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JOINT COMMITTEE ON TREATIES

Monday, 16 September 2002

Members: Ms Julie Bishop *(Chair),* Mr Wilkie *(Deputy Chair),* Senators Barnett, Bartlett, Kirk, Marshall, Mason, Stephens and Tchen and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Evans, Mr Hunt, Mr Peter King and Mr Scott

Senators and members in attendance: Senators Barnett, Kirk, Marshall, Stephens and Tchen and Mr Adams, Mr Bartlett, Ms Julie Bishop, Mr Evans, Mr Peter King and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 27 August 2002

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Committee met at 10.08 a.m.

FROST, Ms Robyn Louise, Principal Legal Officer, Office of International Law, Attorney-General's Department

TUCKER, Mr Mark John, Acting First Assistant Secretary, Marine and Water Division, Department of the Environment and Heritage

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, International Organisations and Legal Division, Department of Foreign Affairs and Trade

SCOTT, Mr Peter, Executive Officer, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—Good morning, ladies and gentlemen. I declare open this meeting of the Joint Standing Committee on Treaties. First I would like to make welcome two visiting parliamentary staff from the parliament of Fiji who join us this morning, Mr Nemani Marti and Ms Rasieli Bau, who are guests of the Commonwealth parliament under the auspices of the Commonwealth Parliamentary Association education trust fund. Mr Marti and Ms Bau will be observing part of this morning's proceedings. We welcome you here to Canberra.

Today, as part of our ongoing review of Australia's international treaty obligations, the committee will review six treaties tabled in parliament on 27 August 2002. Some representatives from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us for the entire morning's proceedings, with witnesses from other departments joining us for discussions on the specific treaties for which they are responsible. To begin our hearing this morning, we will take evidence on the proposed amendments to the schedule to the International Convention for the Regulation of Whaling. I will now call representatives from Environment Australia and the Department of Foreign Affairs and Trade.

Before we commence I should advise you that, although the committee does not require you to give evidence under oath, the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Does somebody wish to make some introductory remarks before we proceed to questions?

Mr Tucker—I will make some short introductory remarks on the first item. At the 54th meeting of the International Whaling Commission held in Shimonoseki from 20 to 24 May 2002, the International Whaling Commission amended the schedule to the International Convention for the Regulation of Whaling to maintain the moratorium on commercial whaling and to renew Aboriginal subsistence quotas. The proposed treaty action involves amendments to the schedule to the convention. Australia has been a contracting government to the convention since it came into force in 1948. The amendments maintain the moratorium on commercial whaling and renew quotas for Aboriginal subsistence whaling in certain parts of the Northern Hemisphere. They also insert an editorial footnote regarding the Indian Ocean sanctuary. Some amendments to the moratorium simply change the dates in certain paragraphs of the schedule to

make the zero quota apply for the current year. Amendments to renew the Aboriginal subsistence catch limits require several changes to paragraph 13 of the schedule.

The effect of the amendments is to renew for five years the shared quota of 620 grey whales taken by the indigenous people of Russia and the United States, to renew for five years the quota of 187 minke whales taken each year by the indigenous people of Greenland and to allow the take of four humpback whales per year for the next five years by the Bequian people of St Vincent and the Grenadines on the new condition that the hunters conduct their activities under appropriate legislation and with the advice of the scientific committee.

Under the International Convention for the Regulation of Whaling, amendments enter into force on the expiration of 90 days after formal notification, except for those parties who have lodged an objection. Official notification of the amendments was sent to the Australian government on 12 June 2002 and the amendments entered into force on 10 September 2002. In accordance with the requirements for tabling treaty actions in parliament, the department prepared a national interest analysis of the amendments, which was cleared by relevant departments and the committee secretariat on 2 August. The Minister for the Environment and Heritage also wrote to the chair of the committee on 15 August outlining the particular arrangements. The amendments accord with Australia’s long-held position on the banning of commercial whaling and the limited hunting of whales by Aboriginal subsistence cultures to meet demonstrated traditional, cultural and dietary needs. Finally, the amendments to the schedule will not add to Australia’s existing obligations under the convention. Australia already prohibits whaling under its domestic legislation.

CHAIR—If there are no further comments, we will proceed to questions. Can you explain to me a little more about the number of parties to the convention. How many countries are party to the convention?

Mr Tucker—The number of parties varies from year to year depending on how many parties are up-to-date or not up-to-date with their payments. I think there is a fair bit of lobbying in the membership of the commission concerning the particular issues at hand. As you are probably aware, there are some countries that still wish to conduct commercial whaling or scientific whaling and there are other countries that are bitterly opposed to those things.

CHAIR—Are they parties to the convention?

Mr Tucker—Yes. When the convention first came into effect in the late 1940s it was actually a convention to determine the number of whales that could be commercially harvested. So it is actually a harvesting convention. I think it is fair to say that the member parties have evolved over time into a more conservation-minded group of people regarding whale harvesting. Back in those early days, they were looking at how many tens of thousands of whales should be harvested. At the current time, we are talking about how many hundreds for traditional purposes. We still have the scientific whaling debate with the Japanese. The numbers do vary from year to year, but there is quite a substantial number of parties to the convention.

CHAIR—What would the number be currently?

Mr Tucker—It is just under 50.

CHAIR—Have the terms of the actual treaty been amended to reflect that change to a conservation treaty rather than a commercial harvesting treaty?

Mr Tucker—The treaty itself retains its current form, but schedules are added from time to time that dictate certain arrangements and amendments to those schedules govern these particular aspects of whale harvesting.

