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JOINT COMMITTEE ON TREATIES

Monday, 20 August 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, Mr Hardgrave, Mr Haase, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senators Cooney, Mason and Tchen, and Mr Baird, Mr Haase, Mrs De-Anne Kelly and Mr Andrew Thomson

Terms of reference for the inquiry:

Treaties tabled on 7 August 2001.

WITNESSES

Committee met at 10.04 a.m.

BARSON, Mr Roger, Assistant Secretary, International Branch, Department of Family and Community Services

HUTCHINSON, Mr Peter Anthony, Director, International Agreements, Department of Family and Community Services

ROCHE, Mr Dennis, Assistant Director, International Agreements, Department of Family and Community Services

GORELY, Ms Amanda Louise, Director, International Law Section, Department of Foreign Affairs and Trade

von BRANDENSTEIN, Mr Tony, Executive Officer, Treaties Secretariat, Legal Branch, Department of Foreign Affairs and Trade

JENNINGS, Mr Mark, Senior Adviser, Attorney-General's Department

MURRAY, Mr Nigel Patrick, Director, Superannuation, Australian Taxation Office

CHAIR—Good morning and welcome. I declare open this meeting of the Joint Standing Committee on Treaties. As part of our continuing review of Australia's treaty obligations, today we will review seven treaties that were tabled in parliament on 7 August, those being agreements on social security with Canada, the Netherlands and Spain; a protocol to a social security agreement with Austria; an amendment to an agreement with the United States on cooperation in defence logistics support; and, finally, amendments to the Convention on Conservation of Nature in the South Pacific. Perhaps one of your number could make an opening statement on each of the treaties, or would you rather go country by country?

Mr Barson—If it is okay, with you, Mr Chairman, I will make a statement that covers the group.

CHAIR—By all means.

Mr Barson—There are four separate treaty actions proposed in the documents tabled on 7 August. These are that Australia enter into new agreements on social security to replace the current agreements with Canada, the Netherlands and Spain; and that Australia amend the current agreement with Austria by way of a protocol to that agreement. As the committee has heard before, agreements provide a number of benefits. They address gaps in social security coverage for people moving between countries, they help people maximise their income and allow people greater choice in where they live or where to retire, they contribute to the overall bilateral relationship between countries and they can also provide foreign exchange benefits. I note that agreement countries currently pay around $A356 million in pensions into Australia while Australia pays about $146 million in pensions to agreement countries. So there is a net benefit to Australia.

In recent years, this department has been engaged in reviewing most of its existing social security agreements which were signed in the late eighties and early nineties. The documents under consideration today are a result of those reviews. We will be bringing forward a further revised agreement and a new agreement for later consideration by the committee. I thought it might be helpful if I briefly outlined what the common changes are, because there is a consistency of approach across these documents.

In the case of Austria, Canada and Spain, we have changed the coverage of disability support pensions under the agreements to limit them to people who are considered to be severely disabled. We have done this because the focus in Australia for some time now has been on the rehabilitation of people with disabilities and, to the extent possible, encouraging and supporting them to enter the work force rather than to simply rely passively on income support. Obviously, we cannot manage a more active regime of rehabilitation for people outside Australia, so the agreements that have been negotiated with our partner countries specify that disability support pension coverage is for people with severe disabilities. This change will produce some savings over the longer term, but because it only operates prospectively it will not affect any people who are already getting a disability support pension under these agreements. We have taken a similar but different approach with the Netherlands, coming at it from the other side. This is because the current agreement with the Netherlands only covers age pensions. Through this variation we will be extending the coverage of that agreement to include the disability support pension, again for people with severe disabilities.

Apart from those, the single new feature of the variations of the agreements is the inclusion of provisions to avoid double coverage of seconded workers in the agreement with the Netherlands. This new agreement with the Netherlands has added significance because it is the first agreement signed for Australia to include such provisions. For Australia these provisions affect the operation of the superannuation guarantee laws and have been negotiated in close cooperation with our colleagues in the Australian Taxation Office who are responsible for their administration. Mr Nigel Murray, who is also appearing before you today, is able to elaborate for you later if you have any technical questions.

In essence, what the provisions do is provide that compulsory contributions, for example, in Australia under superannuation guarantee laws do not have to be paid in both countries when Australian and Dutch employees are sent to work temporarily in the other country. In other words, the employers avoid having to meet compulsory superannuation contributions in both countries at the same time. It is a benefit for business and a benefit for the employees. Double coverage provisions designed to avoid this are also included in the new agreement with Portugal, which will come to the committee later, and also the new agreement with the USA. But the Netherlands agreement before you today is the first to include those provisions.

All of the new agreements will continue, as they did before, to allow people to lodge claims from the other country and to help people to meet minimum qualification periods for benefits. They will overcome time limitations on portability of payments if people live in either country, they will apply a specific income testing regime for Australia and they will provide avenues for mutual administrative assistance to help the determination of correct entitlements in either country.

I know the committee has a particular interest in consultation, so I am happy to say that the relevant community groups in Australia have all been informed about the changes in these new agreements and their comments have been sought, together with comments from other broader community organisations and state and territory governments. There are attachments to each national interest analysis for the groups that have been consulted. I am happy also to say that this consultation process did not bring to light any concerns about the new agreements. Obviously, some issues were raised by groups in a broader social security sense or in a tax sense, but as far as the agreements that are before you today are concerned there were no concerns expressed. These new agreements will continue to bring benefits to individuals and to Australia, as the current agreements do. The new agreements will retain all the major features of the current agreements and, when implemented, will bring into effect long overdue changes and increase consistency. Subject to the views of the committee and the necessary completion of further action in both countries, the Department of Family and Community Services will be able to implement the new agreements from 1 January 2002. Thank you.

