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JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 27 February 2001

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JOINT COMMITTEE ON TREATIES

Monday, 2 April 2001

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: Senator Cooney and Mr Adams, Mrs De-Anne Kelly, Mr Andrew Thomson and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 27 February 2001.

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Committee met at 11.57 a.m.

APPS, Mr David Graham, Executive Officer, Pacific Islands Branch, Pacific Regional Section, Department of Foreign Affairs and Trade

NIMMO, Mr Rick, Director, Pacific Regional section, Department of Foreign Affairs and Trade

STERN, Ms Robyn, Director, International Law Section, Legal Branch/ILD, Department of Foreign Affairs and Trade

FROST, Ms Robyn, Acting Assistant Secretary, Public International Law Branch, Office of International Law, Department of the Attorney-General

LLOYD, Mr David William, Director, Agreements, Defence Legal Office, Department of Defence

WILSHIRE, Mr John Leonard, Assistant Director, Security, International, Industrial and Projects, Defence Security Branch, Department of Defence

CHAIR—Welcome. Would you like to give an opening statement concerning both the agreements with Denmark and South Africa for the reciprocal protection of classified information of defence interest agreements and also the agreement establishing the Pacific Islands Forum Secretariat? We will then have questions.

Mr Wilshire—Yes, if I may. The Australian Department of Defence relies on the ability to exchange classified information with the defences forces, departments of defence and defence industries of foreign countries in order to contribute to the achievement of its aim of developing both Australian and joint defence capabilities. The principle that governs the release of Australian classified defence information to another country is the balance between the demonstrated need to know, the security risk involved in the release of that information, and the benefit to Australia.

In assessing the security risks with providing foreign access to Australian classified defence information, one of the important considerations is that the foreign country demonstrate a level of competence and commitment to give the classified information equivalent protection to that provided by Australian government regulations, policies and procedures. To accomplish this, the foreign government must formally undertake to protect the information. This is normally achieved by negotiating a government to government security instrument that provides for the reciprocal protection of each other's classified information. The instrument can be a treaty status agreement, such as the two agreements before the committee today, or they can be less than treaty status. Government to government security instruments that are in force today include ones with our closest allies together with most of the European and NATO countries and a few others. The agreements before the committee today follow the standard template that is used for agreement of this nature. In fact, they are similar to those pertaining to Canada and Singapore which came before this committee in September and November 1996 respectively.

The reasons for establishing agreements with South Africa and Denmark at this particular point in time are as follows. Since 1997, there have been several instances that have arisen that

have required Defence to release classified information to South Africa. These occurrences include government to government discussions, acquisition project-specific requirements and marketing of defence systems by Australian industry. The volume of these specific releases led to the decision to establish a standard bilateral security agreement with South Africa.

In the case of Denmark, there have been requirements to release information on several occasions since 1969. The most recent releases have been in association with requests for tender for acquisition projects and marketing by Australian Defence Industries of a mine countermeasures system. Defence has security instruments with most of the NATO countries but, as a security instrument is only established when there is a definite requirement, the demand did not warrant establishment at an earlier time.

In summary, these agreements will benefit Australia through an increased exchange of information and facilitation of future defence cooperation. Australian industry can also benefit through easier access to the defence contracting processes of the South African and Danish governments. Finally, the establishment of a security instrument streamlines the exchange of classified information process, and at the same time ensures that exchanged information is protected by legally binding obligations.

CHAIR—Thank you. We will proceed to questions on the agreement with Denmark and South Africa for the reciprocal protection of classified information of defence interest.

Mrs DE-ANNE KELLY—I have no questions, thank you.

Mr ADAMS—You have told us about classified information going to other countries under a reciprocal agreement. Are there other non-legally binding instruments involved in this treaty? Is there another instrument involved?

Mr Wilshire—No; just the agreement.

Mr ADAMS—It is all on deck here? There is no other instrument at all that we are talking about here?

Mr Wilshire—No.

Mr ADAMS—What other countries would we have similar agreements with? I know that you have mentioned some. In the future, are we looking at having negotiations with other countries?

Mr Wilshire—Yes. At the moment we are negotiating with Spain; and there is a revised agreement with the US to replace the extant 1950 and 1962 agreements; we also have the Republic of Korea in train.

Mr ADAMS—I am sorry, but I did not quite understand how we are bringing in private sector involvement there. This is to swap information which may be of use in the commercial sense, is it?