Mr ADAMS—How many countries undertake Aboriginal subsistence whaling? They are probably identified as groups within their own countries—how many of those groups are actually exempted under this treaty?

Mr Tucker—None of them is exempt under the treaty. Because the commission meets annually, the countries under the treaty determine each year how many whales can be taken for indigenous purposes and which indigenous cultures are able to take them. So they are not exempt; it is actually an active decision taken each year.

Mr ADAMS—How many groups are there?

Mr Tucker—I can get you the definitive list, but there are the Inuit people in terms of the Russians, the Alaskan Eskimos, the Grenadines and Greenland.

Mr ADAMS—Are the Greenlanders seen as being indigenous?

Mr Tucker—The Inuit do move to Greenland at certain times of the year during the summer.

Mr ADAMS—So there are basically four groups. Will you supply details of the groups to the committee?

Mr Tucker—We can give you the specifics, certainly.

Mr ADAMS—On my reading of it, when the commission was taking place some other countries were being encouraged to join. I think the chair had asked some questions. Was there a surge of other countries wanting to join the commission at the last hearing?

Mr Tucker—There is a surge almost every year, and I think it is also fair to say that we make our own diplomatic efforts to ensure that we have suitable representation of like-minded countries present at the commission.

Mr ADAMS—Thank you, that was a very diplomatic answer.

Senator KIRK—In paragraph 12 of the national interest analysis there is a suggestion that, under Australian law, the Environment Protection and Biodiversity Conservation Act affords a higher level of protection to whales in Australian waters than is afforded under the convention. Is Australia taking any steps to lobby the commission to extend the protection of the convention internationally in order to reflect the Australian standards?

Mr Tucker—I think it is fair to say that we do that each year. We are also investigating other mechanisms that might be suitable to afford wider international protection. There are other international instruments riding more on the conservation aspect of species internationally—for example, the Convention for Migratory Species and the Convention for the International Trade in Endangered Species. So we actually have a multipronged approach internationally for protecting the species.

Senator BARNETT—My question is related to paragraph 16 of the NIA, and specifically relating to consultation with the states. Based on paragraph 16 it would appear that there has not been consultation with the states and territories. As a person who strongly believes in the federation of states, I am interested in the process of the consultation.

Mr Tucker—I think that is right. Under this particular treaty, there is such a strong domestic position in terms of the Australian government position that the states are not interested because they have exactly the same view as we do. They have no regulatory capacity in this regard. They have no interest in taking care of these particular species. It is one of those areas where, historically, we would have certainly consulted them when taking care of these particular species. It is one of those areas where, back in history, we would have consulted them over the various arrangements for whaling. But as these amendments apply, they are for the Northern Hemisphere in terms of the take. While the ban on commercial whaling applies globally, it does not happen and it has not happened for some time in Australian waters. I think the last time we took some commercial whaling activity was in the 1970s. So, for this particular item, we would not have been through our normal process of consulting with the states, because they probably would have asked us why we were wasting their time.

Senator BARNETT—What would the normal process be?

Mr Tucker—It would depend on the particular treaty item. We have various committees established with the states in terms of consultation and environmental matters. At the peak level we have the Natural Resource Management Ministerial Council, which the Minister for the Environment and Heritage co-chairs with the Minister For Agriculture, Fisheries and Forestry. Under that ministerial council there are standing committees and various subcommittees that work on particular items. The most relevant one for this subject matter would be what is called the marine and coastal committee, which I attend. At those meetings we have a standing item on international matters and what we are taking forward, and we directly engage formally with the states on those things. In addition to that, on specific items we would write to our counterparts for their advice each time we were proposing treaty action.

Senator BARNETT—Would the states and territories receive information about any changes regarding these sorts of matters once a year or in an annual report?

Mr Tucker—The committees meet at least twice a year. In each of those meetings we have a standing item. We are looking to report more formally on each of those meetings with a document which points out exactly what you are suggesting.

Senator BARNETT—You are looking at that at the moment?

Mr Tucker—Yes.

Dr French—I could possibly add to that. There is the standing committee on treaties, which also involves the states. A list of all treaty action is distributed to the states through that mechanism, so the states are certainly aware that a treaty like this and this particular action are coming up, and if they have any questions they can—

Senator BARNETT—How often do they meet?

Dr French—Twice a year.

Senator BARNETT—Would this sort of change be listed?

Dr French—Indeed.

CHAIR—On that issue of consultation, paragraph 15 of the national interest analysis also refers to consultation between Environment Australia and a number of non-government organisations. Given the Australian government's very strong stand on this issue, what is the purpose of those consultative meetings? What are the topics discussed there and what is the point of those meetings? What happens to the information or resolutions that emanate from them?

Mr Tucker—With this particular item it really is a consultation process for conservation organisations, because we have no domestic interest in harvesting whales. We talk to particular groups such as the Australian Conservation Foundation, the World Wide Fund for Nature, Project Jonah and the whale conservation society. The discussion is very much that they are particularly interested in the Australian government's position on issues which come up which still remain contentious. For example, there are a number of international sanctuaries for whale conservation and invariably each year a number of countries want to lift the protection provision for those sanctuaries. We also have proposals each year for scientific whaling; a number of governments want to resume whaling in their coastal waters or resume a form of commercial whaling. There are a number of active items, if you like, under consideration internationally at the moment in terms of whale harvesting and conservation. The discussions we have with the non-government groups are very much about those particular contentious items—what our position is and what is the best strategy to take them forward.

CHAIR—This is in relation to other countries as opposed to our own policy?

Mr Tucker—In relation to most other countries. On our delegation we have representatives from the non-government organisations who actually attend the delegations.