CHAIR—The extent of consultation, or at least the list of names, sets a new record perhaps for the Dutch Clog Dancers of Western Australia.

Mr Barson—Theirs is a very important group.

CHAIR—I suppose they have got a lot of members so it is a good way of getting into these communities. That is excellent.

Senator COONEY—Could I ask a question about the disability pension? As I understand it, what you are saying is that the emphasis there is to be on rehabilitation. Can you tell me whereabouts in these agreements—I should have perhaps read them more thoroughly—rehabilitation is provided for?

Mr Barson—I may not have been very clear there. I guess we are dealing with a situation where some of the current agreements allow the payment of disability support pension to persons regardless of the level of the disability. Australia for some time has recognised that people with lesser levels of disability need and deserve support to move back into the work force or be rehabilitated back into the work force. We and our counterpart countries felt that by continuing to cover all disability support pensions under these agreements we were not really pursuing that goal.

By continuing to provide coverage for people with severe disabilities, we are recognising that there are people for whom a full employment goal may not be the current objective. So we are allowing those people to be covered by agreements and therefore to work under the provisions with other countries. We felt that, in relation to people with lesser levels of disability, it simply was not possible to pursue a necessary rehabilitation regime in Australia if we continued the coverage of those pensions overseas. I note also that many of our partners already did not pay pensions overseas under the same sorts of provisions for people with lesser levels of disability. The whole point was that these agreements will continue to allow coverage for people with severe disabilities, but they do not allow the same coverage for people with lesser levels of disability.

Senator COONEY—What I am trying to get at is this: what provisions are made for rehabilitation? Are there some provisions for payments for people being rehabilitated through rehabilitation institutions?

Mr Barson—No, the agreements do not cover the issue of rehabilitation; they cover only severe disability. I guess what I was giving you which was confusing was a rationale for why that is so. But, no, they do not cover rehabilitation.

Senator COONEY—I just wonder what the relationship between rehabilitation and the payment of disability support is, that is all.

Mr Barson—There is a more general answer which relates to the moves by the government to assist people with disabilities into employment both through the Commonwealth Rehabilitation Service and the $300 million spent in employment support services for people with disabilities in Australia. I should say that it is not an issue under the agreement but I would be happy, if you are interested in further information, to give that to you later.

Senator COONEY—So these agreements have been confined to total and permanent disability?

Mr Barson—One could say that. It is really people with a more severe level of disability who are, for example, not even able to work for eight hours a week. So we are saying that there are people for whom currently a rehabilitation goal is not the optimum. They are people who cannot work for more than eight hours a week. They are still covered under the agreements. We have simply tightened up the arrangements around the border of the disability support pension.

Senator COONEY—This deals simply with pension schemes that are non-contributory?

Mr Barson—From our side, yes, but in relation to the other countries they are mostly contributory schemes.

Senator COONEY—Say a person contributed to a scheme overseas to cover disability. What would happen to him or her? Say they were from Canada and put into a contributory scheme. I do not know whether Canada has a contributory scheme or not. What would then happen? Would they miss out on that?

Mr Barson—Whatever domestic arrangements apply in that country would still continue, just as the domestic arrangements of Australia continue. However, they would not get access to the particular provisions of the agreement. For example, under an agreement they are able to apply for that pension while living in the other country. Under the agreement, for example, a person living in Australia could apply to Canada while living here for a pension under that scheme. Without an agreement, it is whatever the domestic provisions provide.

Senator COONEY—Say there was an overpayment by a foreign power to somebody in Australia and they wanted to recover that. Who does that? Does the department do that or is that left up to the other country? Can you tell me?

Mr Barson—I will ask Mr Hutchinson to deal with the technical issues.

Mr Hutchinson—Generally speaking, the agreements do not allow us to recover overpayments for foreign countries and vice versa. We do allow a situation where, because of using the agreement, one country grants a pension with arrears. For example, Canada might grant a pension going back to January and we have been paying this person all the time. We would then reassess the entitlement we would have paid the person under our means test, take that Canadian pension into account as if it had been paid over that period and work out an overpayment. The agreement would provide that Canada would withhold any overpayment from the arrears of the payment that it was going to make. That is a common provision in our agreements.

Senator COONEY—But do you get situations where the overseas country comes to Australia and sues?

Mr Hutchinson—No, we do not normally. As I said, they might be purely domestic overpayments in the sense that they do not have anything to do with one side granting a pension—

Senator COONEY—I see what you mean.

Mr Hutchinson—We do not have any provisions to allow for recovery in that sense.

Mr Barson—The other country, of course, may vary its future payments to that person accordingly. But I gather you were interested more in recovery.

Senator COONEY—Yes. There are some provisions in here about recovery. In relation to Holland, you pointed out that there are agreements breaking new ground insofar as deals with superannuation are concerned, and you have consulted about that with many groups. Did you consult the ACTU in respect of superannuation payments?

Mr Murray—On the superannuation side employer groups and key superannuation industry groups were consulted in addition to those listed there. The ACTU was not included in that.

Senator COONEY—I was just looking at that. What about the Meat Industry Employees Superannuation Fund? Did you consult it?