Mr Wilshire—Australian Defence Industries companies are dealing on a daily basis with Australian classified information. In order for an Australian company to be a subcontractor to a company of another country, it is necessary to have the procedures in place for the exchange and protection of the information.

Mr ADAMS—What are the penalties if a company does the wrong thing with that information?

Mr Lloyd—It will depend very much on the facts of the situation, and these can stem from what are, in effect, administrative penalties. If you have a secure company which has access to Australian classified information, they have been security cleared by John Wilshire's area. If they were to not treat that information with sufficient respect and diligence, then they might lose their position as a security cleared company. But it can work all the way up to penalties under the Crimes Act. It is at about section 79, the official secrets provision. If it were to be an unauthorised disclosure which was actually, on the facts, a criminal act, then there are criminal penalties for that.

Mr ADAMS—So we would then have to get that company's principals back into Australia, wouldn't we?

Mr Lloyd—If you are taking criminal action, yes; and there would be issues about that. But typically, if we are talking about Australian companies, there will be people in Australia.

Mr Wilshire—Perhaps I could add to that. When we contract with a foreign company, there are security clauses in that contract which enable the Commonwealth to make a contract null and void if the company does not comply with the security requirements in the contract.

Mr Lloyd—We can close the contract.

Mr ADAMS—But does that mean that we do not pay them? What else would that mean? Does that mean that they will lose the business?

Mr Wilshire—That depends on the conditions of the contract.

Mr ADAMS—Do we do an audit? If a company has a three-year contract supplying something to our defence industries, do we do an audit through that company to see whether everything is—

Mr Wilshire—With respect to Australian companies, we audit companies 12 monthly if they have a secret clearance; six monthly if they have a top secret clearance. We rely on the similar industrial security program procedures that other countries have with respect to their own industries.

Mr ADAMS—So we recognise theirs.

Mr Wilshire—Yes.

Mr ADAMS—Those audits are undertaken by whom in the Australian government? Are they done by our defence department?

Mr Wilshire—By the defence department, by the Defence Security Branch.

Mr ADAMS—Are you quite happy that they are up to speed? There has been a lot of talk about their competence lately.

Mr Wilshire—Yes; I am happy that they are up to speed.

Senator COONEY—In fact, this backs up a commercial agreement, does it? This contemplates commercial agreements between purchasers in Australia and sellers in Denmark: is that right?

Mr Wilshire—No. Let me emphasise that the emphasis here is for the protection of Australian classified information, whether it be with the government or the industry or another country. So our bilateral agreement, first of all, facilitates exchange on a government to government basis and then extends that, industry to industry. But it is always via the government.

Senator COONEY—So it is not to underpin the contract.

Mr Wilshire—No.

Senator COONEY—The only reason I say that is that, if you look at the way it is expressed here, it talks about contracting parties and classified information, but that goes to such issues as intellectual property rights and what have you. I thought there would have been an element of commercial contracting that this contemplates.

Mr Wilshire—It does, in effect, in that we stipulate the security clauses and stipulate that a foreign government, for example, or a foreign company implements the industrial security procedures of its country. We have looked at those procedures in the lead-up to finalising an agreement of this nature.

Mr Lloyd—I might add that there are two emphases in the agreement, if you like. John Wilshire is focusing particularly on the emphasis of the exchange between the governments, and that is the main priority of the document. But inevitably the reasons why you might exchange would include involvement in commercial contracts with our contractors or with contractors overseas. I think that is where the two then overlap. So there are industrial security procedures which cover the situation where, having passed the classified information between the governments, the government then passes it to their contractors; and it is setting rules and boundaries on how the contractors can then have access to that information and use it.

Senator COONEY—But that would be, as it were, monitored by government in both cases.

Mr Lloyd—Yes.

Senator COONEY—So, if you have a commercial agreement, that is overseen by government, in so far as secrets might be involved in the agreement?

Mr Lloyd—Exactly right.

Mr WILKIE—It would appear that the documents are going to be a template for use in the future. Is it basically the same document, just modified for each country?

Mr Wilshire—Essentially, yes. Of course, it depends which country gets in first and tables the first document. But we tend to move towards our own template as much as we can.

Mr WILKIE—So it is a matter of standardising it, I imagine.

Mr Wilshire—Yes.

Mr WILKIE—In what ways has Australian industry benefited from the previous agreements? Can you give us any examples?

Mr Wilshire—Yes; in that there are a number of Australian companies that have exported Australian defence products overseas that have involved classified information; without an agreement of this nature in place, some contracts would not be possible.