CHAIR—How are they selected?

Mr Tucker—They are nominated through the conservation groups themselves. We have had some people—for example from Project Jonah—on and off the delegations for 10 or 15 years, so they have an extraordinary depth of knowledge.

CHAIR—At the 2002 annual meeting, Project Jonah and, I see, the Humane Society International are the Australian representatives. Representatives from those organisations are part of the Australian delegation?

Mr Tucker—That is right. Other conservation organisations attend as observers, but we actually include those two people as part of our delegation.

CHAIR—How is it determined who will be members of the delegation?

Mr Tucker—The nominations come from the conservation groups. The government makes a commitment each year to include members from the non-government organisation sector on the delegation. We then invite the non-government organisations to nominate who they believe would be the most appropriate. Clearly, the make-up of the delegation is the government's decision at the end of the day, but at this stage we invite the conservation groups to come forward.

Mr MARTYN EVANS—Could I ask a related question? Is there also consultation with the Australian Institute of Marine Science, CSIRO Marine Research and organisations like that?

Mr Tucker—The International Whaling Commission is backed up by a very large scientific committee which has been doing work for a number of years on a revised management scheme, asking, in a sense, what would be the basis of sustainable whaling if commercial whaling were to start again. A number of Australian scientists participate in that scientific committee. We can get you their names if the committee wishes; I am sorry, I do not have them off the top of my head.

Mr MARTYN EVANS—But our delegation then does not consult directly with Australian scientific groups like—

Mr Tucker—Yes, it does. When we get to examples such as the one I just mentioned, where there is a scientific debate, we will certainly be informed in the science by consulting with our domestic scientific bodies.

Senator BARNETT—I have a question related to the question from Mr Evans: apart from the scientists, what about fishing industry representatives?

Mr Tucker—Because we have not participated in whale harvesting for more than 25 years, there is no fishing industry that is based in Australia. Where there would be a fishing industry interest would be in the interaction perhaps between whales and 'real fish'. Those policy matters are handled domestically at the moment. Where we do have international matters that talk about that interaction between whales and fisheries, that tends to be held through other forums such as FAO. But they themselves do not have an interest in this particular issue.

Senator BARNETT—How are they funded? For example, who funded this recent delegation?

Mr Tucker—The non-government members?

Senator BARNETT—Yes.

Mr Tucker—I might have to call for some assistance on that.

Dr French—My strong impression is that they fund themselves.

Senator BARNETT—That is your impression.

Mr Tucker—We can confirm that.

Senator BARNETT—Thank you.

Mr KING—For the purposes of the exemption, what is the dugong? Is that a whale or a pelagic fish; what is it?

Mr Tucker—The dugong is a marine mammal but it is not a cetacean. It is different from a whale.

Mr KING—What is that word you just used?

Mr Tucker—Cetacean.

Mr KING—That is a new one for me.

Mr Tucker—That is the technical term for whales, dolphins and porpoises—they are commonly known as cetaceans.

Mr KING—I have received a lot of letters in my office about dugongs, but that is not part of the exemption.

Mr Tucker—No, they are not covered by this treaty.

CHAIR—Australia has not lodged objections; have any objections been lodged?

Mr Tucker—No.

CHAIR—So it has come into force?

Mr Tucker—That is correct.

CHAIR—And the amendments came into force on 10 September?

Mr Tucker—That is correct.

CHAIR—There being no further questions, thank you very much for your time this morning. We appreciate that.

[10.27 a.m.]

FROST, Ms Robyn Louise, Principal Legal Officer, Office of International Law, Attorney-General's Department

SCOTT, Mr Peter, Executive Officer, Legal Branch, Department of Foreign Affairs and Trade

ALCHIN, Mr Robert John, Policy Officer, Strategic Transport Planning Branch, Transport and Infrastructure Policy Division, Department of Transport and Regional Services

BROCKLEBANK, Mr Winton, Acting Assistant Secretary, Strategic Transport Planning Branch, Transport and Infrastructure Policy Division, Department of Transport and Regional Services

CHAIR—I welcome witnesses from the Department of Transport and Regional Services and the Department of Foreign Affairs and Trade. The full names of the treaties we are considering are the Amendment to the Limitation Amounts in the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969 and the Amendment to Limits of Compensation in the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make some introductory remarks before we turn to questions?

Mr Alchin—Yes, thank you. I would like to start by providing you, firstly, with a simplified explanation of the two International Maritime Organisation, IMO, conventions which will be amended by these resolutions being considered by the committee.

CHAIR—That would be appreciated.

Mr Alchin—I realise that they are fairly complex. There is a two-tier scheme for providing compensation for pollution damage resulting from a spill of oil from an oil tanker. Under the first bit of it, the tanker owner is liable for damages and the owner's liability is limited, but this limit increases with the size of a tanker and, if you get up to the very big oil tankers, the maximum liability of a tanker owner is approximately $A150 million.

CHAIR—And that equates to the size of the tanker—

Mr Alchin—Yes.

CHAIR—or to how much it carries?

Mr Alchin—No, it equates to the size of the tanker, even if it is only half full. If there is a pollution incident and the compensation costs exceed the amount available from the tanker owner, further compensation is payable from an international fund. Currently the maximum aggregate amount payable in respect of any one incident is approximately $A330 million. This international fund is financed by levies imposed on anybody who receives by sea, in a calendar year, more than 150,000 tons of oil. The resolutions that we are considering today will increase limits by approximately 50 per cent, so that, in the case of a major pollution incident involving an oil tanker, up to about $A500 million will be available for compensation.