Mr Murray—No. We consulted with the Association of Superannuation Funds of Australia, which is the peak lobby group representing the superannuation industry as a whole. We did not consult specifically with any of the union industry based superannuation funds, if that is the issue you are talking about. The people most affected by these provisions are actually the employers. Employees will still get covered under the existing super guarantee legislation in any case. It is, I guess, mainly of benefit to the employers in terms of having to make double contributions.

Senator COONEY—But if you have an employee overseas, what about if that country has to make a contribution because that person is there for an extended period? What happens then?

Mr Murray—The provisions cover somebody temporarily going overseas. If I were sent overseas for two years to the Netherlands to work, what would happen at the moment is that the

employer would have to pay both the super guarantee here in Australia as well as the equivalent of the super guarantee in the Netherlands in respect of the same work I am doing. What the agreement does is remove that coverage obligation in the Netherlands as I am only away temporarily, the concept being that I should be covered by my home country scheme and only my home country scheme. So it removes the obligation to pay into the Netherlands system but retains the obligation to pay under the super guarantee. So the employee still gets the minimum level of coverage that all Australians are entitled to under the super guarantee.

Senator COONEY—Do you think it might have been a good idea to ask the employees or their representatives about this?

Mr Murray—I guess a number of industry type groups were consulted through the normal process with DFACS, but it is certainly something we will take on board and do in future agreements.

Senator COONEY—I can follow that, but the employees are going to be the recipients, aren't they?

Mr Murray—The employee would currently in effect get two lots of contributions made for them in respect of their same work.

Senator COONEY—I can follow what you are saying, but all I am asking is this: do you think it would have been reasonable to ask them about it?

Mr Murray—It is certainly, as I said, something we will take on board and we can include those groups in future.

Senator COONEY—Do you think it might be worthwhile us holding this up while such inquiries are made?

Mr Murray—I do not really think that would be necessary in this particular context. As I said, these agreements and bilateral agreements on super are something that nearly all other modern westernised countries actually have in place between themselves. Australia is certainly lagging behind at the moment without it.

Senator COONEY—I am asking you about it because this is the first one, isn't it?

Mr Murray—It is.

Senator COONEY—We are going to have to deal with plenty of these. I thought it might be an appropriate one to raise the issue. Paragraph 22 of the national interest analysis states:

> The provisions of Part II (Articles 6 to 9) deal with the situation of employees who are sent from one country to the other to work. These Articles are generally aimed at avoiding double coverage of employees or liability of employers in, for example, the case of superannuation. Article 8 specifies that in certain circumstances only one country's legislation relating to coverage will apply.

Is it general? Is it only the legislation in the country in which the employee is working that will apply? If that is correct, that would seem to imply that it is the law of the country where the

person is working that is going to apply. That, I would have thought, would affect the employee's entitlements back here.

Mr Murray—No, there is a general provision. The way these provisions work, there is a general rule that states it is the law of the country in which the person is working that applies. There are specific exception provisions that follow that, and they deal with the case where the individual is seconded temporarily to work in another country.

Senator COONEY—Can I follow on from that in that respect? The main exception to this is that, where the employee has been seconded to work temporarily in that country, a five-year limit applies?

Mr Murray—Yes.

Senator COONEY—Wouldn't you want to be able to tell the employee exactly what was going to happen and how his or her superannuation was going to be affected?

Mr Murray—Yes, they will remain covered by this.

Senator COONEY—You are telling them that, but do you think it might have been a good idea to ask?

Mr Murray—I guess from the employees' perspective there is no real change to their Australian entitlements. They are already covered by the super guarantee. They are already having that eight per cent at the moment put into a fund for them. That is not changing. Their Australian entitlements are remaining as before.

Senator COONEY—Some people say that the employee ought to have a choice in superannuation funds and things like that. That is a matter of policy, and I would not ask you about that. But, if that is so, it seems to me that this particular agreement or treat—whatever you want to call it—rather confines the choice, doesn't it?

Mr Murray—There remain some events covered in their home country. This is the country they are going to retire in, and I guess the policy aim is that the country in which they retire is where their superannuation would remain.

Mr Barson—Senator, it is always a good idea to consult with anybody who might be affected. I think the answer is, yes, if it had occurred to us, it would have been sensible to include the groups that you are mentioning—the unions and the ACTU—in the consultation list. I will give you my personal guarantee that we will include them in the consultation list in the future.

Senator COONEY—Would it be possible just to notify them in respect of this one?

Mr Barson—Certainly.

Senator COONEY—I am sure that that would probably cover a lot of problems if, before we okayed this, you could at least get in touch with them and say, 'What thoughts do you have on these issues?' Thanks very much for that.

Mr Barson—We will do that, and we will alert the inquiry secretary if there are any concerns expressed.

Senator COONEY—Thanks very much indeed.

Mr HAASE—On that particular topic, my concern is perhaps 180 degrees opposed to that of the good senator inasmuch as with holiday workers on the harvest trail there is a great deal of concern amongst those employers that the superannuation that is being paid on behalf of those employees is an absolute waste of time. I accept that perhaps the reality and the perception may be different, and I would like you to explain to me why the process of deductions on behalf of these harvest trail workers ought to continue to be made.

Mr Murray—I guess these harvest trail workers, as you are probably aware, are not sent here temporarily; they sort of come over here as backpackers or whatever. So as a result they are not covered by these provisions before us. They are still obliged to have their superannuation guarantee paid into them. I guess the question you are asking is whether that is still appropriate. I am not sure that is really something that is at the heart of this particular agreement. The agreement is really there to deal with seconded employees; it is not designed to deal with the backpacker type situation. I am aware of the issue you are raising, but I guess it is more of a policy issue for government as to whether they consider those contributions should still be made. At the moment they are required to be.