CHAIR—I would like to explore just briefly some of the legal effects of this, so perhaps I can question Ms Stern and Ms Frost. This is an agreement between two governments; so, ipso facto, it is not yet part of the domestic law of either state: is that right?

Ms Frost—That is right. I understand from both the terms of the agreement and the NIAs that no domestic implementing legislation is actually required, at least from the Australian end.

CHAIR—Certainly. If the rights that companies or contractors have to protect intellectual property—we could call it classified information, but let us call it by the generic legal phrase ‘intellectual property’—that they have, if the agreements are not observed by, say, the other side—in this case either South Africa or Denmark—how does the company, in a sense, protect its rights? Is it justiciable in a domestic court? Is there a right to compensation? Does the agreement mean anything in that sense?

Mr Lloyd—I might answer that, if that is okay. It is actually important to distinguish between intellectual property rights and security classification. This agreement is very much about security classified information. It is not intended to protect intellectual property rights. In fact, if there are intellectual property rights, a separate licence or contract or other agreement is required to protect that—even if the information, the intellectual property, is only being passed between governments. This document is very much solely focused on protecting the security classified information. In part, that is deliberate because we did not want the two things to get confused. We wanted anyone who had intellectual property to separately think about and work out what needed protecting, and then to separately work out what needed protecting from a security perspective. So, if intellectual property rights were to be breached, it should be the case that there is a contractual mechanism; and, under either Australian domestic law or the domestic law of the other country, there should be the standard contractual remedies which you have to

prove for the breach. However, if in doing that you actually disclosed classified information, it would then be a question about what remedies there might be for an unauthorised disclosure of what is security classified information. So it is actually important to treat them quite separately.

CHAIR—So a breach of this agreement would bring diplomatic opprobrium on the breacher—and, really, a little more.

Mr Lloyd—Yes; again, it would depend. Were a government to do so, then I think that would be the case. But it is a commitment that governments take extremely seriously. All governments have a great interest in protecting security classified information. So it would be something that would have quite significant diplomatic consequences, I think, if it were to be breached. Robyn Stern could probably add more to that. But if an individual were to breach it in Australia then, depending on the facts, there might be a consequence under our Crimes Act or under other relevant legislation.

CHAIR—Yes; as with Wispelaere.

Senator COONEY—Just listening to what you say to the chair, article VIII says that this agreement does not in any way diminish or limit intellectual property rights. That would seem to contemplate that, if you took a case, you could go to court and give evidence about the matters that arise under any particular transaction or agreement subject to this treaty.

Mr Lloyd—Possibly, although it is also worth looking at the provision under the industrial operations section on publicity concerning classified contracts, which is paragraph 12 in the annex at the back. In that, the parties make certain commitments to obtain the prior written approval of the disclosing party before any publicity is given to the existence of particular classified contracts.

Senator COONEY—What does article VIII mean in those circumstances?

Mr Lloyd—In those circumstances? Really, the purpose of article VIII is to make clear that this document is not really impacting on existing intellectual property rights, and that you need to separately enter into appropriate arrangements to protect your intellectual property rights and satisfy yourself. You cannot really look to this document to do it for you.

Senator COONEY—But also this document specifically says that we are not going to limit in any way the exercise of your intellectual property rights. If you wanted to sue someone because they had transgressed your intellectual property rights, then this would seem to give you every entitlement to produce whatever evidence you thought was necessary.

Mr ADAMS—Including some of the classified information.

Mr Lloyd—It would be a case of reconciling the two things. In practice, I guess both governments would have an interest in ensuring that the classified information was not publicly disclosed, and it would be a case of reaching a mutually acceptable solution.

Senator COONEY—But say that some arms manufacturer—we have not got any in Australia that I know of; I am not aware of any—

CHAIR—What about Metal Storm Ltd? That is a Queensland company.

Senator COONEY—There you go. If their patent were breached, you would be almost obliged to produce every bit of information, if you were going to do the right thing by the manufacturer, and article VIII gives you permission.

Mr Lloyd—When you say that a Metal Storm patent was breached, the question first would be how it would necessarily be Australian classified information.

Senator COONEY—I do not know. But that is the point: you do not know what you might have to do or might not have to do to run your case. This allows you to do that.

Mr ADAMS—The case is that we make rifles in Australia for our Defence Force under patent, I think, from Austria. If that is the case, and if we break that patent and the Austrian company sues in our courts, they would want to produce the classified information. I think that is the point we are making.

