COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## JOINT STANDING COMMITTEE ON TREATIES

**Reference: Treaties tabled on 10 October 2000**

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**JOINT COMMITTEE ON TREATIES**

**Monday, 30 October 2000**

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

**Senators and members in attendance:** Senators Cooney, Mason and Tchen and Mr Baird, Mr Bartlett, Mr Hardgrave, Mrs De-Anne Kelly, Mr Andrew Thomson and Mr Wilkie.

**Terms of reference for the inquiry:**

Review of treaties tabled on 10 October 2000.

## WITNESSES


**HODGES, Mr Chris, Principal Legal Officer, International Branch, Criminal Law Division, Attorney-General's Department ........ 1**

**IRWIN, Ms Rebecca, Principal Legal Officer, Office of International Law, Attorney General's Department ........ 1**

**JENNINGS, Mr Mark Brandon, Senior Adviser, Office of International Law, Attorney-General's Department ........ 1**

**LENNARD, Mr Michael Andrew, Acting Assistant Commissioner, International Tax Division, Australian Taxation Office ........ 26**

**NUGENT, Mr Michael, Acting Executive Officer, Treaties Unit, International Tax Division, Australian Taxation Office ........ 26**

**PEPPINCK, Mr Winfred Marcel, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade ........ 1**

**ROWE, Mr Richard Anthony, Legal Adviser and Assistant Secretary, Legal Branch, Department of Foreign Affairs and Trade ........ 1**

**SCOTT, Mr Peter Guinn, Executive Officer, International Humanitarian and Criminal Law, International Law Section, Legal Branch, Department of Foreign Affairs and Trade ........ 1**

**SERDY, Mr Andrew Leslie, Executive Officer, Sea Law, Environmental Law and Antarctic Policy Section, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade ........ 33**

**SKILLEN, Mr Geoffrey James, Senior Legal Officer, Attorney-General's Department ........ 1**

**WARNER, Commodore Robin, Acting Director, Operations and International Law, Department of Defence ........ 1**

**Committee met at 10.06 a.m.**

**1998 Statute for an International Criminal Court**

**WARNER, Commodore Robin, Acting Director, Operations and International Law, Department of Defence**

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

**ROWE, Mr Richard Anthony, Legal Adviser and Assistant Secretary, Legal Branch, Department of Foreign Affairs and Trade**

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**JENNINGS, Mr Mark Brandon, Senior Adviser, Office of International Law, Attorney-General's Department**

**SKILLEN, Mr Geoffrey James, Senior Legal Officer, Attorney-General's Department**

**CHAIR**—Welcome. I declare this meeting of the Joint Standing Committee on Treaties open. As part of the continuing review of Australia's treaty obligations, we are going to review five treaties tabled on 10 October this year. The remaining three treaties in this batch will be reviewed by the committee on 6 November. I would like to first call representatives from the Department of Foreign Affairs and Trade, the Attorney-General's Department and a representative from the Department of Defence to give evidence as part of our review of the Statute for an International Criminal Court.

In doing so, I note a press release has been issued somewhat pre-empting these proceedings by the Attorney-General and the Minister for Foreign Affairs and Trade, stating quite clearly the Commonwealth's intention to introduce legislation by the end of the year to ratify the Statute for the International Criminal Court. That would seem to pre-empt proceedings that are on foot today. It is not a practice the committee would encourage on behalf of the executive and I note that the Attorney says:

This is a major international human rights initiative for Australia.

I think we had better say for the record that this committee is a major sovereignty initiative for Australia and those two things must always be balanced. In these contentious matters, made more contentious by these press releases, we are going to need all the advice we can get.

Generally speaking, the committee does not require witnesses to give evidence under oath, but I should advise you that these hearings are legal proceedings of the parliament and warrant immense respect, as if they were proceedings of the House or the Senate chamber, and that the giving of any false or misleading evidence is a serious matter that will be regarded as a contempt of parliament. Would one or a number of you like to make some opening remarks, and then we will proceed to questions from the committee?

**Mr Rowe**—I would like to make an opening statement on behalf of the departments represented at the committee's meeting this morning. Mr Chairman and members of the committee, the Statute of the International Criminal Court was adopted by a Diplomatic Conference in Rome on 17 July 1998. Australia signed the statute at the United Nations in New York on 9 December 1998. The statute's adoption was an historic achievement, representing the culmination of years of preparatory work and difficult negotiations under United Nations auspices. The creation of an international criminal court with the capacity to deal with the most serious crimes of concern to the international community—such as genocide, crimes against humanity and war crimes—has been a longstanding goal of Australia and many other countries.

Australia's promotion of the court reflects the government's strong commitment to practical and constructive outcomes in the field of human rights, including the building of institutions that will make substantial contributions to ensuring that human rights, civil society and the rule of law are promoted and protected around the world. Australia's delegation comprised the departments present this morning—that is, the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Department of Defence—as well as representatives from the states and academic advisers. At the Diplomatic Conference in Rome, Australia chaired the Like-Minded Group of over 60 countries that strongly supports the establishment of the court. Australia continues to play an active role in the post-Rome negotiations in the Preparatory Commission that is preparing proposals for practical arrangements for the establishment and coming into operation of the court. Australia continues to chair the Like-Minded Group.

The national interest analysis which has been tabled before the committee provides detailed and comprehensive information and commentary on the structure and content of the statute, which has also been tabled. I would, however, like to comment briefly on some key aspects. The Rome Statute of the International Criminal Court will establish, when it enters into force, a permanent international criminal court with the necessary administrative apparatus to support it and an assembly of the states parties to the statute to oversee its operation. The court will be based in The Hague.

The court will only have a limited jurisdiction: it will only be able to investigate and try allegations of the commission—after the statute's entry into force—of three tightly defined crimes that are universally recognised to be of international concern. These are genocide, crimes against humanity and war crimes. A fourth crime, equally uncontroversially considered to be of international concern—the crime of aggression—will be added to the court's jurisdiction, at the earliest, seven years after the statute enters into force. This will be conditional on a definition for that crime being agreed. The court will only be able to investigate and try cases where the offence was either committed by the national of a state party or on the territory of a state party, or by the national or on the territory of any other state that expressly accepts the court's jurisdiction in writing. The one exception to this is where the Security Council refers a situation

to the court. This is a power that the Security Council has by virtue of the Charter of the United Nations.

The statute makes it very clear that the court is complementary to national jurisdictions. Its purpose is not to override national jurisdictions or to be an alternative to them. Rather, it is to ensure that, if for any reason a perpetrator of a heinous crime of concern to the international community would not otherwise face justice, the court will be there as a last resort against impunity. To ensure that Australia takes full advantage of this complementarity principle—that is, to ensure that there will never be a time when Australia finds itself unable to investigate and prosecute a statute crime that was committed in Australia or by an Australian abroad—the government has agreed to introduce the statute crimes into Australian law.

The court's jurisdiction will be prospective: it will not be a tribunal for crimes committed before the statute enters into force. The court will have a prosecutor and a prosecutor's office to investigate allegations of crimes and to conduct cases before the court. But it will not have its own police force or any kind of enforcement capacity. It will rely on states in this regard.

The international significance of the statute cannot be overstated. In terms of the global promotion of peace and security, it stands as the third pillar beside the Charter of the United Nations and the Statute of the International Court of Justice. Both the United Nations and the ICJ focus on the accountability of states. The International Criminal Court will complement these with a mechanism to hold the individuals who commit the most serious crimes of international concern criminally accountable when no state can or will do so. It will also have the capacity to pronounce on the willingness of all states genuinely to investigate and prosecute such perpetrators themselves, providing a powerful incentive for states to exercise their longstanding obligation to bring those who commit atrocities to justice. It is thus at once a deterrent for individuals against the commission of atrocities and a deterrent for states against harbouring the perpetrators of atrocities.

Support for the statute is widespread and crosses geographic and political divides. One hundred and twenty states voted for its adoption at the Diplomatic Conference in Rome in 1998. To date, 115 states have signed the statute and 22 have ratified. The number of ratifications is increasing rapidly—many states are well advanced in their ratification processes—and is expected to reach 60, the number necessary for entry into force, before the end of 2001. Ratification of the statute is vital to maintaining Australia's reputation as a state that observes and promotes fundamental human rights and humanitarian principles—

**CHAIR**—Mr Rowe, could you repeat that sentence very carefully for the *Hansard*.

**Mr Rowe**—Ratification of the statute is vital to maintaining Australia's reputation as a state that observes and promotes fundamental human rights and humanitarian principles and that is opposed to allowing persons responsible for committing atrocities of international concern to escape justice. Australia's ratification would be a significant step towards bringing the court into reality. Thank you.

**CHAIR**—Perhaps representatives from other departments would like to add something to that. Mr Jennings? No? Have you come here just to stay silent? There must be a view from the other departments, otherwise—

**Mr Jennings**—Mr Chairman, if I might respond: the departments you see before you have worked closely together for several years on this matter and in the negotiations, and our ministers have been involved in the government consideration of the matter. At the end of the day, we are all here to answer the questions of the committee. We all have our areas of expertise which we wish to put before you. To assist in answering your questions, we thought that the best approach would be for DFAT to make a statement and we will then assist as we can.

**CHAIR**—Fair enough.

**Senator MASON**—Mr Rowe and Mr Jennings, my questions relate more to matters of procedure. I was looking through the national interest analysis, and the summary here says that part 3 of the statute provides for the general principles of criminal law to be applied by the court. Let me make an admission, first of all, that I have not read the statute—I have just been given it. But are those ‘principles of criminal law’ some melding of civil law with common law? Therefore the obvious question is, ‘What rules apply?’ Is the test ‘beyond reasonable doubt’ for the proof of guilt? Is there the presumption of innocence and so forth?

**Mr Jennings**—Indeed, Senator Mason, you are correct in observing that the general principles of criminal law enunciated in part 3 of the statute do reflect a melding of the common law and the civil law criminal principles. That was done and, indeed, was necessary because one system, be it civil law or common law, was not going to be fully reflected in a negotiation involving 160 countries.

**Senator MASON**—Absolutely, yes.

**Mr Jennings**—Consequently, it was a very detailed process of analysis. In a sense, it was a comparative law exercise of analysing the relevant principles of criminal responsibility, defences and so on and seeing where the common ground was and how that could be formulated. In terms of—

**Senator MASON**—Does the presumption of innocence remain?

**Mr Jennings**—The presumption of innocence remains, yes.

**Senator MASON**—How about proof beyond reasonable doubt?

**Mr Jennings**—And proof. I am just trying to find the relevant provision that will set that out. It is a while since I have looked at part 3 myself.

**Senator MASON**—I take your word for it. That is all right.

**Mr Jennings**—Mr Hodges has helped me out. It is article 66, which, in fact, does not appear in part 3. Article 66, paragraph 1, says:

Everyone shall be presumed innocent until proved guilty ...

Article 66, paragraph 3, says:

In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

These are quite fundamental principles in that regard.

**Senator MASON**—You may be aware that, in very recent times, this committee has looked at another melding of common law and civil law in relation to extradition proceedings. My next question relates to if there is an Australian citizen being sought as a party to this agreement. Article 89 paragraph 3(b) sets out:

A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

And so on. In short, is that again the ‘no evidence rule’ that is commonly used in extradition?

**Mr Hodges**—If I may respond, in order to give you a full answer to that, can I quickly return to the complementarity principle?