Mr HAASE—It was a very convenient opportunity to have you address it, Mr Murray. I will perhaps approach you in another forum.

Mr Murray—That would be fine.

Senator TCHEN—Mr Barson, it is probably due to my own ignorance of the application of this agreement, but you mentioned that this is the first set of quite a number of agreements, and I gather that from the generic nature of the NIA. Can you tell me that all these agreements will be applied to people who reside permanently overseas or who intend to reside permanently overseas—Australian citizens?

Mr Barson—They do cover people who are permanently residing in an agreement country, yes.

Senator TCHEN—So how does it work? For example, if someone is an Australian citizen or a former Australian permanent resident who now intends to live in Spain for the rest of his or her life, what social security system does that person access, the Australian one or the Spanish one?

Mr Barson—Let us take the case of a person who is currently receiving an age pension in Australia and wishes to move to Spain for presumably the rest of their life or to live there for a long time. Under the domestic portability arrangements, that person can already take the core of

their pension with them for up to 26 weeks but can only stay there that long. What the agreement does is remove that barrier and enable the person to live in Spain for a much longer period. That changes the payments that are made under the Australian pension, and here we get into slightly complex formulas. I would probably flick this to my colleague, but Australia continues to pay a pro rata pension based on the proportion of working life that that person spent in Australia. Under the agreement, Spain would pay a pension the person is entitled to in that country. So the two countries would end up sharing the cost of social security for that person based on the period of working life that was spent there. So often we have cases where a person who lived and worked in Spain moves to Australia, moves onto an age pension and wishes to return to Spain. Under the agreement, the two countries share the cost of supporting that person. Mr Hutchinson may wish to add something, or to correct me.

Mr Hutchinson—That is basically the situation, Senator Tchen. The essential part of the agreement says that it allows people to move between the countries and still retain access to their social security entitlements that they may have accrued in either country. So in many cases a person will get a pension from both countries or a part pension from both countries.

Senator TCHEN—There are no top-up arrangements; they are just strictly proportional to the working life?

Mr Barson—They are separate pensions, and Australia is paying a pension based on the proportion of working life that the person has spent here against a certain denominator, and the Spanish government would pay under its own provisions the pension the person is entitled to on a similar pro rata arrangement.

Senator TCHEN—And is it the same arrangement for other former social security supports?

Mr Barson—No, it would only cover the pensions that are covered by the agreement. So in these cases it is only covering the age pension and disability support pension for people with severe disabilities.

Senator TCHEN—What about others, for example—

Mr Barson—That is the core.

Mr Hutchinson—There are some other payment types covered in some agreements. For example, we cover parenting payment, single, for widows, and we generally do that to reciprocate the survivor payments that most other countries pay.

Senator TCHEN—You referred to portabilities. What happens to those Australian citizens or permanent residents who qualify for social security supports, like the age pension, while they are in Spain or in an agreement country?

Mr Barson—The way they would qualify is that, if they turned 65 while they were overseas and if they were in an agreement country, they would be able to claim the Australian pension whilst still living in Spain. If they are not in an agreement country, they are not able to claim the Australian pension, unless they are residing here.

Senator TCHEN—What about the disability supports?

Mr Hutchinson—The same thing applies essentially. They can be living in any country with which we have an agreement.

Mr Barson—It works both ways, of course. The person who is living here and who reaches a qualification age or whatever is able to claim a pension from Spain while living in Australia, which they would not otherwise be able to do.

Senator TCHEN—Thank you. I was mainly concerned about people who acquire the qualification while they are overseas and whether they need to actually come back here and achieve portability before they move out again.

Mr Barson—That is a good point. One of the key features or key benefits of an agreement is that it avoids that having to happen. If it were not for the agreement, yes, they would have to return. In fact, they would have to return and reside here, not simply return for a visit.

CHAIR—I have one last question. Why is it that the superannuation provisions are included in the treaty with the Netherlands but not the others? What was the difference?

Mr Murray—We did actually enter into negotiations with the other countries. At that stage we were not able to come to an agreement with them. We are hopeful that, now that we have had a breakthrough with the Netherlands and the Portuguese and, in particular, the US, a number of these other countries will actually come on board. As we were starting afresh, they were holding a fairly strict line on some issues at that stage. But now that we have had a few wins we are hopeful that we will be able to go back to the other countries and get them to come on board as well.

CHAIR—Understood. Many thanks. We will consider this report now in private.

Senator COONEY—Could I just ask one last question? Article 19 of the agreement with Spain—and 22 for that matter—which is entitled 'Benefits for accidents at work and occupational diseases' says:

> Benefits relating to incapacity due to work-related accidents or occupational diseases according to Spanish legislation shall be paid by the Spanish Competent Institution whenever a person is subject to the legislation applied by it at the time the accident occurred or at the date the occupational disease has been contracted if that person has been pursuing an occupational activity likely to cause that disease according to the legislation of that Party.

Why is that in there? That seems to be pretty much confined to Spain itself.

Mr Barson—Yes.

Mr Hutchinson—It is. We do not have workers compensation provisions, which is basically what this is, in our agreements. But occasionally the other country will include those provisions unilaterally.

Senator COONEY—So that does not really add anything one way or the other; it simply says that they proceed according to their law?

Mr Barson—It is desired by the Spanish government to include it so there is no doubt.

Senator COONEY—And in article 20, 'Voluntary insurance', it says:

> Persons to whom this Agreement applies shall be entitled to voluntary insurance under Spain's Social Security system in accordance with Spanish domestic legislation and for this purpose may, if required, totalise periods of Australian working life residence.