Mr Wilshire—I will comment on Metal Storm. The patent, or elements of it, is indeed classified. The system is that if the Australian Patent Office has a submission for a patent that it considers may be of defence interest, it is referred to Defence and Defence looks at it and says, ‘Yes, this is worth classifying’ or not. In the case of Metal Storm, it was. Ergo, from that day forward, the patent is a classified patent and is protected in accordance with the normal protective security measures of this country and of any other country with which we have a bilateral instrument.

Senator COONEY—We will not persist with this, but that might require a case to be pursued; and then all this information comes out. You cannot have secret courts, let’s hope.

Mr Wilshire—In fact, in Australia we endeavour to clear the people involved in a case so that they can have access to classified information. That is the standard procedure.

CHAIR—We might have another day on this. Thank you very much for your evidence. It has been very interesting.

[12.18 p.m.]

APPS, Mr David Graham, Executive Officer, Pacific Regional Section, Department of Foreign Affairs and Trade

NIMMO, Mr Rick, Director, Pacific Regional Section, Department of Foreign Affairs and Trade

CHAIR—Welcome. We will now hear evidence regarding the agreement establishing the Pacific Islands Forum Secretariat. Please make an opening statement, and then we will have questions.

Mr Nimmo—Thank you. Australia plays an important and constructive role in Pacific regional affairs, not only as an economic partner and aid donor but also in demonstrating the benefits of embracing outward-looking, transparent and tolerant democratic governance. Australia has strong and enduring bilateral relations with all forum island countries, and the region is clearly a focus of the highest level of foreign policy attention. Recent instability in some countries has only highlighted the challenges facing the countries of the region and has underlined the importance of Australian engagement. Australia's core interests in the region centre on bolstering political stability, encouraging growth in regional trade and investment to the benefit of all, and assisting forum island countries to achieve the maximum possible degree of self-reliance and self-sufficiency. Our membership of all the key regional organisations reflects a strongly held conviction that regional mechanisms provide substantial benefits to achieving these foreign policy objectives by promoting shared solutions to common problems. This not only minimises the potential for clashes between nations when conflicting interests arise but also provides a cost-effective and coordinated way for key donors to deliver meaningful assistance to the region.

The Pacific Islands Forum was first established as a formal entity in 1971, as the South Pacific Bureau for Economic Cooperation, or SPEC, to increase cooperation in matters relating to trade and economic development in the Pacific region. Since then it has developed into the key vehicle for regional cooperation among the countries of the region and provides the premier mechanism for meetings between the leaders of the 16 member states. At their meeting in Palau in October 1999, the leaders of the then South Pacific Forum agreed to change the name of the organisation to the Pacific Islands Forum, to reflect the wider geographic spread of forum member countries, some of which are located in the North Pacific. A new agreement was struck to implement this decision, taking its substance from the terms and provisions of the 1991 agreement establishing the South Pacific Forum Secretariat.

In the broad, this agreement contains nothing new but simply implements the necessary changes to the 1991 agreement to reflect the name change, and makes a few other housekeeping type of amendments. These amendments include: bringing the number of deputy secretary general positions down from two to one; adding the name of Palau as a member state—Palau became a member in September 1995; and changing all references to Western Samoa to Samoa, to reflect that country's decision to change its name.

The ultimate aim of this agreement is to facilitate and enhance regional cooperation in trade, economic development and security, giving the Pacific Islands Forum Secretariat a central coordinating role in pursuit of such cooperation. Ratification of the agreement is something that our department believes would be in Australia's national interest, given our position as a founding member of the Pacific Islands Forum and the strong signal our continued support for the forum sends about Australia's commitment to partnership with its regional neighbours, particularly the small island countries of the Pacific region.

Mrs DE-ANNE KELLY—This is certainly a very welcome agreement. Sound relations with our neighbours is obviously a priority for us. I am interested in the publicity given recently to matters of security. Could you tell me please, Mr Nimmo, what has been done by the Pacific Islands Forum as regards security in the region?