**Senator MASON**—Yes.

**Mr Hodges**—So that you can understand the totality within which the statute operates. Complementarity refers to the fact that the jurisdiction of the court will not be prime over Australian jurisdiction or, indeed, the jurisdiction of a country that has those crimes. The crimes, as indicated by the opening address, are genocide, crimes against humanity and war crimes, for present purposes. Once a national jurisdiction has those crimes in place, the jurisdiction of the court is secondary, if you like. It is a court of last resort, in one sense. There is an expectation and, indeed, an obligation on the states parties to prosecute in the first instance.

**Senator MASON**—That is assuming you can, in fact, prosecute things like genocide under the common law, isn’t it?

**Mr Hodges**—Yes, that would be right. Where a country had those crimes on its statute book that would be possible and, indeed, that is the expectation. All through the negotiations there has been this fundamental principle of complementarity, that it is always the first choice of the country. In order to get to the arrest warrant stage, you have to go through a couple of procedures as laid out in the statute. In the first place, the prosecutor has to be satisfied that there are sufficient acts or omissions to be able to apply for an arrest warrant.

**Senator MASON**—The prosecutor has to be satisfied.

**Mr Hodges**—The prosecutor, yes. We would say that that is the first safeguard, if you like. Secondly, the prosecutor applies to what is called the ‘pre-trial chamber’. The pre-trial chamber comprises three judges of international standing who review the decision of the prosecutor to apply for the arrest warrant. So it is only after the pre-trial chamber has been through that process that the decision is made as to an arrest warrant. If it passes that process as well and, in terms of the crimes under investigation, the necessary evidence and the basis on which the prosecutor seeks the warrant, then the arrest warrant is issued. So it is not a light process. That is the fundamental point, as well, I suppose: these are the crimes of the most serious international concern.

**Senator MASON**—Thank you. What evidence does the prosecutor have to forward, say, to the Australian authorities? Not very much, according to this.

**Mr Scott**—Mr Chairman, I would point out that the equivalent provision to extradition is in fact not article 87—that refers only to where an individual prisoner is being transited through your state. Article 91 is, in fact, the provision for surrender. There you will see that the evidence required is basically up to whatever that state's policy is. You will see there in article 91, paragraph 2(c), that the prosecutor is required to furnish such information as is necessary under the law of the state from which extradition is being requested. The proviso is that it must be no more burdensome—

**Senator MASON**—'Burdensome'—so in fact it is the no evidence rule.

**Mr Scott**—It would depend on what the government's policy of the day turns out to be.

**CHAIR**—As you are aware, in Australia, there are two standards of proof required for extradition. There is, if I might say, the much admired common law standard that we have between Commonwealth countries, and there is this other, more flimsy standard between civil law countries—so-called 'no evidence'. If you say that this request from the court must meet the policy—which is inherently a political and not a legal standard: it must be; it is a policy, not a law—then, in answer to Senator Mason's question, which standard must it meet: the common law standard or the civil law no evidence standard?

**Mr Jennings**—Mr Chairman, if I could come back to that issue: we are not talking in the circumstances of part 9 of the statute of extradition. Part 9 of the statute is quite clear: in article 102 it defines 'surrender' and it defines 'extradition'. Where 'surrender' is used, it is not meant to represent 'extradition'. 'Extradition' is referred to, certainly, as to the processes—and there are some similarities—but it was clear that the court, in similar terms to the international criminal tribunals for Yugoslavia and Rwanda, would be operating a system which had been developed for its purposes.

If you look at the implementing legislation for the war crimes tribunals under the International War Crimes Tribunals Act 1995, there is a regime that applies there which, if you want to use the term 'no evidence'—I am not using that term—effectively provides for the process by which we would deal with a request from these already existing tribunals that have been established by the Security Council. I recall that it is provided for in the statute that the Security Council can refer matters to this court and, in so doing, obviate the need for these ad hoc tribunals.

So it was the view of the negotiating states that we needed to develop a process that was suited to the type of tribunal that we had. Indeed, we had the precedents before us of these ad hoc tribunals, which were dealing with the same sorts of crimes and operating this process. When you look at the International War Crimes Tribunals Act 1995, the process that was put in place there to deal with those requests is likely to be followed in similar terms. But, of course, the legislation is yet to be drafted and so on; and so I do not want to venture too far into that; it is perhaps a touch premature.

Part 9 certainly sets out all that is required not only for the purposes of requests for surrender of persons but also for assistance to the court in its investigations and prosecutions. So it is meant to be that part of the statute to which states look in order to ascertain how they need to go about dealing with the court in requests for surrender and also requests for assistance with investigations collecting evidence.

Returning to Mr Hodges's comments: he outlined the process that would be gone through for the processes of the issuance of the arrest warrant. I would draw your attention to article 58 of the statute. There it sets out the steps that are required for the issuance by the pre-trial chamber of a warrant of arrest. This is not something that the prosecutor himself or herself can dispatch to a state.

**Senator MASON**—But, Mr Jennings, this is by the foreign tribunal, isn't it?

**Mr Jennings**—It is by the International Criminal Court.

**Senator MASON**—Sorry, it is by the International Criminal Court and not by Australian judges?

**Mr Jennings**—No. This is the point I was going to make. I recall the very distinguished service of Sir Ninian Stephen on the International War Crimes Tribunal for the former Yugoslavia and the current excellent service being delivered by Justice David Hunt, formerly of the New South Wales Supreme Court. So indeed, we have—

**Senator MASON**—It is not a slight. We are fairly pragmatic, Mr Jennings. We just want to know what the law is.

**Mr Jennings**—That is obviously what we are attempting to provide by running through the process. This is a process that has a number of steps that have to be gone through, and it has a number of steps that have to be gone through because of the complexity of the crimes and the most serious nature of these charges. To allege that someone has committed genocide is the most serious charge that can be made, so the processes that have been put in place are there, firstly, to ensure that an accused person is given a fair shake in this process. Indeed, the pre-trial chamber has to be satisfied that there are reasonable grounds for the issuance of this arrest warrant. It needs to look at what is brought forward by the prosecutor. So this is not a light decision that would be taken, as I think Mr Hodges said. So there is a consideration of the material that the prosecutor has. Given the nature and complexity of these crimes, the prosecutor may well have a vast amount of evidence that has been drawn together from witness statements and so on. I am just trying to set the scene for the consideration of the material by the court.

**Senator MASON**—I accept that—it is quite legitimate. But what is the answer to Mr Thomson's question? What is the test? Forgetting the international tribunal, and looking at the Australian situation with Australian judges, what is the test? Mr Thomson is quite right. It says:

... except that those requirements should not be more burdensome than those applicable to requests for extradition.

Is it the common law test or is it what we colloquially call the no evidence test? I think it is the latter, isn't it?

**Mr Jennings**—As I said, I am not using the term 'no evidence'. This is why I referred to the procedure we have for the war crimes tribunals: it would be taking the arrest warrant and other material that might be forwarded and determining that you had the right documentation and that the correct person was identified. If you want to have a look into the International War Crimes Tribunals Act 1995, I do not want to take up any further of your time by going through that, but that would be an indication of the sort of process that would be involved—bearing in mind that what we are dealing with in relation to the criminal court is an institution—albeit a permanent one—very similar to those we find with Rwanda and Yugoslavia. So they are quite specific in their origin.

**Senator MASON**—Just one more question, Mr Chairman. Thank you for your indulgence. You mentioned in the national interest analysis, referring to article 17:

That provision gives clear substance to the principle of complementary—

which you have mentioned—

by requiring the Court to determine a case is inadmissible, *inter alia*, where:—

and this is the second dot point—

- the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

Mr Jennings, I was thinking of the example in Cambodia where a young Australian, a Mr Wilson, was executed by the Khmer Rouge. There was a lot of concern in Australia that the Cambodian judicial proceedings were insubstantial and ineffective. Assuming Cambodia was a party to this agreement and assuming those things, is the test for determining 'inability' an objective or a subjective test?

**Mr Jennings**—If we look at paragraph 2 of article 17, it gives guidance to the court and, clearly, there is an objective set of factors that are going to be involved in this assessment. It says:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law—

Hence, an objective standard—

whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility ...

(b) There has been an unjustified delay ... to bring the person concerned to justice;

(c) The proceedings ... are not being conducted independently or impartially ...

And so on. Paragraph 3 also deals with the case of where a national judicial system is basically in total or substantial collapse so there is no mechanism in place by which a person could be tried. So that is another aspect. This is the guidance to the court to say these are the areas that were of concern to the states in terms of persons not being prosecuted by the national jurisdictions or not being vigorously pursued.

**Senator MASON**—Internationalism requires that different approaches be taken into account but the Cambodian example leaves one with the taste that sometimes other countries do not do it well enough.

**Mr Jennings**—I do not think we would want to be commenting on the legal situation—

**Senator MASON**—As politicians, we obviously have to take the Cambodian example as a good one.

**Mr Jennings**—What we can say in relation to complementarity is that it was the strong view amongst the states that were negotiating that it really was up to national jurisdictions to deal with these crimes as the most appropriate forums. But, in a general way—to pick up your comment—we know that in the past this has not always happened and that persons have escaped prosecution, have had the benefit of impunity. That is really what was driving this: the need to ensure that national jurisdictions acted properly, but to have the backup of the court where that was not the case; it is to cover off.

**Senator MASON**—Many thanks.

**Mrs DE-ANNE KELLY**—Relating again to national jurisdictions that are unwilling or unable to deal genuinely with alleged crimes, I notice in article 17 at 2(b), the clause says:

There has been an unjustified delay in the proceedings ...

What constitutes an unjustified delay? I am simply thinking of newly emerging democratic countries where, for their own good political reasons, they may have processes in train in their own countries to proceed. I refer, of course, to Indonesia and the recent concern over the part the military may have played in atrocities in East Timor. Obviously, for internal political reasons, Indonesia wished to conduct its own inquiry in its own time, but isn't that clause allowing such an international criminal court to override the natural political concerns in particular countries? Is there enough credence given to real political and social concerns in countries, which may constitute a justifiable delay?

**Mr Jennings**—The criteria set out in paragraph 2 were the subject of a great deal of debate because all participating states were well aware of the critical nature, the balance to be struck between national jurisdictions and the court. Clearly, the balance has been struck in the first instance in the favour of national jurisdictions. The application of paragraph 2(b) would, at the end of the day, depend on the circumstances of the given case. There may be factors which militate against immediate prosecutions or even prosecutions within the medium term because of the need to gather the evidence to bring persons into custody and so on. Consequently, where the reference is to 'unjustified delay', by using those words there is the prospect there for those factors to be made known to the court. States have standing to appear before the court and argue

not only in relation to 2(b) or 2(a); they can argue and make representations to the court on the basis of decisions the court has made in relation to inadmissibility.

Obviously once the court is in operation we will then have the court applying the terms of the statute. But, as I said, there was great care taken in the negotiation of these provisions to ensure that an appropriate balance was struck and, indeed, when you look at paragraph 1, it talks about a state being ‘unwilling or unable genuinely to carry out’ so there is an intention there on the part of the state to proceed. Factors are taken into account in terms of how soon proceedings or investigations can commence if there is a genuine willingness to proceed. I think that is what the court would be looking for at the end of the day. As I said, there was a great deal of negotiating effort put into these particular provisions because of their critical nature to the functioning of the court and the balance with national jurisdictions.

**Mrs DE-ANNE KELLY**—If a state were unwilling to surrender a citizen for what they saw as justifiable reasons, what punitive measures does the Criminal Court have available against that state?