The second matter I wish to address relates to the date of application of the amendments made by these resolutions. The resolutions were adopted by the legal committee of IMO in October 2000 by what they call the 'tacit acceptance procedure'. The amendments were deemed to have been accepted on 1 May 2002 unless one-quarter of the states that were parties to the conventions being amended indicated that they did not accept the amendments. No states indicated that they did not accept the amendments, so they will enter into force on 1 November 2003. I acknowledge that this means that the committee was not asked to examine the resolutions before the deadline had passed for Australia to indicate that it might not accept the amendments. I thought I should just provide some explanation of why we did not bring this to the committee earlier on. Firstly, it was because of a number of staff changes within the department. As the person who was responsible for implementing the resolutions, I was not aware of them until some time after they were agreed to by the legal committee of IMO. We have changed our procedures now to make sure that in future cases I will be aware fairly quickly of any changes made by the legal committee.

CHAIR—Was there no system in place to trigger a reminder that, unless we did something by such and such a date, we were deemed to have accepted?

Mr Alchin—That is basically it. There was a problem of having a number of staff changes—of people going into a job and not quite understanding what they were doing and then moving out again and another person coming in. This is just one of the things that happen when you get a rapid changeover in one particular part of the—

CHAIR—Is there now a system in place whereby, notwithstanding staff changes, there is a record somewhere as to action or obligations that need to be attended to?

Mr Alchin—There is. The current way it works, which I hope will continue, is that, as well as being responsible for implementing these things, I also attend the legal committee, so I obviously know what the legal committee has decided. It is to be hoped that this more logical way of working will continue.

CHAIR—What happens if you are not always available to attend the legal committee meetings? Is there an opportunity for the legal committee's resolutions to be made known to you?

Mr Alchin—Because I attend the legal committee meetings now, I am very—

CHAIR—You are always going to attend the legal committee meetings?

Mr Alchin—I will while I remain in my current job, and whoever follows me will do the same thing.

Mr ADAMS—We would like some retribution! This committee is getting a reputation for taking retribution! We like to be informed. Take it on notice.

CHAIR—So we will cross-examine you for another half an hour on this!

Mr Alchin—I also might talk about another thing. There was doubt whether changes to conventions adopted by this tacit acceptance procedure were required to be tabled. One person suggested to me that the tabling requirement applies only if it is proposed that Australia should not accept the amendment. If Australia were to accept the amendment, it has been suggested that it would not need to be tabled. That is not the way that we are doing things here.

CHAIR—Is the position not clear within the department as to when one does or does not table amendments or other aspects of international instruments?

Mr Alchin—In relation to these matters commencing by tacit acceptance, it was not clear, but I think we are fairly clear now that it does apply.

CHAIR—And what is our policy now?

Mr Alchin—The policy is that things that come out of the Legal Committee of IMO, whether or not they are by the tacit acceptance procedure, should be tabled before this committee.

CHAIR—In other words, when in doubt, table.

Mr Alchin—Yes.

Mr ADAMS—How many reviews have there been since 1992?

Mr Alchin—Since 1992 this is the first time. Future ones will be done by the tacit acceptance procedure, but it will not be for probably another five or 10 years, or whenever the committee decides. In looking at whether things should be tabled, it is a matter of considering whether or not something is significant. These amendments by themselves may not seem to be significant because they do not have any immediate effect, but if there were a major oil spill from a tanker—and the spill was much worse than anything that had previously occurred in Australian territory—then the extra compensation potentially available, because of the implementation of these resolutions, would be about an additional $150 million. That certainly would be significant. I apologise to the committee that the resolutions were not tabled prior to 1 May this year, but I trust that committee members may understand at least some of my reasons why they were not tabled earlier.

CHAIR—In a sense then, this hearing is just for notification. There is nothing the committee can now do. We can make no recommendation one way or the other because the resolutions have been deemed to be accepted as at 1 May.

Mr ADAMS—I would not agree with that.

CHAIR—I am just putting a proposition in practical terms.

Mr ADAMS—That may be in a practical sense, but we can still table something in the House.

CHAIR—You can recommend what you like, but in practical terms they were accepted on 1 May. Is that right?

Mr Alchin—Yes. If Australia had said, ‘We don’t accept this’—and maybe only one or two other countries had said that they did not accept it—the amendments would still have come into effect. If we still said, ‘No, we don’t accept these,’ the only way to get out of it would be to renounce the treaties as a whole.

CHAIR—Withdraw from the treaties generally?

Mr Alchin—Withdraw completely, and that would mean there would be no compulsory requirement for insurance for oil spills or no compensation scheme.

CHAIR—That is fairly dramatic. We will take that on board. It might well be the subject of a recommendation in terms of procedure and process, but for the purposes of these particular amendments is there anything further you wish to say about the substance of them?

Mr Alchin—No; that is all I would like to say.

Mr WILKIE—I realise that tanker owners are supposed to take out insurance to cover these sorts of eventualities, but is any effort made to make sure they actually have the policies in place before they enter Australian waters?

Mr Alchin—There is no way that we can check tankers before they enter Australian waters. The requirement set out in the legislation is that they are required to have insurance on entering or leaving an Australian port. Because of freedom of navigation, we cannot just pull up a tanker and ask, ‘Can we see your insurance requirements?’ But there is a very strong process of inspection of ships. The Maritime Safety Authority, as part of their port state control inspections, will inspect ships. When they are inspecting for safety things, they also check to see if they have appropriate insurance certificates. If a ship in port does not have its insurance certificate, an offence is created but, more importantly, from the tanker owner’s point of view, the tanker will be detained until it has that appropriate insurance. So, if it takes it a week to get it, that tanker will not be allowed to move.