Mr Nimmo—In the wake of the developments of the last few years of instability in the region, the Pacific Islands Forum adopted at its Tarawa meeting of leaders last year a watershed agreement, commonly called the Biketawa declaration, reflecting the place in Kiribati where the agreement was negotiated. Under the Biketawa declaration, the forum nations for the first time agreed that, in the event of a regional crisis affecting one of its member countries, there would be mechanisms brought into place to allow the forum as a regional grouping to address those sorts of crises—to bring countries back to democracy, to ensure regional security. That was the first time the Pacific Islands Forum recognised a role for itself in basically counselling members within the region and providing the wherewithal for countries to move back to the path of democracy. While the agreement does not directly relate in retrospective terms to Fiji and the Solomon Islands, it is meant to address those sorts of situations that arise in the future.

At a lower level, there is also a number of initiatives that the Pacific Islands Forum takes up in cooperation with member states. This year, for example, Australia will be hosting in cooperation with the forum a small-arms workshop that directly addresses the problems caused by small arms in the region. So there are initiatives both at the macro level and the micro level that address the sorts of security issues you are raising.

Mrs DE-ANNE KELLY—That is a very encouraging story. Thank you.

Mr ADAMS—Is this for the future, this security?

Mr Nimmo—The Biketawa declaration?

Mr ADAMS—When was it negotiated?

Mr Apps—Last year. It commenced at a meeting of foreign ministers in Apia in August last year. Recommendations were made at that meeting that flowed into the leaders meeting in Tarawa in October last year, and the leaders accepted those recommendations from the forum foreign ministers.

Mr ADAMS—Have they circulated back into the population much, do you think?

Mr Nimmo—The recommendations are widely known now within governments of the region. There has not been a circumstance where the sorts of measures they are looking at

would be triggered. At this point, there will be further discussion at the next forum meeting, to look at some of the mechanisms that are being proposed. There is also work at the moment on such things as possible names for an eminent persons group that may be called upon, questions of relevant meetings within the region to look at these sorts of issues. So it is an ongoing process that started last year.

Mr ADAMS—But it deals specifically with security within the region?

Mr Nimmo—It deals specifically with threats to democracy and governance within the region, which may have wider regional security implications.

Mr ADAMS—Does it imply that we would go to the aid of anybody?

Mr Nimmo—There are no commitments set out in the Biketawa declaration. It is a general principle for common cooperation, but there are no specifics to that level.

Mr ADAMS—What sort of investment has Australia put in there? What sort of aid have we put in there in the last 10 years?

Mr Nimmo—To the Pacific Islands?

Mr ADAMS—To the forum generally, and to the Pacific nations?

Mr Nimmo—To get you a total figure, I would probably have to refer it to AusAID. So I would have to take that on notice. But, in terms of the Pacific Islands Forum, our annual support for 2000-01 is in the order of \$3 million. That involves both core budget and program support.

Mr ADAMS—Does the forum have a secretariat set up?

Mr Nimmo—The secretariat for the Pacific Islands Forum is in Suva.

Mr ADAMS—Is that a permanent body there?

Mr Nimmo—Yes. It has been set up, I think, originally since 1971.

Mr ADAMS—Who is the present president or chairman?

Mr Nimmo—The Secretary General is Noel Levi of Papua New Guinea.

Mr ADAMS—Who was the previous one?

Mr Nimmo—Ieremia Tabai of Kiribati.

CHAIR—The functions of the secretariat are listed in article IX. In a sense, there is quite a big list of things to do. It would be a big burden on the secretariat. How would it possibly do that with such a small budget?

Mr Nimmo—It involves a close and heavy degree of prioritisation, which is coordinated through what we call the FOC, the Forums Officials Committee. It meets annually in association with the leaders meeting, just prior to the leaders meeting. It looks at the budget proposed by the Secretary General and suggests ways in which priority tasks can be pursued to allow the forum secretariat to prepare a budget which is fully prioritised.

CHAIR—So there is a degree of scrutiny about how it is—

Mr Nimmo—Member countries meet in the context of the FOC to scrutinise the Secretary General's proposals for his budget.

CHAIR—We have not really got time to go into this further. Members had a lot of questions about how much of NGO donations raised in Australia go to the Pacific, and things like that. The government has a review of charitable bodies just reporting now, chaired by a guy called Gonski. So, if I could offer some gratuitous advice to the department, get an IDC up quickly with Treasury and make sure that there is something in all this review of charitable contributions that somehow prioritises where our tax deductible contributions are going. Instead of being wasted in distant parts of the world, they could be a lot better spent in the Pacific. This is a good opportunity to somehow change policy to make some of that happen. Many thanks to all this morning.

Resolved (on motion by **Mr Adams**):

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

Committee adjourned at 12.28 p.m.