**Mr Jennings**—If I could refer the committee to article 87, part 9 of the statute which deals with requests for cooperation, general provisions, some of this is quite procedural about how the process for requests are going to be forwarded. When you come to paragraph 7 of that article it reads as follows:

Where a State Party fails to comply with the request to cooperate by the Court contrary to the provisions of this Statute thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

There is the option that is available to the court. The court refers it to the Assembly of States Parties where a state party has lodged a complaint or the prosecutor has initiated a prosecution. However, where the Security Council has referred a matter and it is, in a sense, treating the court as it would an ad hoc tribunal, then that would be referred to the Security Council. It would in that case operate in a similar fashion to the current tribunals because it is within the power of those tribunals to bring non-cooperation by states to the attention of the Security Council. The Security Council then can take what action it deems fit. That is what the court can do. It can bring it to the attention of the Assembly of States Parties and it then is a matter for consideration by the Assembly of States Parties as to what further action might be required.

It is important, I think, to make a brief reference to the Assembly of States Parties because it is the body which will have the continuing role in relation to the court in terms of its finances, the amendment of its statute, the amendment of its rules of procedure and evidence and its oversight. This is not an institution that is being wound up and left to its own devices. There is a continuing oversight by states parties through the Assembly of States Parties. So, in a sense again we are achieving a separation of powers, if you like, in the international community between an international judicial body, such as the court, and in fact a legislative oversight body, which is the Assembly of States Parties. In terms of the continuing functioning of the court, the Assembly of States Parties will meet on a yearly basis to review it; it will elect the judges et cetera and consequently you have this critical role of the states parties to the statute into the future as long as the court is in existence.

**CHAIR**—Can I intervene?

**Mrs DE-ANNE KELLY**—I will defer to the chairman but I have two more questions.

**CHAIR**—The Attorney-General and minister, the authors of the press release and your masters, so to speak, have made loud complaints about the administration of the UN human right's committees this year. Likewise, there is widespread concern about the general poor quality of administration in the UN headquarters, wasted budgets and so forth. You are proposing that the same parties that are responsible for the maladministration of those two bodies should be entrusted with the criminal court. The state parties that run the UN Human Rights Commission so poorly that we have had to complain about it are now to be given criminal jurisdiction. That is what Mrs Kelly is getting at.

**Mr Jennings**—We are not talking about a UN body here.

**CHAIR**—No, but I assume that the same parties that are, generally speaking, parties to the UN human rights covenants are going to be parties to this. How do you draw the distinction between their poor supervision of the Human Rights Commission and giving them supervision of a much more important authoritative body like a criminal court? Would you like to take that on notice?

**Mr Jennings**—No, I would not wish to take it on notice. I think that is a very important question that should be answered here today to clarify the situation. This court will enter into a relationship with the United Nations. I do not want to speak too loudly on behalf of my colleagues from the Department of Foreign Affairs and Trade. I think they will want to add to what I say. I just want to give you the background to how this court fits into the system. It is not going to be an organ of the United Nations. It will enter into a relationship agreement. As I have already said, when functioning, it will be in a position to accept referrals from the Security Council. But it will operate under its own financial and management rules and its own statute. Extensive details are being put in place to ensure that the court operates fully, effectively and efficiently.

On the types of judges who will be elected to this court, I return to the comment I made earlier to Senator Mason. I distinguish between human rights committees, which are not judicial bodies, and this court, which is a judicial body. If you look at the statute, it provides for the judges, the prosecutor and the registrar to be persons of essentially the highest international standing. I recall that Sir Ninian Stephen was a judge on the War Crimes Tribunal for the former Yugoslavia and Justice David Hunt of the New South Wales Supreme Court was concurrently a judge on that tribunal. In terms of the operation of the court, we would expect persons of the highest calibre to be entrusted with the onerous task of dealing with these most serious crimes. I think Mr Rowe will be in a position to go through the role of the assembly of parties in more detail and the budgetary circumstances and to address these concerns which you have expressed, Mr Chairman, concerning whether states can be trusted to monitor an institution such as this.

In closing, we entrust the Security Council—three of whose members have signed up to this statute, one of whom, France, is already a party, and other members—to monitor the workings of the ad hoc tribunals. These ad hoc tribunals have been doing a very good job in the most dif-

ficult circumstances. They are being monitored through the UN process by many of the same countries that participated in these negotiations. We have the UN member states presently quite familiar with the operation of international criminal tribunals because we have two very similar institutions already in existence. I do not think we would say that the UN has failed in its task to ensure that the operations of these tribunals are monitored. I do not want to stray too far into the area of responsibility of my colleagues from the Department of Foreign Affairs and Trade. I think it is important to understand the context of this court and how it is drawing on the precedence of these two existing tribunals, and also to recognise the differences in that it will not be an organ of the United Nations.

**Mrs DE-ANNE KELLY**—You state that the cost to Australia is $US5 million but this depends on which states are amongst the first 60 to ratify the statute. Which of our neighbours in South East Asia have agreed to ratify the statute and financially support this court, and which have refused, so far?

**Mr Rowe**—I would like to answer that question. Ratifications of states in the Asia-Pacific region to date comprise New Zealand and Fiji. Other states are signatories to the statute—Samoa, for example. A number of states in the Asia-Pacific region are actively considering signature and ratification. The deadline for signature of the statute is the end of this year.

As to the costs of the court, in so far as Australia is concerned, which has been mentioned in the national interest analysis, the $US5 million is only an estimated cost. It is based on the annual assessed costs according to the UN scale of assessment of Australia's contribution to the tribunals for Yugoslavia and Rwanda. The actual amount will be determined by the number of states parties and the cost will not be able to be determined until there are 60 states—

**Mrs DE-ANNE KELLY**—We will get to the costs shortly. With respect, you have not answered the second part of my question. Which countries in South East Asia have refused to ratify the Statute for an International Criminal Court?

**Mr Rowe**—As of now, none.

**Mrs DE-ANNE KELLY**—But only two have ratified—New Zealand and Fiji. Is that correct?

**Mr Rowe**—That is right.

**Mrs DE-ANNE KELLY**—That is all. Right. What other nations worldwide have ratified so far? Could the committee have a copy of the list of nations?

**Mr Rowe**—As I mentioned earlier, 22 states have ratified. Perhaps I could read those out.

**Mrs DE-ANNE KELLY**—If you could, and could I also please have the names of the countries in South East Asia that have expressed concerns and indicated that they would not ratify. Are there any that have expressed concerns?

**Mr Rowe**—I am not aware of any—no; none that has publicly expressed concerns.

**Mrs DE-ANNE KELLY**—Then why are they not moving to ratify?

**Mr Rowe**—Firstly, there is the question of signature, and then ratification follows signature. To my knowledge, the question of signature is under consideration by all countries. There has been quite a global focus on the need for countries to focus on signature and ratification.

**Mrs DE-ANNE KELLY**—Are all countries interested in signature? Is there no country that has expressed—

**Mr Rowe**—Some countries, in their consideration, may adopt a position where they may decide not to sign. As I mentioned, there are 115 signatures to date. For example, in the UN membership there are nearly 190 countries, so obviously there are some that have not signed. But I do not know whether individual countries have—

**Mrs DE-ANNE KELLY**—But is it not ratification that makes the treaty effective?

**Mr Rowe**—Yes, that is correct.

**Mrs DE-ANNE KELLY**—So signing is, shall we say, a gesture that does not really imply enforcement within the state, does it?

**Mr Rowe**—No, that is correct.

**Mrs DE-ANNE KELLY**—So we can disregard signatures, if you like. We are looking at ratification.

**Mr Rowe**—That is right.

**Mrs DE-ANNE KELLY**—So you have 22 countries worldwide that have ratified, so far.

**Mr Rowe**—Yes, as of now.

**Mrs DE-ANNE KELLY**—Do you know of any countries in the Asia-Pacific region, other than New Zealand and Fiji, that are planning to ratify?

**Mr Rowe**—Countries in region that have signed are Thailand—

**Mrs DE-ANNE KELLY**—We have just established that that has no real force in the state. That is not what I asked.

**Mr Rowe**—With respect, it is relevant in the sense that one could envisage that countries that have signed in the region are also considering ratification.

**Mrs DE-ANNE KELLY**—One could also envisage that they would not. Is that not so?

**Mr Rowe**—That is possible, too.

**Mrs DE-ANNE KELLY**—Let us be fair about it.

**Mr Rowe**—Yes, that is possible.

**Mrs DE-ANNE KELLY**—Could we have a list of the 22 countries, please.

**Mr Rowe**—Yes, certainly. I will read them in alphabetical order. These are the 22 countries that have ratified: Belgium, Belize, Botswana, Canada, Fiji, France, Gabon, Ghana, Iceland, Italy, Lesotho, Luxembourg, Male, New Zealand, Norway, San Marino, Senegal, Spain, Tajikistan, Trinidad and Tobago, and Venezuela.

**Mrs DE-ANNE KELLY**—The United States has not?

**Mr Rowe**—No, the United States has not.

**Mrs DE-ANNE KELLY**—Is it intending to?

**Mr Rowe**—The United States did not vote for the adoption of the statute in Rome in 1998, because it has a particular concern with the text of the statute, which it is still seeking to have addressed. So the United States has not made any pronouncement about signature or ratification.

**Mrs DE-ANNE KELLY**—What is the concern the United States has?

**Mr Rowe**—Basically, the United States wishes to ensure that, as a non state party, there will be provision for non state parties which will guarantee them that none of their nationals engaged in official acts will be brought before the court without the consent of the non state party. In other words, they are seeking an exemption from the jurisdiction of the court—a tightening of the complementarity regime. In essence, it is a tightening, a further layer of complementarity, to ensure that none of their nationals will be brought before the court unless they consent.

The United States has been very heavily involved in the negotiations. They were actively involved in the lead-up to the Rome diplomatic conference, and have been involved since. The statute actually reflects a large input from the United States, not least in relation to the complementarity regime, including the provision whereby a non state party can make a declaration of readiness to cooperate with the court in relation to one of its nationals. So the provision is there to provide for the non state party to click in to complementarity and say, ‘We’re a non state party. We’re investigating our own citizen.’

**Mrs DE-ANNE KELLY**—But the United States has made no moves to ratify?

**Mr Rowe**—No, because—as I mentioned—they are still seeking this further layer of protection, of guarantee, and that is still an issue within the post-Rome negotiations. It is a matter that is on the table and is part of the ongoing discussions. I should also add that certain members of the United States Congress have a very firm view on what is required in relation to the statute for the US to be able to become a party to the treaty.

**Mrs DE-ANNE KELLY**—Has our largest neighbour, Indonesia, indicated that they will ratify?

**Mr Rowe**—No.

**Mr Jennings**—Could I add a comparison to a convention that the committee is familiar with, that is, the Convention on the Law of the Sea. I remember referring to it myself a couple of meetings ago when I appeared here. Again, it is a most significant international convention. It also required 60 ratifications, the same as the ICC statute. Those sorts of numbers are settled on because of the importance of the subject matter that is being dealt with and the need to ensure a critical mass of state parties—for a whole range of reasons. UNCLOS, or the United National Convention on the Law of the Sea, was adopted in 1982 and entered into force in the early 1990s. It took nearly 12 years for 60 ratifications to be achieved. We are now a little over two years out from Rome and we have had more than 20—more than a third of the ratifications required.