Mr WILKIE—Does that happen with all tankers or is it done at random?

Mr Alchin—It is not done with all ships; about 25 per cent of ships undergo port state control inspections. Customs also inspect ships. Customs, in inspecting documentation, will also check to see if they have these insurance certificates. I am not aware of the percentage of ships that Customs inspect, but I suspect it would be a fairly high proportion.

Mr WILKIE—Of that 25 per cent of all ships it would be interesting to know how many were actually tankers. I am particularly concerned given that there is a trend these days to go for flags of convenience ships. Often those ships are not well maintained. We had an incident in Western Australia where the front fell off a ship close to our reefs, which had the potential to cause enormous pollution problems for Western Australia. If only 25 per cent of ships are being looked at, I would be very interested to know how many of those are tankers and what percentage of tankers are actually inspected and made to comply.

Mr Alchin—Those figures I do not have, but the inspection regime that has been instituted by the Maritime Safety Authority is a targeted inspection program. Where they suspect that a ship may not be insured or may have some other defect they will inspect that ship. They also rely on intelligence from other port state control authorities.

Mr WILKIE—Would it be possible for you to take that question on notice and advise the committee?

Mr Alchin—Yes.

Mr KING—Is he the right person to do it though? Isn’t it AMSA who should be doing that?

CHAIR—We will take it on notice.

Mr Alchin—I can find out the information from AMSA.

Senator TCHEN—Mr Alchin, I notice that, according to the NIA, the 1992 Fund Convention defines contributing oil as crude oil and fuel oil. What about petroleum products like petrol and diesel oils?

Mr Alchin—It does not cover all petroleum products. It covers what is called persistent oil, which is basically oil that does not evaporate readily. Refined petroleum products, for example, are not covered by these conventions.

Senator TCHEN—I see. So LNG is not covered?

Mr Alchin—No, LNG is definitely not covered.

Senator TCHEN—In that case, this actually does not affect too many Australian shipowners, does it?

Mr Alchin—It does not affect many Australian shipowners, but the important thing is that it is providing a protection against pollution for all tankers coming in.

Senator TCHEN—I understand that. I mean in terms of costs imposed on Australian shipowners.

Mr Alchin—Yes.

Senator TCHEN—In the NIA you mentioned that consultation letters were sent to, amongst other people, the Shipowners Association.

Mr Alchin—Yes.

Senator TCHEN—As a matter of interest, are there any members left in the Shipowners Association?

Mr Alchin—We do not have exact figures, but the Australian Shipowners Association represents Australian owners of ships.

Senator TCHEN—I just did not think there were too many left.

Mr KING—Are they Australian owners of Australian ships or Australian owners of ships anywhere?

Mr Alchin—Australian owners of ships.

Mr KING—Anywhere.

Senator BARNETT—My question relates to that. Paragraph 23 of the NIA talks about the consultation process with shipowners, including the Australian Shipowners Association, Shipping Australia and the Association of Australian Ports and Marine Authorities in states and territories, and then it says, ‘All responses received supported the introduction of the revised amounts.’ Did all those that were consulted forward a response to you or was it only one or two?

Mr Alchin—No.

Senator BARNETT—How many?

Mr Alchin—From the states and territories there were only two or three formal letters that came back to us, but these matters were also discussed in the consultative procedures between the Commonwealth and state transport authorities from the Australian Maritime Group, which represents maritime interests; the Standing Committee on Transport, which is the senior transport officials; and the Australian Transport Council, which is the state and territory transport ministers.

Senator BARNETT—So you feel confident that the states and territories have given their support?

Mr Alchin—I am very confident that the states and territories are supporting these changes.

Senator BARNETT—What about the other industry groups like the Australian Shipowners Association? What did they say?

Mr Alchin—The Australian Shipowners Association did not respond, Shipping Australia were supportive and the ports authorities are gushing in their support.

Senator BARNETT—Was it surprising to you that the Shipowners Association did not respond?

Mr Alchin—It was not, because in many cases we only have a response from them if they object to something.

Senator BARNETT—Do you feel comfortable that we have done everything we can to pursue natural justice and fair play to ensure that they have an opportunity to respond and say what they think?

Mr Alchin—I am reasonably confident that they are in support of these changes.

Mr MARTYN EVANS—In the event that any of the insurance policies were not adequate, were not in existence or were with HIH, for example, to what extent is the compensation fund available to us here? Do you find the application of the fund adequate in all of its terms?

Mr Alchin—I will start off by saying that there has never been an incident in Australian waters or an incident involving an Australian ship where the fund has actually been required to be used. But the fund is an international body—it is based in London and was set up under this convention and it works very closely with the International Maritime Organisation. It has a very strong process of examining any incidents and providing adequate compensation. As I mentioned, there have been only two incidents where it has not been able to provide adequate compensation, and they were to do with things like the *Erika* incident, where it is still examining claims.

Mr MARTYN EVANS—So there is a good fall-back position?

Mr Alchin—Yes, the limit provided under the fund convention is there, even if one cent is not available from the shipowner.

Mr KING—Thank you for your frankness on that issue of the tacit acceptance procedure in the IMO. I have a little bit of experience with the IMO. How long has this tacit acceptance procedure been running and operating in this way in relation to amendments to conventions?

Mr Alchin—It is something that the IMO are starting to introduce to their conventions for things that they regard as technical amendments. With previous conventions that had entered into force, they would agree at a conference on amendments to conventions and they then had to wait for entry into force requirements of, say, 20, 30 or 40 states or whatever to become a party. Sometimes these things would take five or 10 years before they entered into force. In some cases, there are amendments to other conventions that have been adopted by the IMO which

have not even reached the required entry into force requirements. They considered this a way of ensuring that the amendments will enter into force.