Again, that is very much confined to Spanish law but enables somebody who is going to claim on that voluntary insurance to count, as part of his or her working life, that life in Australia?

Mr Barson—That is correct.

CHAIR—Thank you kindly. We will report in due course.

[10.38 a.m.]

HELDON, Mr Ken, Director International, Joint Logistics Command, Department of Defence

LLOYD, Dr David William, Director, Agreements, Department of Defence

MIZEN, Ms Nicola, Director, United States Section, Strategic and International Policy Division, Department of Defence

SWANSON, Lieutenant David, Legal Officer, Directorate of Agreements, Defence Legal Service, Department of Defence

THOMSON, Mr Kenneth James, Director, Americas, International Materiel Branch, Industry Division, Defence Materiel Organisation

CHAIR—Could one of your number give us an opening or introductory statement or remarks? Then we will ask questions.

Mr Heldon—Mr Chairman, you and the committee have, for your consideration this morning, the national interest analysis covering the extension and amendment of the 1989 Australia-United States Cooperative Defence Logistics Support agreement, the so-called CDLSA. The CDLSA was put into place by the then government in 1989, replacing a less than treaty status memorandum of understanding. Upgrading the arrangement at that time so as to be binding in international law was proposed by the United States and agreed to by Australia. The CDLSA is an integral part of the defence relationship, and it is the parent or the umbrella document under the 1951 ANZUS treaty for mutual logistics support arrangements between the two countries. Its extension was agreed by officials in the context of government policy covering the Australia-United States relationship as expressed in Australia's strategic policy 1997. It remains very much in line with current policy as expressed in white paper 2000.

I will read a couple of very short extracts from white paper 2000. Firstly, under the heading of the United States Alliance, it says:

> … the US-Australia alliance will continue to be founded on our mutual undertakings to support each other in time of need. These undertakings are stated clearly in the ANZUS Treaty, which does not commit either of us in advance to specific types of action, but which does provide clear expectations of support.

Under the heading of 'Self-reliance, self-reliance does not suggest that we would not seek and expect help from our allies and friends. Self-reliance does not preclude us from planning on a significant degree of support in non-combat areas, including intelligence and surveillance, resupply and logistics. The CDLSA could be described as an in-principle agreement. It starts from the premise that both countries will approach logistics support in a cooperative way and as partners. As it states, it is subject to national laws and regulations and to the exigencies of war. It functions on a case by case basis, but it starts with a 'yes, if we can' rather than a 'no, why should we' attitude. Where there is scope for interpretation; it encourages favourable rather than unfavourable outcomes.

According to government reports at the time, the CDLSA proved its worth to Australia almost immediately during the Gulf War in 1990. Since then it has been more commonly implemented through its prime supporting instrument, the Australia-United States acquisition and cross-servicing agreement. The committee might recall considering that agreement in 1999 and its conclusion, as tabled in report No. 21 dated 7 June 1999, that it was in Australia's interests that binding action be taken. The committee might also be interested to learn that that agreement was put to immediate and very effective use for the reciprocal provision of logistics support between Australia and the United States during East Timor operations. This exchange of notes extends the CDLSA for 10 years, from 1999 to 2009; it amends the definition section to take into account updated definitions proposed by the United States and agreed to by Australia in relation to computer databases, programs and software; and it deletes mention of the Audit Act 1901, replacing it with the Financial Management and Accountability, or FMA, Act 1997.

As the national interest analysis states, the note in reply to complete the exchange of notes to extend and amend the CDLSA was handed to the United States Secretary for Defence by the Australian Minister for Defence at the Australia-United States ministerial meeting in Canberra on 30 July 2001. It was tabled on 7 August. Thank you, Mr Chairman.

Mrs DE-ANNE KELLY—I have no questions. It sounds like an excellent proposal.

Senator COONEY—I know you said that this is all about, as it were, making sure that the onus is going to be on those who do not want to go ahead with this. In other words, the thrust of the agreement is to get things working on a cooperative basis. I was looking at the way a lot of it is expressed. Article II talks about policy. It states:

> Each Party shall, within the broad aims of its defense policies, and the exigencies of war, provide or facilitate the provision of Logistic Support on a cooperative basis. Each Party's commitment under this Agreement shall be subject to its national laws, regulations, and policies and to case-by-case review and determination.

In clause (c) of article IV the expression 'their best efforts' is used, and I think that is used generally throughout the agreement. Article V (b) states:

> … when agreed to by the Party having export approval authority, it shall use its best efforts to assist the other Party in negotiations, where appropriate …

It seems a very cautious agreement in the sense that the language is such that, if one or other of the parties wanted to cavel something, that party would be readily able to do so according to the language of this agreement. Do you have any comments on that?

Mr Heldon—It is true that there are provisions and that it is written in a general way. If national laws, regulations and policies at the time were to preclude the use of this agreement, they of course would hold sway. The whole nature of the thing is to say that we are partners, we will cooperate and wherever we can, providing we are not contravening laws or regulations, then we should do so. It is true to say that there is some generality in it. It is also true to say that the language is one of cooperation rather than, for example, as a contract might be.

Senator COONEY—Would it be inaccurate to call it an aspirational document rather than a tight agreement? Perhaps I should not ask you that.

Mr Heldon—I would say that it is an agreement and has to be, because when dealing with the transfer of technology and when dealing with matters which cover the Arms Export Control Act from its point of view, the United States needs to have a document which is binding in international law. From our point of view it is an agreement. It is also good from Australia's point of view that it is that. It gives more weight to our argument for cooperative treatment.