Many countries are required to put domestic legislation in place and, as we all know, there is a lead time involved in that. Some countries can do it more quickly than others. It depends on their domestic systems. When you look at it in comparison to another very important international convention, the Law of the Sea, these ratifications are coming in at quite a reasonable rate, given the complexity of domestic implementation for some countries. I might also recall that 120 countries voted for this two years ago in Rome on the final day. We have 115 signatories. That would appear to be a reasonable conversion rate in terms of political will from votes in favour.

**Mrs DE-ANNE KELLY**—And 22 ratifications.

**Mr Jennings**—As I have indicated, these ratifications are coming in at a reasonable rate compared with, for example, the Law of the Sea Convention. We know other countries have their legislation. For example, the United Kingdom has released its draft legislation and others are working towards it.

**Mrs DE-ANNE KELLY**—I think we have established the facts we need. Thank you very much for your explanation.

**Mr HARDGRAVE**—It is a silly example because since 1982 Russia has disintegrated and some of your 22 states were part of the USSR. Some of your others were parts of other countries in Africa. I just make the point that I think that is not even a relevant example.

**CHAIR**—We are not going to debate that.

**Senator COONEY**—You know the difference between ratification and signing, don't you, because it is ratification I am asking about? Has the United Kingdom ratified?

**Mr Jennings**—It has signed.

**Senator COONEY**—No, that is exactly what I asked you not to do. I asked: have they ratified it?

**Mr Jennings**—No.

**Senator COONEY**—That is the answer I want, Mr Jennings. I do not want a speech from you when I am trying to get a bit of information. The United Kingdom has not ratified. That is the answer.

**Mr Jennings**—No, it has not.

**Senator COONEY**—Thank you very much. Has anybody in the Middle East ratified it?

**Mr Jennings**—No, not yet. It would not have been ratified.

**Senator COONEY**—Nobody in the Middle East has ratified it. Has Sri Lanka ratified it?

**Mr Rowe**—No.

**Senator COONEY**—So the United Kingdom, where you have a situation in Northern Ireland; the Middle East, where you have a position around Palestine, and Sri Lanka, where you have the position between the Tamils and the Senegalese, have not ratified. The United States is not ratified.

**Mr Jennings**—That is correct.

**Senator COONEY**—Has anybody discussed in the department the proposition that this is really a court of the powerful, and that the only people who are going to be prosecuted before the courts are those who come from states that are not powerful?

**Mr Rowe**—The impetus for the creation of this court is very longstanding. As I mentioned in my opening remarks, it is very broadly based in the global community. We have already mentioned that 120 states supported the adoption of the statute in Rome. That is obviously a very significant percentage of the international community. I understand your point about the difference between signature and ratification.

**Senator COONEY**—Can I just stop this now? It is terribly hard. We come here week after week and can never get an answer to a question. You ask a question and around you go. I ask you simply: had anybody discussed whether this is going to be a court for the powerful? Then we go into who has signed the treaty and who has done this and that. It gets impossible in these hearings just to get some sort of response to questions. That is why people around this table get frustrated. They cannot, for some reason, get a responsive answer ever. We get a lecture and a very erudite lecture. Do not get me wrong; I am very interested. It might be the most stupid thing in the world—I agree with that—but even if it is stupid it satisfies us and we really want to get an answer and we cannot.

**Mr Rowe**—I can perhaps be a little bit more precise in answering your question. It is not considered to be a court of the powerful. It is considered to be a court of universal, global interest and support.

**Senator COONEY**—If we got a situation such as occurred in Dresden during World War II or in Vietnam, could England and the United States be brought before this court?

**Mr Rowe**—In a situation like that, under the complementarity that we have been talking about, the onus would be first on the national jurisdiction. In the absence of action by the national jurisdiction, then the matter could be referred to the court.

**Senator COONEY**—Do you think that might be one of the reasons why the United States is reluctant to ratify the treaty or to even sign it? If you think that might be an explanation, has somebody tried to counsel the United States about this situation?

**Mr Rowe**—As I was indicating earlier, the United States clearly has concerns about ensuring that its nationals do not appear before the court on what I might call politically motivated trumped up charges. That is certainly a very fundamental aspect of the U.S. approach to the court. As I indicated earlier, it is widely considered that the system of complementarity of checks and balances, which are designed to ensure that politically motivated charges are not a reason for bringing someone before the court, provides the protection.

**Senator COONEY**—There is concern that you might have trumped up charges brought against some states just to get them before the court? There is some concern about that?

**Mr Rowe**—Indeed. That was a very key feature of the negotiations of the diplomatic conference in Rome. It led to the strengthening of the provisions of complementarity that we have been discussing to ensure that those sorts of charges do not get before the court but are filtered out.

**Senator COONEY**—Senator Mason was asking you about the procedures and rules that the court might follow. In the book is there a point of law that the court would follow that, if there is a reasonable explanation for a set of facts which is consistent with innocence, that will mean a verdict of innocence? Perhaps Attorney-General's might help out, please?

**Mr Hodges**—The answer is yes, bearing in mind that you have got complementarity first. The state would have first bite of the cherry.

**Senator COONEY**—If you had a set of facts like a bombing of a city or a killing, the court could say that is in accordance with the rules of law or there is an explanation of that consistent with the rules of law. That is innocence. But if it is not, then that is a war crime.

**Mr Hodges**—Yes, after the complementarity has taken place. The first bite would be the country itself to prosecute and then in the very limited circumstances that the court would get jurisdiction—it would have to be a collapsed state or that sort of thing—then the court would hear it. It could take into account issues as to innocence, certainly.

**Senator COONEY**—A court could fairly easily reach an explanation of the same set of facts in one case saying there was a war crime, and in another case with a different country saying there was not. They will have to come to conclusions about motives and intents.

**Mr Hodges**—I suppose the answer is that it is possible. If you put it in those terms, I suppose it is possible. The answer is yes, bearing in mind that you have got very detailed definitional aspects in articles 5, 6 and 7 as to what constitutes war crimes.

**Senator COONEY**—So who is on the court is very important?

**Mr Hodges**—Absolutely. As Mr Jennings has said, you see that there will be the higher standards of international judges, geographic spread and gender spread to ensure that only the top people get on to the court. And indeed it is the same with the prosecutor.

**Senator COONEY**—They are voted, aren't they? These people are not selected; these are people voted onto the court?

**Mr Hodges**—Yes, the Assembly of States Parties—the overall governing body—not the UN.

**Senator COONEY**—I understand that. If you a are person, such as I, who has some apprehension about voting judges onto tribunals, that is a real worry—if you are in that position. Are our High Court judges elected?

**Mr Hodges**—No, they are not.

**Mr WILKIE**—Comments were made earlier about ministers being critical of some of the human rights committees. I have a view that they were mainly critical of those committees that were about to point out some of our shortcomings. That notwithstanding, the national interest analysis states that:

A State Party may only deny a request for assistance, in whole or in part, if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

How is 'national security' defined under the statute: 'under existing war crimes tribunals, if states refuse requests on the basis of national security issues'? Could you tell us who they are, if you are aware of any?

**Mr Hodges**—Article 72 deals with the protection of national security information. The gravamen is that the information would prejudice the national security interest of the state party. That is the prime criterion. You see in article 72(4) that the states have got a right to intervene, where it says:

If, in the opinion of a state, disclosure would jeopardise or prejudice its national security, it can take all reasonable steps ...

The bottom line is that there is a basis to deny access to that sort of information to the courts.

**Mr WILKIE**—How do they define national security?

**Mr Hodges**—In article 72(1) it says:

The article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State ...

So it is the state which is being asked to provide the information; it is their decision. So it is subjective in that sense.

**Mr WILKIE**—Do you know if it has been used to deny providing evidence in the past?

**Mr Hodges**—In the international criminal tribunals?

**Mr WILKIE**—Yes.

**Mr Hodges**—We are unsure as to the precise answer in terms of yes or no. I can give you an outline and, if you feel it is necessary, we could take the question on notice. The outline is that we are certainly aware in relation to the tribunal for the former Yugoslavia that a claim was made, we think by the Milosevic government, to deny access to certain information. But because of the international odium associated with that regime and the strong support for the tribunal, the tribunal found a procedural way of getting around the issue. So the information was, at least, obtained in part to enable the tribunal to continue. If you would like I could get more information, but that is our general understanding.

**Mr WILKIE**—Yes, I would appreciate more information.

**Mr HARDGRAVE**—Why do we always have to be one of the first to sign up to all these things—to ratify them? Let us deal with the ratification only. Why do we always have to be the first?

**Mr Rowe**—Obviously each particular treaty action is looked at on its merits. I am not sure I would necessarily agree that we need to be the first to sign up. Obviously there is a threshold question of whether international instruments of treaties actually are fully compliant with, and reflect, Australia's national interest. It is the role of this committee and of the legislature in relation to treaties to provide a very important input into that process. I will, just by way of comment, avert to what the chairman said earlier. I think that is the reason why we are here today before this committee and why it is proposed that the legislation be tabled in the parliament as part of that broad process of determining the national interest. In relation to this particular instrument, I would comment that the government considers that this is a particular international entity which has particular merits and is needed for the reasons that are outlined in the NIA.

**Mr HARDGRAVE**—Can I ask on what basis we make that assessment?

**Mr Rowe**—We make it on the basis of Australia's national interest—

**Mr HARDGRAVE**—On what basis, though, do we make the assessment that this is in Australia's national interest?

**Mr Rowe**—As part of Australia's involvement in building international institutions and networks that promote the rule of law and ensure that justice is done.

**Mr HARDGRAVE**—So there is a principle underlying this. It is not just some sort of international reality or some club mentality driving this?

**Mr Rowe**—It is not a club mentality, no. There is a broader basis that I outlined in my opening statement as the rationale for the government's approach.

**Mr HARDGRAVE**—It is just that I have never had one person in my electorate come to me and say, 'We must have an international criminal court.' I have to say that I owe my allegiance purely to the people who elect me, not those who voted for me but those in my electorate. I would have thought that was a principle that affects my operation as a member of parliament. So when I apply that measure across this, I find absolutely no connection with the average person in my electorate, nor do I hear in your answer thus far any connection with the interests of the Australian people. Rather there is some great mass called 'Australia International Inc.' which seems to want to provide some sort of international signal or something. Are we really connected with what the people of Australia would expect the government to be doing by pushing this so hard, or are we better off spending our $5 million per year on legal aid?

**Mr Rowe**—I would suggest that on the basis of the submissions that have been made to another inquiry—that is, the Joint Standing Committee on Foreign Affairs, Defence and Trade—on Australia's relations with the United Nations. In the department's submission to that inquiry, there is a reference to the importance of the International Criminal Court and, indeed, the submissions of Defence and Attorney-General's comment on the same matter. There have been a large number of submissions from civil society very strongly supportive of Australia's work in promoting the International Criminal Court and of Australia ratifying and becoming a party to the statute.

**Mr HARDGRAVE**—Mr Rowe, I would certainly be very pleased to see some of those submissions, but what concerns me greatly is what the difference of this is compared with what we are already doing anyway. All morning we have been hearing from the Attorney-General's Department about inquiries into the ad hoc international criminal tribunals for Rwanda and the former Yugoslavia as some basis of legitimacy for this ongoing, forever established moving feast of International Criminal Court jurisdiction. I do not understand what the difference is. Why are we wanting to establish yet another level of bureaucracy funded by the Australian taxpayer which is essentially going to do the work of tribunals which are already established when they are needed?

**Mr Rowe**—One of the fundamental objectives is to create an international body that has a broad based mandate rather than going through the ad hoc approach that has been adopted in the past.