Mr KING—My experience in relation to provisions of that type is that the member countries are entitled to lodge a pro forma statement with the secretary-general to indicate that Australia, for example, is not prepared to adopt the tacit procedure approach. It has to be a proactive policy on your part, but that may be something that you can look into now that you are taking a more proactive role. It is important, because we are talking about millions of dollars here. It might be a technical variation of the convention but it is a very significant change. That is just a thought. Have you any thoughts about the relationship between the 1976 Convention on Limitation of Liability for Maritime Claims and the 1992 Civil Liability Convention?

Mr Alchin—You are talking about the Convention on Limitation of Liability for Maritime Claims?

Mr KING—Yes.

Mr Alchin—For the benefit of other committee members, the 1976 Convention on Limitation of Liability for Maritime Claims is a very general convention that provides a limit on the amount of damages that can be claimed by somebody who suffers some sort of damage as a result of something occurring in connection with the operation of a ship. The conventions that are being amended by these resolutions today have been specifically excluded from the coverage of that convention. In relation to oil pollution, for example, that convention would apply to and limit damages for a spill of fuel oil from a ship that is not a tanker.

Mr KING—So we are talking about two different types of spills. The loss of bunkering fuel out of, say, a tramp ship would not be covered by this convention; it would be covered only if it were an oil tanker?

Mr Alchin—Yes. The conventions that we are talking about today apply very specifically to either cargo or bunker fuel carried on an oil tanker.

Mr KING—Is that bipolarity, as it were, also clear in relation to the amendments that have just gone through?

Mr Alchin—To the ones that you are talking about today?

Mr KING—Yes.

Mr Alchin—Yes, it is very clear that they do not apply to anything other than oil tankers.

Mr KING—You mention that the oil fund convention is set up in London. Is that an actual fund or is it a right to call upon the P and I clubs or other shipowner interests?

Mr Alchin—No, it is set up as a separate legal entity. Its full name is the International Oil Pollution Compensation Fund. It is set up in London and it collects levies from companies who receive oil. I cannot use the word ‘import’, because if oil is moved from one part of a country to

another by sea it is received and people are still required to pay a levy, as long as they receive more than 150,000 tons in a calendar year.

Mr KING—What is the current level of the fund, do you know?

Mr Alchin—Do you mean the amount of money in the fund?

Mr KING—Yes.

Mr Alchin—I do not know. They make forward projections every year based on two things: their administrative costs and the amount of estimated payments in the coming year. Based on that they set a levy, which applies to people who received oil by sea in the previous calendar year.

CHAIR—Could you go through the rationale for the increase in compensation from 135 million units of account to 203 million units of account? How is that arrived at?

Mr Alchin—Each of the conventions provides that the amount of increase can be no more than six per cent compounded from the time of the previous increase. That was the maximum permitted. Six per cent was allowed from when these levels were first set until the time that they were discussed at the IMO Legal Committee in 2000.

CHAIR—As you said in answer to Mr Adams, there had not been an increase previously—is that right?

Mr Alchin—No, not by this tacit acceptance procedure.

CHAIR—But there have been increases otherwise?

Mr Alchin—The 1992 protocol itself was an increase on the previous conventions.

CHAIR—So, if this was seen to be inadequate and if further amendment were to be made, it could only be a six per cent increase on 203 million units of account?

Mr Alchin—Yes, but the Legal Committee of the IMO is looking at developing a further protocol to the fund convention, which is to be considered by diplomatic conference next year. This came in response to concerns from the European countries that the level of compensation may not be adequate. So the actual level that will be in this extra protocol is to be determined next year by the diplomatic conference.

CHAIR—Just for clarification, we note that paragraph 16 of the second amendment says that 135 million units of account is approximately $A332 million, then paragraph 33 says that the current limit of 135 million units of account is approximately $A319 million.

Mr Alchin—Can you give me the references again, please?

CHAIR—They are at paragraph 16 and paragraph 23 in the second national interest analysis, resolution LEG.1(82).

Mr Alchin—I am sorry; that is one change that I must have missed. In the various drafts of these the unit of account changes. I apologise.

CHAIR—So what is the current limit?

Mr Alchin—The current level, which I checked yesterday, is that 135 million standard drawing rights of units of account is approximately $A325 million.

CHAIR—So it is between the two, anyway.

Mr Alchin—Yes—take the average.

CHAIR—Would you also clarify the position in relation to the insurance increase referred to in the national interest analysis? What is the situation with the anticipated insurance increase?

Mr Alchin—Insurance is based on historical claims data. The international group of P and I clubs, the members of which cover just about all ships and probably every tanker that comes to Australia, say that if there were to be an increase it would be minimal. The words in italics in paragraph 21 of that national interest analysis are the full response from the P and I clubs when we asked them if it was likely there would be an increase. Because the component of a tanker's insurance that covers oil spills is only a very minor part of the whole cost of the insurance for this vessel, an increase in liability will probably not have an increase in the insurance premiums.

CHAIR—But, in any event, even if there were they could not quantify it at this stage.

Mr Alchin—No. If, say, 10 major incidents happened around Australia it may mean that the insurance costs would go up.

Mr ADAMS—So it is on a historical basis.

Mr Alchin—Yes.

Mr ADAMS—Would you advise the committee of the figure held in this fund and whether it sits in a bank account or a trust account? Would you let us know the amount and who actually controls it?