CHAIR—If it is of treaty status, what is it from the point of view of the United States? Is it an executive agreement or is it going to the Senate for two-thirds ratification?

Dr Lloyd—It is an executive agreement in US terms.

CHAIR—What is its relationship in terms of paramountcy to those existing United States acts, such as the Trading with the Enemy Act, the Arms Export Control Act and so forth? If it is later in time and under the treaty clause in their Constitution, does it have supremacy over those existing acts? Article V says that 'each party shall approve the export of technology'. That is a fairly broadly drawn phrase, given how detailed their export control statutes are.

Dr Lloyd—I think that is exactly why there are those qualifications in there about it being subject to national laws, because in fact as an executive agreement it does not override the existing US legislation where there is inconsistency. As you rightly point out, if it were to be of that higher status as a treaty in US terms, that would lead to different consequences. But as an executive agreement, no, it is subject to those export control laws in the US.

CHAIR—I gather that some executive agreements, although not ratified according to that procedure of two-thirds of the Senate, can have the status of a treaty.

Dr Lloyd—In the US system?

CHAIR—Yes. It depends on the terms. There is a Supreme Court case, although I cannot think what it is. That is a rather academic thing. So those export controls that they have on their statute books are obviously still in place and this is drawn to mesh in with that.

Dr Lloyd—Exactly.

Senator TCHEN—Mr Heldon, I take on board your comments that these agreements are of the nature of 'yes, if we can' rather than on the basis of 'why should we'. Given that qualification, I still note that the United States has a much stronger defence logistics support base than Australia has. What is the potential implication of this agreement on Australia in the defence industry? I ask because the NIA is silent on this point. What I am getting at is: if we can get it from the United States, why should we bother developing Australian industry?

Mr Heldon—This is about logistics support and the support for the equipment that we buy. Under this agreement, the United States undertake, providing it is within their national laws, to provide technology to Australia so that they can undertake support of equipment which has been purchased from the United States. I use the F111 for example, which we bought a long time ago. We still need support but the United States does not need to support it anymore. Under this agreement they can give us the technology which enables us to support it. As a logistics support agreement, really it is talking about maintenance of equipment primarily in Australia.

From the other point of view, it covers the work done by Australian industry for United States forces. For example, during Operation Tandem Thrust recently Australian industry provided maintenance as well as goods and services generally to the United States forces worth many millions of dollars, not specifically under this agreement but primarily under the acquisition and cross-servicing agreement. So it is very much a two-way document; but it is also related to need. If Australia needs the most then it might buy from the United States, but I think this encourages the United States to provide us with the technology to look after ourselves in Australia.

CHAIR—I have one last question. In terms of the United States' dealings with allies or friendly countries in military matters, especially in the transfer of technology, one could assume that there is a hierarchy among those other countries, including Australia, as to who has access to, if you like, the highest levels of such technology. We have had hearings at some length on the joint facility at Pine Gap. We have a reasonable grip on the technological intimacy of this relationship. Is Australia, in your collective opinion, at the top level in terms of the transfer of military technology, or is there another country that is higher than us among America's allies?

Mr Heldon—I do not know that I am able to answer that question. In relation to the United States and Australia and our Cooperation in Defence Logistics Support agreement, I am not aware of another one with any other country. But of course for NATO countries there might not be the same sort of need where there is already a standing military alliance. I am not able to say that Australia stands third or fourth or 17th on a list. I do not have that information. I do not think any of us could answer that.

CHAIR—I suppose it is a matter of opinion in some ways. It would just be interesting to know where we are in that sense.

Senator COONEY—I have a question arising from that. I suppose this is just one of many instruments that set up the relationship between Australia and the United States in defence matters. Is there any way we could get not the details but a general picture of what those agreements, treaties and what have you are with the United States? I was putting it to you before that this is all very vague, but I suppose if there are other agreements this takes on a different picture. We have had Pine Gap before us, we have had this one and there are other ones as well. Underpinning it all no doubt is ANZUS; would that be right?

Mr Heldon—That is correct. Do I understand it that you want just logistics agreements?

Senator COONEY—I would like an idea of what our relationship on a security basis is with the United States so that we just do not look at an agreement like this which comes before us on its own. I do not want this in any sort of great hurry. This is just so that if other instruments come before us to do with the United States, or I suppose with anyone, we can see that this is just part of a very colourful patchwork of agreements that make up a very effective relationship with the United States.

CHAIR—What the senator is about, I think, is that we all know about ANZUS, if that is the umbrella agreement. We have had the joint facility at Pine Gap agreement. We have had status of force agreements. There seem to be quite a lot. Could someone send us a memo setting out the family tree, if you like, of these agreements?

Dr Lloyd—I can provide you with a list of the treaties that we have with the United States relating to defence matters, if that is what you would like.

Senator COONEY—I do not want you to go to too much trouble, but if you could put down what deals with logistics, what with the exchange of intelligence, what deals with how we will fight together in the field or on the seas or something like that, that would be helpful?

CHAIR—Thank you kindly. We will consider this at our private meeting and report to the parliament, I am sure within the prescribed period.

[10.57 a.m.]

HYMAN, Mr Mark, Assistant Secretary, International Intergovernmental Branch, Environment Australia

THOMAS, Mr Lee, Director, Park Policy and Management, Environment Australia

CHAIR—We have got the NIA and the terms of the amendments, but by all means make an opening statement and we will have some questioning.

