particular need to follow up ourselves with a particular company when we know that that company is already required to meet standards which we are familiar with and which we regard as appropriate.

Senator LUDWIG—But you have not satisfied yourself whether the companies can meet the standards?

Mr Tyson—We accept that they have obligations which we also have and which we understand and accept. As Mr Leask says, we receive those assurances from the IAEA and from EURATOM just as we would in relation to other companies covered by these requirements. For instance, I think the last time I was before this committee on this issue it was to add a couple of

American facilities. The same would be true in that case. We would not and did not make direct contact with those companies, because we knew that under international standards they were already well covered and were required to meet standards which we regarded as sufficient for our purposes.

Mr WILKIE—Do we contact the monitoring organisations to find out what the record is of these companies? It is fine to say that they have standards with which to conform, but do we know whether they are conforming with those standards adequately or whether they have a problem?

Mr Leask—We may not in this case have made an inquiry, but we do make general inquiries of EURATOM in regard to the compliance and performance of companies within its jurisdiction. That is not necessarily a formal arrangement. ASNO visits EURATOM as a minimum every six months, sometimes more frequently, and we sit down with the safeguards directorate and we are able to make inquiries of them, if we wish, in regard to the entities for which they are responsible and have jurisdiction. Some of the information may be formally passed across and some of it may be a little more anecdotal. As to whether there have been problems or difficulties in the past, we have not been advised of any difficulties that EURATOM has had with the compliance of the entities for which it has jurisdiction.

Mr WILKIE—But we have not actually asked it specifically in regard to these two companies?

Mr Leask—No, we have not.

Mr WILKIE—Can you advise us in due course?

Mr Tyson—We can certainly follow up with EURATOM or indeed with the IAEA.

Mr BAIRD—In terms of the agreements that we have with Belgium and France, are they subject to separate treaties in relation to uranium or are all of the treaties specifically with companies per se?

Mr Tyson—We have a safeguards treaty with EURATOM. For that purpose, we regard EURATOM countries as a single country. That said, we also have a bilateral agreement with France. The commitments that are made under those treaties are the commitments to which we refer, rather than commitments to specific companies.

Mr BAIRD—Under those commitments, do they regularly provide details to us and on what?

Mr Tyson—Maybe Andrew could answer the specific question, but I should perhaps say first that we do have regular consultations with them. Indeed, last year I was at EURATOM to discuss the categories of information which we receive from EURATOM and how we receive it to ensure that we can be satisfied for the purposes of accountability with the material we receive. But in relation to the details, Andrew might like to comment.

Mr Leask—ASNO's specific interest in this is to ensure that Australian uranium remains exclusively in peaceful use and therefore we liaise directly with EURATOM, which speaks on

behalf of the European countries which are their member states, to ensure that we can track Australian material through the fuel cycle and we know exactly where it is. They report to us or confirm delivery. They report quantities of deliveries. If we made a specific request, they would investigate a company or a security issue on our behalf within their jurisdiction. In addition to that, as Mr Tyson has already mentioned, we have a bilateral agreement with France and the UK. Those are two specific countries that use material more than the others. Particularly between the bilateral agreement and the EURATOM agreement we are completely satisfied that our material is accounted for and remains exclusively in peaceful use.

Mr BAIRD—So what do these countries specifically provide information on separate from EURATOM?

Mr Leask—They provide separate information, but it really confirms what EURATOM has already reported, and sometimes it comes perhaps at a different time frame, because a specific country might be able to report a little more quickly on some issues. They report our material, quantities, whereabouts, where it is in the fuel cycle, whether it is transferred from a facility to another facility or a facility to a customer. Every year we visit these countries, in addition to the other visits to EURATOM which I mentioned, specifically to reconcile or balance our accounts of Australian nuclear material. Sometimes queries do arise. We ensure at least once a year that we reconcile this on a face-to-face basis.

Mrs ELSON—When you have been reconciling the amounts in the past, have there been any discrepancies that you have had to follow up?

Mr Leask—There have been discrepancies that we have followed up. All material has, however, been accounted for. Discrepancies usually arise due to the time frame in which they are reported. Whether it be a receipt or an onward transmission, sometimes an error is made in entering information. There are several entities which cross-check that information and we share that with our counterparts in Europe. We are satisfied that all of our material is accounted for.

Mrs ELSON—Because of the sensitivity of uranium with the Australian public, I feel similarly to Senator Ludwig in that I, too, would like to be assured that companies that are going to be handling this have the commitment to be able to see out their contracts, that they have the facilities to be able to handle what Japan is asking and that they have full accountability for it. If we could see a report or something on that I would be most pleased.

Mr Leask—We are certainly very happy to make the direct inquiry that has been requested and to give you feedback on that. In regard specifically to the accounting of nuclear material, that appears in ASNO's annual report. We report separately to parliament in addition to the DFAT annual report.