Mr Alchin—They would be ANO persons.

Senator TCHEN—Mr Alchin, in your consultation process did you involve the maritime unions?

Mr Alchin—No, we did not.

Senator TCHEN—Is that for any historical reason? This is an environment in which they have to work.

Mr Alchin—The main outcome of this would have some effect on the companies' insurance, if anything. It is not something that we felt was an issue for the unions.

Senator TCHEN—I would have thought it would be wise to keep the unions informed of the costs of the environment in which they work.

CHAIR—Is this a matter of great concern to you, Senator Tchen?

Senator TCHEN—No. It is just a general comment. I think that we probably should not compartmentalise organisations.

CHAIR—Mr Alchin, would you let us know again what you propose in relation to the tacit acceptance amendments in the future, so that the committee can understand what we can anticipate in terms of the matters that come before us?

Mr Alchin—As I said earlier, we will ensure that they are tabled before the period in which Australia can lodge an objection has expired.

CHAIR—I guess the point is that tabling in the parliament still does not take account of the time that it takes for this committee to consider, review, take evidence, analyse and report back to parliament in order for the government to take account of any recommendation that we make.

Mr Alchin—We will ensure that we do it expeditiously to allow the committee to complete its procedures and complete its report to parliament.

CHAIR—Have you come across any other amendments or instruments of this type?

Mr Alchin—Not arising out of the Legal Committee of IMO, which is the area that I deal with.

Senator BARNETT—On that point, chair, should we as a committee be advised of the process in relation to Mr Alchin's suggestions for tightening up the procedures at our next meeting? Shouldn't we be advised as to how that will happen so that it will not happen again?

CHAIR—I think Mr Alchin has made it pretty clear that tacit acceptance amendments will be tabled now, as opposed to there being some uncertainty as to whether they should be or should not be. It will be one of those alarm bells that will signal that these have to be tabled in sufficient time. Obviously there was plenty of time.

Mr Alchin—Yes. All Legal Committee conventions, as far as I am aware, allow for 18 months.

CHAIR—Thank you for your time this morning.

[11.02 a.m.]

GRIGSON, Mr Paul, Branch Head, Maritime South East Asia Branch, South and South East Asia Division, Department of Foreign Affairs and Trade

HAMMER, Dr Brendon Charles, Assistant Secretary, Americas Branch, Department of Foreign Affairs and Trade

COLLETT, Mr Matthew, Analyst, International Tax and Treaties Division, Revenue Group, Department of the Treasury

HOLDAWAY, Mrs H.K., Analyst, International Tax and Treaties Division, Revenue Group, Department of the Treasury

MARTINE, Mr David, General Manager, International Tax and Treaties Division, Revenue Group, Department of the Treasury

McBRIDE, Mr Paul, Manager, International Tax and Treaties Division, Revenue Group, Department of the Treasury

CHAIR—I welcome witnesses from the Department of the Treasury and the Department of Foreign Affairs and Trade to give evidence relating to two protocols: one between Australia and Canada, and one between Australia and Malaysia amending the conventions for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Mr Martine, do you wish to make some introductory remarks and then we will proceed to questions?

Mr Martine—We welcome the opportunity to present to this committee the benefits to Australia of the Canadian and the second Malaysian protocols and recommend that the members of the committee support the proposed treaty action. As I indicated to the committee on 27 August, the double tax treaty function has recently moved from the tax office to the Treasury. As you are aware, following the committee's recommendation to develop an effective methodology to quantify the economic benefits of double tax agreements, we held discussions with the committee on 27 August to discuss our proposed methodology.

This is our first opportunity to present a revised methodology to better describe and quantify the benefits of double tax agreements. For the committee's information, we provided a supplementary brief on 10 September to the national interest analysis of both the Canadian and the second Malaysian protocols, which we trust will more effectively address the committee's areas of interest.

Before outlining the specific benefits of the individual protocols, I would like to first outline the general benefits of entering into a bilateral tax treaty. Broadly, a bilateral tax treaty action will promote the flow of investment, trade and skilled personnel between the two countries by eliminating double taxation and providing a reasonable element of legal and fiscal certainty. It will improve the integrity of the tax system by creating a framework through which the tax administrations of both countries can prevent international fiscal evasion and eliminate double taxation. It will also improve Australia's geopolitical, strategic, security and regional interests; develop and improve bilateral relations; and maintain Australia's position in the international tax community.

Within this context, I would like to outline the principal features of the Canadian and second Malaysian protocols. The Canadian protocol, amending the Convention between Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, was signed in Canberra on 23 January 2002. The measures in the protocol will broadly provide several benefits. Firstly, it will protect Australia's rights to tax profits, income or gains earned by Canadian residents from alienation of property in Australia by making such rights explicit in the convention. This is an important tax based protection measure.

Secondly, it will provide benefits to Australian enterprises investing in and trading with Canada by having the effect of reducing Canada's dividends, branch profits and interest withholding tax rates on payments or flows back to Australia. The lower withholding taxes will reduce the business costs of Australian enterprises. Australia's domestic withholding tax rates already meet the lower limits outlined in the protocol. Finally, it will modernise the convention and reduce both the administration and compliance costs to business and individuals. Overall, the protocol is expected to have a minimal direct cost to Australian revenue of about $1 million per annum.

The second Malaysian protocol and the associated exchange of letters amending the agreement between the government of Australia and the government of Malaysia for the avoidance of double taxation and the prevention of fiscal evasion, as amended by the first protocol, were signed at Genting Highlands in Malaysia on 28 July 2002. The measures in the second protocol provide several benefits. Firstly, it will deny double tax agreement benefits to those who obtain preferential tax treatment under Malaysia's low tax business activity regime. This is an important measure to ensure that Australian revenue is protected from inappropriate claims for double tax agreement benefits by persons enjoying tax privileges under preferential tax regimes which shelter income from taxation.