Mr Hyman—Thank you, Mr Chairman. I will keep my opening comments very brief because the amendments we are dealing with here are quite minor. The Apia convention is the principal legal instrument concerning regional cooperation for nature conservation and biodiversity in the Pacific. The amendments to the convention which are before you at the moment are essentially procedural and they go some way to bringing the convention up to date. Australian ratification of the amendments will encourage regional commitment to the Apia convention and through it to the conservation of nature and biodiversity in the Pacific without imposing additional obligations on the parties. We believe that Australian ratification would also send a positive signal to Pacific island countries regarding our commitment to the region and its development, and that it may also encourage accession by a greater number of Pacific island countries, as at the moment the convention has only three such countries as parties. As I mentioned earlier, no additional obligations would be imposed on Australia as a result of the proposed treaty action.

Just in general terms, the convention's obligations require that in a general way Australia protect biodiversity through the creation and management of national parks and other reserves, and we are required to report on those. We have met our obligations hitherto through existing government policies, and I imagine that we would continue to do so.

CHAIR—You said three countries are parties?

Mr Hyman—No, there are three Pacific island countries that are parties as well as Australia and France.

CHAIR—Is that all?

Mr Hyman—Yes. There are five parties at present.

CHAIR—Dear, oh dear! There are more than five countries in the Pacific.

Mr Hyman—There are indeed.

CHAIR—Why don't they sign up?

Mr Hyman—I think that is a good question. I am not sure. I think the major reason probably is that for many of these countries, which are often very tiny, the obligations involved in taking on another treaty, even if those obligations are comparatively minor and constrained as they are

here, are often quite daunting. Very often the legal machinery that they have available to them to go through the process of sorting out issues of ratification and whether or not they want to take on these obligations in a formal sense are quite demanding for very small countries. There is often a long list of global conventions, for example, too, that they take time to get to. I do not know that I can be any more precise than that. But I think quite frequently the countries find that the less formal processes available to them—for example, through SPREP, the South Pacific Regional Environment Program—are perhaps simpler to engage with and do not require any formal undertakings on their part. But these comments have a degree of speculation about them.

CHAIR—It is just that they seem very red hot about the Kyoto protocol, yet it seems strange that so many of them will not go through the relatively simple process of ratifying something that is just a cooperation framework agreement. I am not suggesting there is something suspicious here, although I would not be the first person to think that there might be in the Pacific. Let us be blunt, there are a lot of things to be suspicious about there. But it is for another day as to why they are not a party to this. Who are the parties? There is us, France and New Zealand?

Mr Hyman—New Zealand, I think, is not a party. There is Australia, France, Samoa, the Cook Islands and Fiji. Perhaps in regard to your earlier comments I might just note that another regional convention that is in some ways similar to this in the environmental area is the Waigani convention, which provides certain protection for the region in respect of imports of hazardous wastes. That is having quite a difficult path to get to the 10 ratifications it needs to come into effect, although one would think that it would be very much in the interests of the Pacific countries to do that. I think there is a good deal of inertia involved in this.

CHAIR—I bet that is a convention that has one of these new type clauses that is supposed to apply to non-parties, like the Basel convention. There could be good reasons for not proceeding with that to create a precedent for the future or that it violates the Vienna convention or something like that. But, anyway, we will go into that another time.

Mr BAIRD—I find it rather curious that we should have France as part of a group concerned about the conservation of nature in the South Pacific, given its track record in nuclear testing in the South Pacific. I just wonder whether that might explode the credentials of this particular cooperative agreement.

Mr Hyman—I am not sure how I should respond to that apart from saying that the policies of successive French governments seem to have changed in that regard. To the best of my knowledge, the French in the South Pacific these days take quite seriously their biodiversity and conservation responsibilities.

Mr BAIRD—So what is being done to increase the numbers of people in the cooperative agreement?

Mr Hyman—We do from time to time encourage other Pacific Islands countries to become party to the various conventions in the Pacific. There is more than one around that would benefit from a wider membership. But it is sometimes a bit difficult for these countries to put in

place all the actions that might be needed. We are fairly active participants for example in SPREP, and through avenues such as that we offer general encouragement.

Mr BAIRD—What do you hope to achieve through this cooperative agreement? Is it just a motherhood statement?

Mr Hyman—I suppose the basic hope is that the general approach towards biodiversity conservation will be improved through its codification. I might ask my colleague to expand on those sorts of points.

Mr Thomas—Just to pick up your point and give some particular examples, a number of the Pacific Islands countries do have difficulties in marine conservation, for example. The marine resources are heavily utilised for subsistence fishing and that sort of thing. Yet with some foresight and planning it was possible to increase the yield in the fishing sense to these island communities by establishing what we called protected areas in certain fishing areas. You would encourage fishing nurseries, for example, in some of the protected marine areas. That in turn leads to greater breeding effort and production of fish, which then of course migrate out of those areas into general areas of fishing. That is just one example of where we are able to provide an oversight and a planning framework to improve the livelihood of and the impact on the communities of those sorts of policies.

As another example, in protected area planning generally we are able to assist with expertise as required in providing the transfer of policy expertise to the Pacific Islands countries so that they are better able to establish a framework of protected areas in their countries. We have participated in a number of forums to that effect where we have provided that assistance to them.

Mr BAIRD—So how does it work? Do you have regular conferences to discuss it?