**Mr HARDGRAVE**—But currently that broad base is 22 countries out of 190-something countries. That is not a broad base.

**CHAIR**—Did you mean broad base in terms of its jurisdiction or its support?

**Mr Rowe**—I meant broad based in the sense that you have a single, internationally sponsored and endorsed entity that will deal with the most serious crimes that concern the international community.

**Mr HARDGRAVE**—So you are talking jurisdiction here?

**Mr Rowe**—Yes, and as a basis for dealing with those crimes when national jurisdictions do not act. In terms of its worthiness as an international entity, I would maintain, as I said before, that the international community clearly has expressed its view on that. There are only 22 ratifications as of now, but we have been indicating there are many countries that are in the process of ratifying. There is that large number of signatories, which I understand may not be considered to be the same level of support, but by indicating through their signatures these countries are demonstrating that they do support the principle of the establishment of the court.

**Mr HARDGRAVE**—Surely, if the biggest power in the world is holding out, why is it that Australia should sign to be one of the 60 to create this? Why not wait until the 60 other countries have ratified it and then Australia consider its position?

**Mr Rowe**—As I indicated earlier, Australia has its own national interest in supporting the establishment of this type of institution.

**Mr HARDGRAVE**—To look like it is a good international citizen?

**Mr Rowe**—As part of its contribution to the strengthening of global measures in relation to the rule of law and the pursuit of justice.

**Mr HARDGRAVE**—Mr Rowe, you are from DFAT. Attorney-General's people can jump in on this. It strikes me that a law by law approach to these sorts of matters, or a war by war approach, would have to be better than carte blanche. If we look at the international bribery of public officials convention, which I think is an OECD matter, and at the child tourism sex crimes legislation, both of which give us some jurisdiction over Australian nationals who perpetrate a crime in another jurisdiction, one would imagine that people would be well satisfied there has been a proper assessment on the exact nature of that particular agreement made. It has been signed up and passed into law.

I must say that Minister Vanstone did a good job in actually airing the bribery matter for full discussion before this committee. What we have here though, essentially, is a sign up, trust us, and not only that, broad jurisdiction, only 22 countries so far signing up, and the biggest country, the most powerful in the world, not signing up to it. I think we are potentially signing away a chunk of our sovereignty in the process. We have here a completely different set of philosophies or principles applying to this matter. You only have to look at the contrast to the bribery matter or the child sex tourism matter. Why are we not going down those paths, case by case, war by war, instead of this carte blanche approach?

**Mr Skillen**—You raised Australia's enactment of offences in the nature of child sex tourism and bribery in accordance with the OECD convention. As I take your question, you appear to be suggesting that whereas in those two cases the extra territorial application which was enacted by Australia was fairly tightly defined and constrained, in the case of the ICC this will not be the case. The fact is that the offences that are proposed for enactment as part of our process of ratifying the ICC statute and implementing it into Australian law will be fairly tightly defined, and they will be defined in accordance with the way in which they are defined in the statute of the ICC.

**Mr HARDGRAVE**—So not everything will be referred to it. Is that what you are saying? Or not everything will come to be of interest to it. That might be more the case.

**Mr Skillen**—To answer that question, we probably need again to emphasise the importance of the principle of complementarity.

**Mr HARDGRAVE**—So there is no answer. What about this whole question before, about participating states being aware of an 'appropriate balance' applying to whether or not they participate or otherwise? What is an appropriate balance? Who sets that? What cultural jurisdiction dictates appropriate balance? While you are there: we have heard something about a 'genuine' reason for not being involved. Whose measure of genuineness is applied? What cultural definition of genuineness is applied? Also while you are there: what about the suggestion from Mr Rowe about politically motivated, trumped-up charges? What cultural jurisdiction of politically motivated, trumped-up charges is going to apply there? Is it the winner or the loser of a conflict that is going to have the political motivation?

What I am trying to say to you is that this morning in your evidence you have given us, as Senator Cooney has quite rightly detailed, a great deal of waffle, a great deal of bureaucratese—and total disrespect intended, I suspect. But I have got to say to you, gentlemen and one lady who has not to the best of my knowledge said anything, we cannot as members of parliament sign up to something that essentially does not have an Australian principle applied to it. I cannot as a member of this committee wholly give my support to anything of this sort. You have left open more doors than were open before you started this morning. Frankly, Chairman, I am less than impressed.

**CHAIR**—That being a statement, we will leave it there.

**Mr HARDGRAVE**—Could someone please detail to me whether or not this body is more important than the High Court of Australia? Will it override anything the High Court of Australia decides?

**CHAIR**—We might need some more specificity.

**Mr HARDGRAVE**—Under the Constitution—in section 71 of chapter 3, as I understand it—we specify the High Court and we talk about matters to do with 'such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'. Is this in keeping with that part of our Constitution? Section 73 provides:

> The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgements, decrees, orders, and sentences … Of any other federal court, or court exercising federal jurisdiction … and the judgement of the High Court in all such cases shall be final and conclusive.

Is that still relevant as a result of this particular organisation? I ask the question of the Attorney-General's Department.

**CHAIR**—There is a phrase in the provision, if I can help—

**Mr HARDGRAVE**—Could I hear from Attorney-General's?

**CHAIR**—It says 'as the parliament prescribes'.

**Mr HARDGRAVE**—Does 'as the parliament prescribes' override that, then?

**CHAIR**—Yes. If parliament enacts a domestic act of parliament enshrining the terms of the treaty in domestic law, will that then remove these matters from the High Court? I think that is what you are asking.

**Mr HARDGRAVE**—I am concerned, because I think we have before us yet another treaty that no-one has stopped to plug into our Constitution, to see what happens. This is something that has not happened for some years, Chairman. In the previous parliament, time and time again, departments were finding their way, and I am stunned that Attorney-General's and DFAT could come here with a lack of preparation for this. We have had too many instances in the past when no-one has related this to our Constitution; the basic thread of the laws of this country is not understood. When we sign up to international agreements, 'It might not work in Australia, but it works somewhere else,' or vice versa, just does not seem to be factored into things, and suddenly we have got unintended consequences emerging. I want to know whether or not an unintended consequence could emerge in this case—or at least have it on the record that it has been considered, or dismissed, or agreed to that there is an unintended possibility.

**CHAIR**—Any views on the Constitution?

**Mr Rowe**—Before addressing that point, I would just like to take up the comment you have made, Mr Hardgrave, about a lack of preparation and not being able to reflect the Australian interest in this. I stated at the outset what the government's primary underlying motive was in supporting this objective, and I draw attention to the consultation section in the NIA, which clearly indicates—and we have had this indicated over many years—that very significant groups of civil society in Australia strongly support the establishment of this court. So I am not quite sure what you mean by there being a lack of basis in Australian civil society for the establishment of the court. I must say, frankly, I am not quite sure what you mean when you say that we are not prepared. We are fully prepared in detail to answer any of the questions, and we have been trying to do that.

**CHAIR**—We should perhaps describe these hearings as preliminary hearings because many of these treaties are backing up what Mr Hardgrave says. That is that, once we start to consider the provisions, it often throws up these questions and curiosity we have about how it fits into a broader framework and constitutionality and things like that. It is becoming obvious to a lot of us that we really need two or three sessions, especially for big treaties, to really bring all these things out. I am pretty sure we are going to have another session by the sound of things this morning.

I will finish off with a few questions. Some concern has been expressed by members about the breadth of the definition of some of the crimes: for example, genocide. That is one issue we would like to deal with. Secondly, there is the question of governance. This was brought out in some questions. A concern was expressed about a two-thirds majority of the state parties being able to amend the elements of a crime and things like that. On that issue, for example, how would the State of Israel find itself where often resolutions are passed in the UN and by broad numbers of member states who are not ordinarily regarded as hostile to Israel but they do vote

for resolutions that are not exactly objective perhaps? I note that Israel is not a signatory. In fact, while we are on that, why aren't any of the Islamic states signatories either? I do not think there is one Islamic state on the list. Is there some reason for that?

**Mr Rowe**—I cannot answer directly because they have not expressed why they have not signed. They were very actively involved in the negotiation process and no doubt are considering their position. Jordan is the one who has signed. The statute does take account of quite a number of their concerns and proposals but, by the nature of things, they have not yet signed on to it. I would suggest that is not unusual.

**CHAIR**—So Burkina Faso has signed it?

**Mr Rowe**—Yes.

**CHAIR**—Benin and Andorra. Andorra is just a ski field. Yet no Islamic country has signed it and only one Asian country has signed it—that is the Republic of Korea.

**Mr Rowe**—I know Cambodia, Thailand, the Republic of Korea and Bangladesh have signed in the Asian region.

**CHAIR**—Extraterritoriality is another question that Mr Hardgrave raised particularly. We have two worthy statutes on the books that give ourselves, for the first time, extraterritorial criminal jurisdiction. Often it is said that it is terribly difficult to prosecute crimes that are committed offshore because of problems with witnesses. There was one noteworthy case tried in Canberra under that child sex tourism thing that fell over. If it is so difficult to prosecute crimes that occur outside Australia in Australia, why is it so efficient to prosecute them in The Hague? I do not imagine they are going to have a lot of war crimes in Holland. If we cannot have extraterritorial jurisdiction for villains that happen to be in Australia, because it is often said that it would be terribly difficult to have cases here, then how do you expect us to believe that it is going to be any better done in The Hague if some villainies happen in the middle of darkest Africa or somewhere?

**Mr Jennings**—With prosecutions and investigations by the court—and this is a point perhaps we could have made earlier—the court will rely on the states to assist it. It will not have its own police force, in a sense. It will have its investigators and so on. Rather than a country doing the prosecutions—and, as you acknowledge, it is not easy to do these extraterritorial prosecutions—you will have a court doing it with a range of state members assisting in its investigations and prosecutions. So it will be able to draw on a broader network of countries to provide evidence and so on. In that sense, it has greater access to the assistance of other countries, whereas if you are doing it bilaterally you can get assistance from other countries, but there is that difference to the bilateral prosecution. That is the best I can do to outline an answer to that.

**CHAIR**—I appreciate that. Why would those countries help the court?

**Mr Jennings**—If you are a state party, you enter into some obligations to assist the court in its prosecutions and investigations, to assist it to collect evidence, to interview witnesses and so on. So it is relying on the state's parties to assist it in its work where necessary. So as a state party you have some obligations there.

**CHAIR**—In the same way as we undertake a prosecution under the Crimes (Child Sex Tourism) Amendment Act or the bribery of foreign officials act and we ask friendly countries for assistance through the normal diplomatic channels—one would assume they would assist us because they think such crimes are despicable and so forth—why wouldn't we mount a domestic statute that did not carve out a chunk of jurisdiction from the High Court, put these things on the book domestically and have a go at these fellows with the assistance of friendly states, in the same way as they are going to do in The Hague, except that they are going to be doing it in Holland and not in Canberra?

**Mr Jennings**—The intention in moving forward with the legislation is to actually put on the books the necessary crimes, so it will allow us to deal with Australians who commit crimes overseas. At that point, as we have mentioned, through the operation of principal complementarity, we will be in a position to deal with our own people. But, in some instances, where states are not in a position to prosecute, for whatever reason, in the courts there, we will be able to pick it up with the assistance of other states. It is not intended—if I could just very briefly return to this constitutional issue—to derogate from the Australian constitution in what we are proceeding with here. This court is not going to be a domestic tribunal of Australia; it will not fit within the constitution of Australia. It is an international tribunal established by the international community to try international crimes.