Senator COONEY—The papers that we have been given set out a lot of companies under the heading Japanese Nuclear Fuel Cycle Program as at 5 March 1982. A number of companies are set out there up till 1982. The briefing notes indicate that four companies are to be added. I take it there are lots more companies now that could be added to that list?

Mr Tyson—Yes. I am not sure what list you have in front of you. If it is a 1982 list it is certainly the case that a number of companies can be added.

Senator COONEY—I think it is set out in the Australian treaties series 1982 No. 22. I think it must be part of the treaty itself. I was wondering whether there were any papers that showed the other companies that have been added to the list since then?

Mr Tyson—I am sure we could provide that.

Senator COONEY—Why were the companies set out there then? What was the idea of that?

Mr Tyson—I am not sure, Senator, but I assume the reason for that is that they were the companies which the Japanese envisaged doing business with at that time.

Senator COONEY—This is just for the sake of completeness and getting an idea of how it has all gone. As you say, the relationship between the Japanese and the companies would have been a commercial one. But the process does have ramifications for our policy on uranium. It would be interesting to know how far the matter has gone and what sorts of companies have been taking up—

Mr Tyson—I am sure we can track back through the records and provide an up-to-date list if it does not already exist.

Mr Leask—First of all, it was a Japanese request that we have the Capsule in the form that it is in. The list from 1982 is the original list that Japan nominated for utilities around the world in the fuel cycle that they might wish to deal with. The agreement is such that they cannot just go to any old other utility and do business with them. Over the years since then there have been a number of additions. Certainly, those additions are documented and will have been before this committee or a similar committee over the years. In the particular case where we are adding the new facilities they would go onto an updated version and Japan is then entitled to deal with any of the companies on the list. It does not have to deal with all of them, of course. That is very much a commercial decision. What they are particularly concerned about is ensuring that they do not get themselves into a situation where they have only one supply option for either the whole fuel cycle or elements of the fuel cycle.

Senator COONEY—As you know, they divide them up into categories—LWRs in operation and under construction, facilities for conversion to UF 6 and facilities for enrichment and facilities for conversion to UO 2. They have gone to some trouble to list them all. It would be interesting to get an idea of how the trade is developing.

Mr Tyson—We will provide an up-to-date list.

Senator COONEY—I would not have thought that it would be a great deal of trouble?

Mr Tyson—No, I am sure it is not. We will track that down and forward it to the committee.

Mr ADAMS—The transportation of uranium between Australia, Belgium and France is laid down in protocol, and that is the world standard?

Mr Tyson—Yes.

Mr ADAMS—Has there ever been any situation where any of our uranium has ended up with a third party? I take it from what Mr Leask said about being accountable—

Mr Tyson—By 'a third party' you mean a third party where it was not meant to end up?

Mr ADAMS—That is right.

Mr Tyson—No.

Mr ADAMS—In relation to this uranium which is going to come from Australia to France, Belgium and then into Japan, the waste from that material is the stuff that has to come back to us in the next 25 years, is it? Our obligation is to take our waste back or to take waste back?

Mr Leask—Senator—

Mr ADAMS—I am not a senator. Please do not put me in that category.

Mr Leask—As far as waste is concerned, it is the responsibility of the country which produces it. In selling uranium to utilities overseas who use that for fuel in nuclear power reactors or research reactors Australia is not responsible for any waste product arising from that use. It is the responsibility of the country that used it. In this particular case we are talking about Japan. Japan buys Australian uranium and uses it eventually as fuel in a reactor. It then has to look after the fuel as a radioactive product or, if it is reprocessed in some way, the waste that might arise from that particular activity. Australia, in turn, is responsible for the eventual waste product which arises from processing and so on of fuel which we use in Australia, for example, at Lucas Heights.

Mr ADAMS—So that is the only material that we are responsible for? There are no other agreements for which we are responsible whereby we have to bring such material back to Australia?

Mr Leask—Absolutely not. The only other waste product which Australia has to deal with is its own nuclear waste, for example, from the medical industry. That is used and generated in Australia. We are responsible for that. We are not responsible under any treaty for waste produced in other countries.

Mr ADAMS—There is a bit of debate going on about Lucas Heights and waste storage facilities in Australia. I have picked up that there is some time line. Can you enlighten me on that? I have heard it said that we have a 25-year or 24-year responsibility. I thought we must have signed some sort of protocol or something that we were going to pick up some sort of waste from the rest of the world?

Mr Leask—No, it is not waste from the rest of the world. What happens is that our own spent fuel, in this case from the Lucas Heights reactor, goes overseas for reprocessing, which is a means by which we extract the nuclear waste component in its smallest volume form. Eventually, that is returned to Australia. The whole process takes a good number of years. We have a commitment to that back, and that is a 15-year-plus time frame.

Mr Tyson—Some time after 2015.

CHAIR—There being no further questions, we will close the hearing.

RESOLVED (ON MOTION BY SENATOR LUDWIG**):**

That the committee authorises the publication of the evidence given before it at public hearing this day.

CHAIR—There being no further questions, we will close the hearing.

Committee adjourned at 11.35 a.m.