Mr Thomas—Yes. There is a regular meeting of the parties to the treaty every three years or so. There is a meeting also of protected area planning and environmental people on a four yearly basis. We regularly participate in those forums. As my colleague mentioned earlier, there is more of an informal arrangement whereby people visiting Australia from delegations from other countries take the opportunity to meet with the technical and specialist people and we are able to assist them with advice. For example, recently through Environment Australia we produced a book on protected area management best practice and principles. So these are the sorts of things we can use to provide them with our experience for them to apply in their situations as best fits.

Mr BAIRD—So it is more a provision of expertise rather than cash provision to them?

Mr Thomas—Yes.

Mr BAIRD—So it is not like aid per se?

Mr Thomas—No.

Mr BAIRD—Thank you.

Mr HAASE—My concern is not a great one. It is a general interest area. I notice the fact that there is a very small number of signatories and that they are outside the Pacific region primarily. My concern is that it almost appears as though this has been thrust upon those states of the Pacific. I am just wondering if you could allay my fears by giving me a little information about where the motivation has come from for this proposal. I am very concerned about how, in our own waters, the rights of the indigenous person are sometimes exclusive and outside general control measures and agreements with regard to native flora and fauna. I wonder if there is any clause in this that impinges on that.

Mr Hyman—I will just respond to the first part of your question. The original convention was negotiated some considerable time ago—in the late seventies, if I am correct. I think the negotiations were finalised in 1976. I think at this stage it would be quite difficult to get all that clear a picture of the circumstances that might have prevailed at the time of its negotiation in terms of what the pressures acting on the countries of the region might have been. If a proposal along these lines were made now, I dare say the circumstances would look very different. So I do not think there is any particular concern. I am certainly not aware of any concern raised by the countries of the region with regard to this convention or any suggestion that they feel that it is irrelevant or an imposition upon them in any sense—or would be if they were to become a party. Certainly I am not familiar with any concern in that direction. If you study the convention, you will see that the obligations it proposes are very general ones and not hugely onerous for countries that might wish to become parties.

The SPREP meeting was held in Guam last year. At that time the director of SPREP appealed to all SPREP members to become members of Apia and there was a general agreement, apparently, among the participants in the SPREP meeting at that time that they should all do so. Australia is doing its bit to respond to that. Evidently we are still perhaps some way ahead of some other countries of the region.

Mr HAASE—Can you elaborate on whether there is any specific arrangement? In my own mind I can see the complexity of what I am thinking. In Australia we have a majority 'mainstream' population, for want of a better term, and a small indigenous population. In the Pacific Islands, of course, the opposite would be true. Perhaps it negates the question that I am concerned about—that is, how it may impinge on classification of general rights and indigenous rights, but I dare say they become one and the same in Pacific countries.

Mr Hyman—I hesitate to venture into these particular waters, but I think it is probably right that for most of the countries of the Pacific those issues do not arise because the population is essentially an indigenous one. The exceptions, I guess, would be countries such as French Polynesia or New Caledonia, where there may be substantial French interests and populations, and possibly some of the Pacific countries with substantial populations from the US. But beyond that I think, to the best of my knowledge, the countries of the Pacific are largely peopled by their original indigenous inhabitants.

Mr HAASE—Unless we single out Fiji, perhaps.

Mr Hyman—Yes. Fiji is a slightly different case.

Mr HAASE—So you are not aware of anything in the situation that refers to rights general and rights indigenous?

Mr Hyman—Having read the convention, I do not recall anything of that kind.

Senator COONEY—You say that it does not impose obligations beyond what is there already. Is that what you are saying?

Mr Hyman—Yes.

Senator COONEY—Article III states:

The boundaries of national parks shall not be altered so as to reduce their areas, nor shall any portions of such parks be capable of alienation …

Then there is the saving phrase 'except after the fullest examination'. Article III(2) is much the same, I suppose. Article III(3) imposes obligations which can be excused for duly authorised scientific investigations. They are quite specific, aren't they? Has any issue ever arisen under any of those or similar provisions?

Mr Thomas—Not to my knowledge. I do not believe that there has been any particular problem arising out of those provisions whatsoever.

Senator COONEY—Is it just an agreement or a convention that has been signed as a declaration of good intent, or can it be taken a bit further if you look at article III—or article IV for that matter?

Mr Thomas—I think they are guiding principles. My knowledge and experience with the Apia convention has been that the parties use it as guiding principles and it is the responsibility of each of the states who are party to the agreement to accept and uphold those principles. But there has been no obligation on member parties such as Australia to be called to go beyond what the governing authority of that country would do.

Senator COONEY—Article II states:

1. Each Contracting Party shall, to the extent that it is itself involved, encourage the creation of protected areas which together with existing protected areas will safeguard representative samples of the natural ecosystems occurring therein (particular attention being given to endangered species), as well as superlative scenery, striking geological formations …

If we had an outstanding piece of scenery, can we squander that, or must the scenery be superlative before it is subject to protection?

Mr Thomas—I think the operative word in that particular article is 'encourage'. It is up to the parties to accept that they will encourage their land-holders to work within the principles.

Senator COONEY—But can you encourage them only in respect of superlative scenery and striking geological formations, or do you think it can be a little less than that and still be saved?

Mr Thomas—I think the way it has been interpreted and applied is that, yes, it can be less than those icon things that we see.

Senator COONEY—The superlative scenery could be Port Phillip Bay. But Sydney Harbour might also marginally be seen as something worth saving, too!

CHAIR—It has to be in the Pacific!

Senator COONEY—It is in the Pacific!

CHAIR—Thank you for your evidence. We will consider this at our private meeting tomorrow or next week.

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

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

Committee adjourned at 11.17 a.m.