**CHAIR**—So it is an additional mechanism.

**Mr Jennings**—It operates within its own sphere, just as our courts operate within their own spheres in the prosecution of these offences or other offences. So it is not intended to derogate—if I can answer directly—from the constitution.

**CHAIR**—We have got to the real heart of this policy dilemma, the fork in the road. To be fair to all concerned, could we ask you, on notice, to provide, preferably over the signature of the same authors of this morning's press release, a letter to the committee explaining, or in a sense providing evidence, why this should be done by way of a supranational body and not a piece of domestic legislation such as we have done with child sex tourism. That is really where we are. Let us not try to struggle anymore through this fork in the road. The debate we have had has been good and we have some profound things to deal with. Let us adjourn there and we will perhaps have another chat later.

**Mr Jennings**—As Mr Rowe said, we came here today prepared to answer the questions from the committee. If I have personally been overly informative, please excuse my degree of information, because it is an issue that I have been involved with since 1993. My own colleagues find me a little excessive in terms of information. But we have indeed sought to provide the best possible information and, of course, all departments stand ready to assist the committee further in its work as you develop that.

**CHAIR**—Those of us who sit in the House of Representatives, and even the Senate, enjoy the robust debate in those chambers. We would never complain about a robust exchange in a committee room; we welcome it. Thank you. We will move on to the next instrument.

[11.40 a.m.]

**Proposed double tax agreement with the Russian Federation**

**LENNARD, Mr Michael Andrew, Acting Assistant Commissioner, International Tax Division, Australian Taxation Office**

**NUGENT, Mr Michael, Acting Executive Officer, Treaties Unit, International Tax Division, Australian Taxation Office**

**CHAIR**—Welcome. Thank you for appearing at short notice. These are formal legal proceedings of the parliament and warrant the same respect. The giving of any false or misleading evidence is a very serious matter and may be regarded as a contempt of parliament. Could we have some introductory remarks and then we will go to questions.

**Mr Lennard**—Thank you. I will be very brief on the introductory comments, make a few comments on the special features of this agreement and leave time for questions. Essentially, this double tax agreement with Russia fills what we think has been a very big hole in our treaties network. We have never had a treaty with Russia or with the former USSR. The trade and investment flows between the countries which are indicated in the NIA are not extremely large at the moment, but we believe that, as with some of the other treaties we have recently brought before this committee—such as the one with Romania—there is a strategic importance in settling the trade and investment framework through a double tax agreement as soon as possible. As indicated in the past, these agreements are essentially to ensure a prevention of double tax when investors from Australia are investing in Russia, and vice versa, and for those trading between the two countries. There is also a second aspect, which is the prevention of fiscal evasion, and there are various provisions, such as an exchange of information, to ensure that.

I will briefly mention some of the main differences between this treaty and our usual model. They are outlined at pages 7 and 8 of the NIA, but I will briefly mention the most important ones. Firstly, the definition of ‘Australia’ in all our double tax agreements excludes, in one way or another, the Australian Antarctic Territory. The usual way it does this is that it does not apply to the external territories, except for those which are listed, and we do not list the Australian Antarctic Territory. That is essentially to avoid the sensitivities which can exist among many countries about what might be seen as a claim upon Antarctica. Some countries feel that that is contrary to the Antarctic Treaty in that it is making a fresh claim on Antarctica.

Russia was not satisfied with our usual way of dealing with that—that is, not mentioning Antarctica. We dealt with that in a way which does not actually change the impact of the agreement, as compared with our other agreements—but which dealt with that sensitivity—by saying in the protocol that nothing in the treaty was contrary to the provisions of the Antarctic Treaty against making fresh claims. Essentially, we are saying that nothing in this treaty makes a fresh claim in respect of Antarctica. It really says nothing about the position of the Australian Antarctic Territory. It leaves that to instruments or matters other than the double tax agreement, so it is effectively the same result as in our other treaties.

The other major one is in the non-portfolio dividends provision, which is paragraph 2 of article 10 of the agreement. The rates in this treaty for withholding tax generally follow our recent practice in that it is 10 per cent for royalty withholding tax, 10 per cent for interest withholding tax, and there is a split rate in respect of dividends. There is a general rate of 15 per cent for dividends but there is a special rate for dividends. In most of our treaties we have a provision which says that that special rate applies only where there is at least 10 per cent ownership in the capital of the company that is paying the dividends—that is called a non-portfolio holding and that is more than a portfolio holding. Also, that the dividends have essentially borne the normal rate of company tax and, where the dividends are paid from Australia, that means that they have been franked.

There is an extra provision in this agreement which requires, to get the lower five per cent rating, that at least the equivalent of $A700,000, or the rouble equivalent, has been invested in the capital of that company. So this treaty is unusual in that 10 per cent is not necessarily enough unless you have the $A700,000 invested in the company. This follows Russian practice. Initially they sought a $US500,000 requirement. We have accepted that requirement but it is $A700,000. At one stage that was roughly equivalent. Things have changed somewhat. So there is that further limit but it is in accordance with Russian practice and we do not think will severely limit Australian investment in Russia.

The other main differences are that we accept source country taxation on government service pensions. Our general rule is that the residence country should be the one that taxes all pensions. But in many of our treaties we have made an exception for government service pensions which other countries frequently require. In effect, there are unlikely to be many Russian immigrants taking government service pensions in Australia so in practical terms it is not likely to be a major issue. It is, as I say, consistent with very many of our treaties.

There is a special provision in this treaty which arises out of a historical reason in that at one stage it was suggested that Russia may establish—and I think it has established—a tax privileged region under its law. This meant that in that area non-Russians could invest and receive a very attractive exemption or very attractive tax rates. Also, very importantly, information in relation to those dealings would get a special measure of confidentiality. So there is a provision in this treaty which probably will appear in some of our treaties in future which says that where you have both these characteristics—the special taxation regime and the special level of confidentiality—the income from that special regime does not get the benefit of the treaty. The main reason is that an area which has special provisions giving extra special confidentiality is one which can be subject to dealings which we will not be able to get to the bottom of because of the lack of exchange of information provision. So for that reason we do not give the benefits of the treaty.

The only other major provision is where adjustments are made by one country to the dealings between two related companies—transfer pricing. What you then require is that the other company must give effect to a correlative adjustment, as it is called. It must say that because the first country has reassessed the tax which should be payable on an arm's length basis, to ensure that there is not a double taxation we have to take that hypothesis up.

Russia, not being a member of the OECD, was a little concerned about directly picking up the OECD rules on this sort of point. In the end we agreed that Russia would give an adjustment so

that if Australia, for example, increased the profit to an Australian entity dealing with a Russian entity, Russia would then agree to decrease the profit coming to the Russian entity to ensure that there was not double taxation of part of that. But in requiring itself to look at what adjustments were appropriate, as it is entitled to do, it would look at objective international standards. I think that is a good result in that the OECD standards are very widely accepted, and increasingly accepted in the UN framework. I think it is a treaty which has some peculiarities reflecting Russian treaty practice and some peculiarities of the Russian system.

One matter which I did not mention is that there is a special provision in the royalties provisions—article 12, dealing with what are called radiofrequency spectrum licence payments. Legislation was passed in 1999 in response to situations where a licence holder of radiofrequency spectrum was overseas and the user was in Australia. There are a lot of taxation advantages in some cases for that sort of set-up rather than where the Australian entity was the actual licence holder and the user was also in Australia. The legislation effectively says that in those cases the licence holder is treated as having a permanent establishment in Australia; therefore, as having a presence which we can tax. Essentially, that is designed to reflect the licence conditions which say that you will have a permanent establishment in Australia.

In the Treasurer's press release of 11 March 1998, he indicated that the government would be seeking to introduce legislation. Ultimately, the right solution is to put something in the treaties which specifically says, 'Any payments from an Australian user to a foreign licence holder of radiospectrum will be treated as royalties under the agreement.' Again, we think it is a good provision in that it reduces the advantages of merely being an offshore spectrum licence holder as compared with onshore ones. Those are the main points. We think it is a treaty that has been missing for a long time. It is a very important country and we think ultimately it is an important destination for trade and investment both ways.

**CHAIR**—Many thanks. Are there any questions?

**Mr BAIRD**—I congratulate you on the agreement. I think it is long overdue. Russia does represent an important trading partner, despite its recent difficulties, so I would be supportive of it. That view may not be shared by everyone on the committee. My only concern is in relation to the business practices of some of the newly emerging entrepreneurs within the country, if I can put it euphemistically, and what degree of difficulty that will present in terms of this agreement.

**Mr Lennard**—This agreement generally encourages trade and investment. As for issues of whether investment in Australia is allowed, for example, it would rest upon the normal procedures of the FIRB—the Foreign Investment Review Board. If anything, having a requirement for an exchange of information actually may benefit. Although the exchange of information must be for the purposes of this treaty, in terms of tax avoidance and things like that, I think having this treaty in place increases the ability of both countries to deal with activities which are essentially avoiding tax. As for activities which might have other aspects to them which are unattractive, this treaty really says nothing either way on that but leaves it to the two countries as to whatever their domestic law is on that. So it certainly does not prevent us looking at those sorts of issues under other provisions of our domestic law.

**Mr BARTLETT**—My questions relate to the general double tax agreements and more specifically as they apply to Russia. Just to clarify this in my own mind, the arrangement with taxing business profits, according to article 7, is that they are taxed in the state of residence, and the state of residence is defined as where the head office is. So, presumably, the business profits of a Russian company investing in Australia are not taxed in Australia; they are taxed in Russia at the Russian rate?

**Mr Lennard**—Generally, yes. If they have a permanent establishment within Australia, Australia can then tax—

**Mr BARTLETT**—And I notice that article 5, protocol 4 says we may tax on the profits. Do we generally do that?

**Mr Lennard**—The word 'may' effectively means that either country may do that.

**Mr BARTLETT**—What is the standard arrangement with all those other countries with whom we have a double tax agreement?

**Mr Lennard**—It depends on the particular matter at hand; it really depends upon our domestic law. But, in our experience generally, Australia does have the ability to tax profits that are made here, but the double tax agreement says you can only do that under your domestic law if there is a permanent establishment here.

**Mr BARTLETT**—So if there is a subsidiary company in Australia, which presumably most foreign investment involves, then we may tax. But what I am asking is whether we generally tax.

**Mr Lennard**—Yes. The words 'may tax' means that Australia may also tax because the residence country may tax as well and then the residence country under the treaty is required to give credit. So, effectively, the source country gets its full taxation rights. In most cases, we would tax.

**Mr Nugent**—In fact, under our domestic law, we would take up that taxing right and actually carry it out.

**Mr BARTLETT**—So we do it with all the other countries with whom we have a double tax agreement?

**Mr Nugent**—Yes.

**Mr BARTLETT**—So that presumably would be the same arrangement in our dealings with Russia?

**Mr Nugent**—Yes.

**Mr BARTLETT**—The critical question for me, and it is a question that has been put to me by a lot of constituents, is with regard to transactions with associated enterprises—and you

talked about the problem of transfer pricing, and this is a problem that comes up all the time. In more general terms, is there a high level of complaint or questions about the existence of transfer pricing arrangements that minimise tax obligations in the source country? Secondly, has there been any exhaustive research done on that whole area and the extent to which transfer pricing—or other arrangements that are perhaps not quite as arm's length as they ought to be—actually minimise or reduce the tax obligations in the source country?

**Mr Lennard**—It is not directly my area, but I can answer in general terms that it has been a big issue at the OECD. It is becoming more and more recognised in the UN, which is redoing a model convention and a model commentary, that it is a substantial issue and there are a lot of difficulties involved with a lot of the economic analysis, for example. But it is an area where Australia is actually recognised as being a world leader in the methodologies and in addressing this with that what are called advance pricing arrangements, where that methodology has worked out—before a dispute arises—the proper attributions of profits. So it is a very important international issue. It is one where Australia is leading the field and where this agreement will actually help us because it allows for the exchange of information. It explicitly allows, in certain circumstances, for us to go back to our domestic law provisions on transfer pricing. It also allows the correlative adjustments. So even if an adjustment is warranted, the other country will take that on board and will reach a result that, while being fair, does not put an extra burden of tax upon one of the entities.

**Mr BARTLETT**—When you say that Australia is at the leading edge in this, is DFAT totally confident that we are not subject to tax minimisation by other countries because of transfer pricing and other arrangements? Are you sure that we are absolutely on top of the game there?

**Mr Lennard**—The Australian Tax Office is what I am representing. It is probably inappropriate for me to answer a question as broadly as that; it would be more a question for one of the senior officers more directly related with transfer pricing. This treaty deals with that and, of course, many other issues, so I could not give figures and things like that. It is a matter that has been addressed before some parliamentary committees; I do not have the points to hand. We could take something on notice and respond; that would probably be the best thing.

**Mr BARTLETT**—I would appreciate that, thank you.

**Mr HARDGRAVE**—Thank you very much, and as Mr Baird said, it is long overdue. I am sure everyone agrees with that. On the question of business profits, which Mr Bartlett raised, it is a maxim in the Australian community that the big American companies—Ford, General Motors and McDonald's—repatriate their profits offshore and do not pay tax here. Could you clarify this position and help me reassure others? Hopefully, the committee can reassure others that there is a deal of tax that is collected by the Australian Taxation Office or is this question of permanent establishment, article 5 and protocol item 4, a way that some companies manage to get around tax here in Australia?

**Mr Lennard**—On the second point first, there will always be arguments about whether there is a permanent establishment. There is a lot of discussion internationally and a lot of questions where, at the edges, that can be a very difficult issue. Basically, what has to be borne in mind is that that is a concept which is a way of saying, 'Is this entity sufficiently connected with your country so that you should be entitled to tax on that?' In the case of most of the big companies

with a presence in Australia, they will have a permanent establishment, so we have the right to tax under the treaty. There are sometimes attempts to reach a situation where there appears not to be PE, even though most people would say that there is a sufficient economic presence to Australia.

One thing I should point out that I think is very relevant to that is that all our treaties are subject to part IVA, which is the general anti-avoidance provision. So if there was an attempt to construct things in a way that was contrary to that provision, we could apply that and many other countries do the same—the general anti-avoidance provision still applies. As to the first point on whether the big companies do pay essentially their fair share of tax in Australia, I would like to consult with the people—not to avoid the question—who have the hand on what the general trends are to respond to that. I would prefer to respond to that more generally.

**Mr HARDGRAVE**—I guess it would be a matter of information. I do not think the information would be too private to give us an understanding of some of the big international companies operating here and the sorts of taxes that they are paying or whatever. There are some institutions in other countries that suggest that paying tax should be a matter of pride. I am sure the ATO would love to be able to try to get that up. I am not necessarily endorsing that, but I am saying that in some places paying tax is a measure of success. A lot of Australians do concern themselves that profits are repatriated first before taxes are paid. The ATO should try to put that to bed as best they can. Perhaps this is an opportunity to do that.

**Mr Lennard**—I will try to put in a submission. Anything I do has to be subject to the confidentiality provisions that would apply. What I would say generally is that a treaty itself cannot force people to pay tax, but it can put in mechanisms, particularly the exchange of information article—we did not have any previous exchange of information article with Russia. That is an instance where we can find out what is happening and we can be in a better position to apply our domestic laws to prevent tax avoidance.

**Mr HARDGRAVE**—Are you saying that, even if you have an ABN operating under the new regime, there is no guarantee that you are actually a taxpaying entity in the sense of being a domestic op company versus an international company?

**Mr Lennard**—What I am saying is that the treaty itself does not actually force people to pay tax. What it does is says, ‘Our two countries have taxing rights at domestic law. In certain instances, this country will only tax this, this country will only tax that; in some cases both can tax; and then, at the end of the day, the residence country must give some credit for the taxes paid in the source country.’ The double tax treaty is an overlay upon the domestic laws of both countries and, in certain instances, says what can and cannot be done. The domestic tax law itself deals with many of the specifics.

**CHAIR**—To clarify that, only God or the courts can make you pay tax—that’s right?

**Mr Lennard**—Or your conscience.

**Senator COONEY**—Are there common accounting standards between Russia and Australia?

**Mr Lennard**—I am not sure as such. Of course, many of the big companies would apply more or less international standards, but I can check that up as well.

**Senator COONEY**—You may not know this but are there a lot of people coming from Russia to live here?

**Mr Lennard**—We do not think there are many. This issue came up broadly in respect of the pensions. Again, we can check that.

**Senator COONEY**—Thanks very much.

**CHAIR**—There are no further questions. Many thanks.

**Agreement on Privileges and Immunities of the International Tribunal for the Law of the Sea**
[12.06 p.m.]

**SERDY, Mr Andrew Leslie, Executive Officer, Sea Law, Environmental Law and Antarctic Policy Section, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade**

**CHAIR**—Welcome. I have to advise you that these are legal proceedings of parliament and they warrant the same respect as proceedings of the House or the Senate. The giving of any false or misleading evidence is a serious matter and would be regarded as a contempt of parliament. Would you make some remarks and then we will have some questions.

**Mr Serdy**—The International Tribunal for the Law of the Sea, or ITLOS for short, along with the International Seabed Authority, is one of two great new permanent institutions established by the United Nations Convention on the Law of the Sea, which these days is commonly abbreviated to UNCLOS. The first election of its 21 judges was held in August 1996 and they took office in October of that year.

I am here today to give evidence to your committee on the Agreement on Privileges and Immunities of ITLOS. Freestanding privileges and immunities treaties are actually quite rare. Usually one finds privileges and immunities embedded within a headquarters agreement—for example, Australia’s headquarters agreement with the Commission for the Conservation of Southern Bluefin Tuna, which came before this committee in 1998—or among the machinery provisions near the back of a longer treaty that sets up an international organisation. So, in a sense, what we have here is a treaty consisting entirely of machinery provisions—an afterthought to UNCLOS, if you like, which treats the subject of ITLOS’s privileges and immunities in a rather cursory fashion.

Rather than attempting a definition of my own of what privileges and immunities are, I might draw on a more practical framework for approaching this question in the form of the five schedules to the International Organisations (Privileges and Immunities) Act 1963, the act under which the regulations to implement this treaty domestically were made five days ago. Essentially, these schedules are menus listing the privileges and immunities that the regulations may confer on an international organisation or on persons associated with it, as long as Australia or a person representing Australia is a member. Regulations have been made for over 50 bodies over the years, so in that respect ITLOS is nothing out of the ordinary. The one caveat is that, although the five schedules make a systematic way of looking at the subject of privileges and immunities, because ITLOS is a court, and so states and individuals cannot formally join it, its privileges and immunities actually have to be given effect under a different part of the act. I will not read out the menus in full, because that would take too long, but I will pick out some examples to illustrate that there is a large degree of overlap between the privileges and immunities in the treaty and those within the schedules.

The first schedule is for the organisation itself, in this case ITLOS. There you find listed things like immunity from legal process; inviolability of its assets, premises and archives; exemption from tax and from import and export duties on the goods it imports for its official

use; exemption also from currency restrictions. All of these ITLOS is entitled to under the treaty before you.

The second schedule is for so-called high officers of the organisation, and gives them the same privileges and immunities as diplomats have. In the case of ITLOS, its judges and the registrar are equated to heads of diplomatic missions for the purposes of the treaty.

The third schedule is for the benefit of persons attending meetings of an organisation. It includes immunity from suit for acts done in an official capacity; inviolability of papers and documents; exemption from immigration and national service laws. It is not directly applicable to ITLOS, because as a court ITLOS does not hold meetings that representatives of Australia and other countries can attend. Instead it hears cases in which counsel and witnesses participate, and it is on these classes of persons that the treaty confers privileges of the third schedule type.

The fourth schedule covers the ordinary staff of the organisation, in this case the ITLOS registry staff. They too get immunity from suit for official acts, as well as the right to import and export furniture and effects free of duty when taking up a post in Australia or leaving, and their salaries are tax exempt.

Finally, the fifth schedule concerns experts sent by the organisation on one-off missions, who enjoy immunity from personal arrest and detention and limited immunity from suit, also inviolability of their papers and documents. And again the treaty has experts of this kind for which it caters.

From all this it is apparent that the provisions of this treaty are more or less standard in terms of what one would find in equivalent parts of other organisation-creating treaties to which Australia is party, the difference being that they are elaborated—and, on the other side of the ledger, qualified—in somewhat greater detail than usual. In fact, the length of this treaty results less from extra privileges and immunities beyond the average than from the extra qualifications to which they are subject. For example, apart from what might be called the standard provision in article 19, that the privileges and immunities are given not for the personal benefit of those who enjoy them but for safeguarding the independent exercise of their functions for ITLOS, there is also article 24, which is not standard. It obliges ITLOS to cooperate with states parties to prevent the abuse of the privileges and immunities. One example I might give of immunity which is not in the schedules is the immunity from baggage inspection, in articles 15 and 16. Although on its face it goes beyond the schedules, it turns out when you read the articles carefully to be far from absolute. The result is that baggage may, in fact, be searched if there are serious grounds for doing that.

Since ITLOS is based in the German port of Hamburg, one might conclude on the basis of what I have been saying that the treaty will rarely actually need to be applied in Australia. That is certainly so. ITLOS is not likely ever to want to hold hearings in Australia, although under its statute that cannot be ruled out. It is more probable, if Australia becomes involved in a dispute, that judges or counsel might wish to pay a visit to an Australian site in some way relevant to the case. But the most frequent contact with Australia that its judges or staff are likely to have is being invited to speak in their official capacity at conferences held in this country. In this context it would be anomalous—

**CHAIR**—Mr Serdy, would you pause there. You are saying that the judges of this thing are going to make speeches?

**Mr Serdy**—It is quite common for international law personalities, if I might call them that, to be invited to all sorts of conferences around the world and to deliver speeches.

**CHAIR**—Are there provisions in this statute to exclude judges from hearing matters if they have expressed a view on it—in some of these speeches, perhaps?

**Mr Serdy**—Not in this treaty as such, Mr Chairman. That is taken care of in the actual statute of the tribunal, which is annex 6 to the law of the sea convention.

**CHAIR**—So you can object to a judge if he has made a speech basically in contradiction to what your country's policy might be on some matter?

**Mr Serdy**—I am not sure that there is an actual provision to that extent in annex 6, although I would be happy to take that question on notice, but I think judges are generally careful not to give opinions in public statements they make on controversial matters.

**CHAIR**—Let us pause there and have some questions.

**Mr BAIRD**—Firstly, I thought that was a very good review of the actual provisions. It seems to be appropriate to bring it in line with other organisations. I understand that is the nature of the exemptions given to other organisations and it seems appropriate that this important organisation should have that. I still question the extent to which immunities are given in this day and age, and we have had some fairly glaring examples of where immunities have been claimed for breaches of the law in Australia. Has this treaty been agreed to by most countries around the world and how many have signed, or is Australia going to be the first again to point our pen towards this treaty?

**Mr Serdy**—There are four ratifications so far, and they are listed in the NIA. From memory they are: Norway, the Netherlands, Slovakia and Croatia. There are 21 states that have become signatory to this treaty. The treaty was closed for signature two years after it was opened so there will be no more signatures, but that does not stop other states from coming on board later through the accession process.

**Mr BAIRD**—Why wouldn't there be any more signatures?

**Mr Serdy**—The general pattern is that once a treaty is finalised it is opened for signature for a set period of time—in this case it was two years. At the end of those two years, if you have not already signed, you can still become a party to it. But rather than going through the two-step process of signature and then ratification there is a one-step process which is simple accession.

**Mr BAIRD**—Are you aware of the reasons the other countries decided not to agree to it?

**Mr Serdy**—That is difficult to say. Perhaps the first thing I should point out is that this agreement was actually adopted by consensus at the meeting of states parties to the Law of the Sea in 1997.

**Mr BAIRD**—By the people who would be beneficiaries of the treaty, I presume?

**Mr Serdy**—Not quite, because the meetings of states parties are made up of bureaucrats such as myself who occasionally go to New York for these meetings. Firstly, the cases are actually quite rare, but the ones that would derive standing benefit from the treaty would be the judges and the registry staff themselves.

**Mr BAIRD**—Thank you.

**Senator COONEY**—This is interesting. If we ratify it will our obligations which arise be executed by regulation?

**Mr Serdy**—That is right.

**Senator COONEY**—Does that happen often? How many ratifications are carried out by regulations?

**Mr Serdy**—It is not the ratification itself that would take place by regulation; it is the domestic implementation of the obligations under the treaty.

**Senator COONEY**—You are right. That is what I am trying to say to you. Do you know how many of those there are where the obligations are carried out by regulations?

**Mr Serdy**—I could not give you an exact number. I did count them about three or four years ago and at that stage there were 40-odd and I know there have been several more since.

**Senator COONEY**—Thanks for that.

**CHAIR**—Could I clarify this notion of privilege and immunity? If a person comes within the definition of an official of the tribunal—registrar, and so forth—and they qualify for this immunity and they happen to be in Australia for one of these conferences, then that immunity applies to them? Is it an across-the-board immunity such as the Vienna Convention on Consular and Diplomatic Immunities? Is it that broad?

**Mr Serdy**—No, it is not that broad. There is a specific list in the treaty.

**CHAIR**—Is it similar to parking fines, as in Canberra? It is a serious matter. If someone happens to be here and commits a crime and claims immunity we have to know how far it is going to extend.

**Mr BAIRD**—It sounds like it goes all the way. It is the same as a diplomat.

**CHAIR**—Yes. Is it the same as an official of the embassy of X country in Canberra?

**Mr Serdy**—The actual diplomatic privileges and immunities are extended only to the judges of ITLOS and to the registrar. The officials have a more limited set of immunities. They are set out in article 14 of the treaty. I note, for example, that paragraph 3 of that article says:

The officials of the tribunal shall be required to have insurance coverage against third-party risk in respect of vehicles owned or operated by them, as required by the laws and regulations of the state where the vehicle is operated.

So that again is an example of the length of this treaty operating to cut down rather than to build up the privileges and immunities that ITLOS and the people connected with it enjoy.

**CHAIR**—In a sense, should we be concerned about diplomatic immunity generally being spread around the international community? What is the basic reason for granting a judge of this tribunal this kind of extraordinary immunity? If a judge of the Australian Federal Court happens to be making a speech overseas, they are not immune from prosecution in that country if they are perhaps falsely accused of a crime. It seems like the currency is being a bit devalued here.

**Mr Serdy**—I do not really want to appeal to tradition and say that this has always been done, because the trend is that more and more countries are giving up their privileges and immunities. Similarly, when new organisations are created, the ones they are given are not as extensive as might formerly have been the case. But, at bottom, the reason for privileges and immunities existing at all is so that the people who benefit from them can exercise their functions uninterrupted and without interference. That perhaps is not so much a problem in this country but it may be elsewhere.

**CHAIR**—Let us take the example of an Australian committee member, one of us. if we were abroad on a study tour—getting into something that pertained to a very important treaty, such as the Kyoto Protocol or something—and we are investigating the emissions of carbon and some of the countries that are perhaps not party to it and some false accusation should be made about us, there is no immunity for us, yet these blokes and ladies are going to swan around the world with immunity. So if we are to grant this immunity to someone who is not part of the Australian system or anything and just happens to be a judge on one of these tribunals—albeit a very august tribunal—and is perhaps not even acting on tribunal business, then we look at ourselves, our families and so forth and weigh it in the balance. We are not here to put you on the barbecue about this, but these things occur to us. There seems to be, as some members have expressed, a concern that things like diplomatic immunity and this sort of joining up to these great instruments are handed around like a packet of Cornflakes with perhaps no thought to considerations of equity and other things like that.

**Mr BAIRD**—Mr Chairman, I fully agree with your sentiments but in some of these decisions the judges would be highly important to some countries because of the dollar value involved, especially in terms of oil rights and so on. You are not so far away. Here we can think of some very significant ones. If judgments are made and the locals who felt they were adversely affected took action, I think there is a need to see the overall importance and the pressure on these particular individuals and to recognise that on the other side of the equation.

**CHAIR**—Yes. There is a question of members of parliament from one country that might be in some sort of conflict with another, and there is no immunity from prosecution for us, is there? I would appreciate it if you would take that question on notice and tell the Attorney-General, perhaps through the correct channels, that there is a little bit of concern about equity here. We will consider it at our next private meeting. Thanks for your evidence this morning.

**Mrs DE-ANNE KELLY**—I would like to ask some questions. Do the non-ratifying countries—and there are only four—then not extend these privileges of exemption from suit in certain taxes? In other words, judges in those non-ratifying countries are subject to the laws of that state, with exemption. Is that so?

**Mr Serdy**—You are talking about judges of ITLOS from a particular country that is not party to this treaty?

**Mrs DE-ANNE KELLY**—Yes.

**Mr Serdy**—There are already provisions in the statute of the tribunal itself, annex 6 to UNCLOS, which apply to the judges only. They say that they are to be given diplomatic privileges and that their salaries are free from taxation. But that is as far as UNCLOS and the statute go. So this treaty is really to fill the gaps that UNCLOS left.

**Mrs DE-ANNE KELLY**—Right, so are they not subject to taxation in any country or only in ratifying countries? Your answer was not entirely clear.

**Mr Serdy**—The exemption from taxation is in respect of the salaries that they receive from the tribunal. All other salary that they get is taxable.

**Mrs DE-ANNE KELLY**—I am aware of that.

**Mr Serdy**—I might also add that being a judge of ITLOS is not a full-time occupation. Generally, the judges are either current or retired professors at some university or other. So they receive a stipend, but most of their income would come from elsewhere.

**Mrs DE-ANNE KELLY**—I will be more specific. I understand, for instance, the United States is not ratifying this—is that right?

**Mr Serdy**—That is right.

**Mrs DE-ANNE KELLY**—So, if one of the judges from this tribunal is in the United States, is that judge exempted from being sued and is he exempt from direct taxes, customs duty and income tax?

**Mr Serdy**—No.

**Mrs DE-ANNE KELLY**—So he pays it in the United States? What you are saying is that if we ratified this we would be extending that immunity, but that our judges, if they happened to be on the tribunal, would be subject to all of that in other countries that have not ratified—and there are only four that have ratified. Is that so?

**Mr Serdy**—The position is that the United States—

**Mrs DE-ANNE KELLY**—Sorry, yes or no, with respect?

**Senator COONEY**—The answer is yes, what Mrs Kelly is saying is right. There is nothing you can do about that—that is the reality though, isn't it?

**CHAIR**—If we appoint you to be a judge and you are in the United States giving one of these speeches, because they are a non-consenting third party they are not bound by any obligations under this, are they, vis-à-vis you?

**Mr Serdy**—That is correct.

**CHAIR**—Or any of these judges?

**Mr Serdy**—That is true. But, equally, I would not be drawing any salary in the United States.

**CHAIR**—Fine. But on the other hand, if a judge comes to Australia from a country that has not ratified the treaty, and we ratify it, we are giving immunity to that judge, even though that judge's own country has not even ratified it. Yes, that is right, because they are a non-consenting third party.

**Mrs DE-ANNE KELLY**—That is right.

**Mr Serdy**—It is true under this treaty but, as I was saying before, to be a judge of ITLOS at all, the judge would have to come from a state that is party to UNCLOS. And UNCLOS does have those minimum privileges and immunities for judges only, not for anybody else and not for the tribunal.

**CHAIR**—Which four countries have ratified it?

**Mr Serdy**—Norway, the Netherlands, Slovakia and Croatia.

**CHAIR**—They are the only countries that can provide judges?

**Mr Serdy**—No, the countries that can provide judges are the states that are parties to UNCLOS.

**Mrs DE-ANNE KELLY**—To the overriding agreement—is that so?

**Mr Serdy**—That is right. At the moment there are 135 of those.

**Mrs DE-ANNE KELLY**—Yes, but this particular amendment has only been ratified by four.

**Mr Serdy**—That is correct.

**Mrs DE-ANNE KELLY**—So everyone can supply a judge, but only these four are the ones that have got to give them an exemption, including Australia if we consent to it?

**Mr Serdy**—No, that is not quite correct, because there is still this obligation in UNCLOS itself—articles 10 and 18 of annex 6 to UNCLOS, the statute of the tribunal—which says that

judges must be given diplomatic privileges and immunities and their salaries are exempt from taxation.

**Mrs DE-ANNE KELLY**—That should be good enough for us, shouldn't it?

**CHAIR**—Yes, why do we need something else?

**Mrs DE-ANNE KELLY**—Why do we need this?

**Mr Serdy**—It is probably good enough for judges, but there is the question of the tribunal itself and the operations that the tribunal has, that would require something beyond that, generally speaking, by comparison with other international courts and tribunals. I might name the International Court of Justice and even the International Criminal Court.

**Mrs DE-ANNE KELLY**—With respect, only four countries agree with that: Croatia, the Netherlands, Norway and Slovakia.

**CHAIR**—Slovakia does not have any sea.

**Mrs DE-ANNE KELLY**—Without making any sort of judgment about those countries, they are hardly world leaders in the international community.

**CHAIR**—Slovakia is land bound; there is not even any sea near there. I suppose the Danube River would go close by. Shall we ask the gentlemen to provide a letter specifically on this point: why is another agreement necessary on top of the convention which grants certain privileges and immunities; exactly why do we need an extra agreement?

**Senator COONEY**—The chairman said they are not going to come here as part of their function so much as to give a talk. It seems to be a big effort to go through to do that. If it is no trouble to you, could you give us a list of those 40 regulations that have been passed to carry out our obligations under ratified treatment? If it is any trouble, do not worry about it; it is just a matter of interest.

**Mr Serdy**—It is no trouble at all. A different part of the legal branch would do it, but it is a very simple operation.

**Senator COONEY**—That would be good. Thank you very much.

**CHAIR**—We will have to adjourn now. We will hold over the other two treaties. If we consider them in our private meeting and if committee members are happy to agree to these treaties on the basis of reading the NIA, we will do that; if not, we will postpone them until the next hearing.

Resolved (on motion by **Mrs De-Anne Kelly**, seconded by **Senator Cooney**):

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

**Committee adjourned at 12.31 p.m.**