Secondly, it will extend the tax sparing provisions of the existing agreement until June 2003. An explanation of tax sparing arrangements is provided in the supplementary brief we provided to the committee last week. Finally, it will modernise the agreement to bring it into line with Australia's recent tax treaty policies and practices. The associated cost to revenue will come from Australian crediting tax that effectively has not been paid and is expected to be small—in the order of $1 million to $2 million.

In summary, both protocols are expected to have minimal direct costs to Australian revenue. Furthermore, these costs will be more than offset by the benefits to Australia. Therefore, we recommend that members of the committee support the treaty action as proposed. As a separate

issue, we would like to note that where a tax treaty action may lead to substantial economic or other benefits to Australia, or has other sensitive aspects, we would like to explore with the committee the possibility of supplying sensitive quantitative and qualitative information as a confidential supplementary brief rather than in the body of the national interest analysis. The committee's views on this approach would be appreciated. Thank you.

CHAIR—Regarding that point, are you suggesting that the attachments to the supplementary briefs now contain such information, or are you suggesting that there would be further information that could be made available to the committee on a confidential basis?

Mr Martine—The supplementary briefing which we provided to the committee last week was marked as 'in confidence'.

CHAIR—Yes. So that is the type of—

Mr Martine—Regarding some elements of that supplementary briefing, we erred on the side of caution.

CHAIR—So, if the committee were minded to accept confidential briefs from you, are you saying that they would be in this form or expanded?

Mr Martine—As we discussed on the 27th, we will, on all future national interest analyses, go through and articulate in a clearer way what the real benefits are. But, if there were some sensitive aspects of that, we would like the opportunity to supplement that revised NIA with some in-confidence information.

CHAIR—Without wishing to speak on behalf of the committee, I am sure I can say that that would be appreciated. Getting as much information as possible, whether it be received in confidence or as public information, is to be encouraged—for, as you are aware, this is an area where the committee requires a deeper analysis. If that means receiving confidential information, that should be encouraged.

Mr Martine—We will certainly endeavour to provide as much as we can in the public NIA. It is just that there may be situations that warrant some supplementary confidential briefings.

CHAIR—Before we get down to some more detailed questions, could you explain to me the national interest analysis for the DTA. The first document that you provided, under 'Costs', mentioned in paragraph 41 that there might be reduction in Australian government revenue, although it did not put a figure on it. In the supplementary briefing to the Canadian DTA, under 'Costs' it says:

> The Protocol is expected to have a minimal direct cost to Australian revenue of $1 million per annum—

which will be offset. Is that something you have been able to calculate in between the preparation of the NIA and the preparation of the supplementary briefing or is there some other explanation?

Mrs Holdaway—Yes, that is correct. Since the request made by the committee, we have been able to quantify certain aspects of the Canadian protocol, which show that there would be a direct impact on Australian revenue of $1 million per annum as stated by Mr Martine.

CHAIR—Can you tell me how that is calculated? Where do you get the $1 million figure from?

Mrs Holdaway—As stated in the methodology that we developed, there are certain aspects of the protocols that cannot be quantified. However, of the measures that could be quantified, there was a particular measure in the protocol which dealt with dependent personal services income. In the past, before the protocol was negotiated, we actually had a threshold within that where, if income was earned by short-term visitors, it would be exempt in the country where the service was provided. The requirement was that the person would have to be in the country less than 183 days and earn an amount of less than $A2,600. The protocol actually removed that monetary limitation, because, as you probably agree, $2,700 is not a great deal now. As a result of that, there was going to be a slight effect on Australian revenue, so the $1 million captures that. Obviously, there is an offsetting amount on the Canadian side as well, but what we have presented to the committee is the direct impact on Australian revenue.

CHAIR—So you mean a Canadian working in Australia for the period of 183 days?

Mrs Holdaway—Or less.

CHAIR—And so there is no monetary amount now?

Mrs Holdaway—Yes, and that is actually now a standard international tax treaty practice. Most of our other double tax agreements also do not have monetary limitations.

CHAIR—So that applies to Australians in Canada?

Mrs Holdaway—Yes, as well; that is right.

CHAIR—Just the time limitation, not the monetary amount?

Mrs Holdaway—That is correct.

CHAIR—I want to ask just one general question and then we will go to questions around the table. Can you explain how these agreements prevent international tax evasion? One of the benefits is said to be the tax evasion point. Can you explain that?

Mr McBride—I guess in a number of ways, specifically with Malaysia, we have excluded from the treaty benefits the Labuan harmful tax measure. So that is a specific thing treaties can do.

CHAIR—That is one specific business scheme.

Mr McBride—Yes, specific to Malaysia. But, more generally, in all the treaties we now negotiate we have exchange of information agreements which allow countries to share information on taxpayers that can add to the compliance programs of the respective countries' revenue agencies.

CHAIR—You said there is information sharing. What level of information sharing is there?

Mr McBride—You can make specific requests or there are spontaneous exchanges of information on companies and their financial data. A country can get access to bank information on behalf of the other country—whatever the other country requests. It also allows us to speak to the other country and occasionally organise under memoranda of understanding how that information will be exchanged and how that information will be used.

CHAIR—What limitations are there on the free flow of information about a particular entity's tax affairs?

Mr McBride—Limitations?

CHAIR—Tax matters are usually highly confidential to the taxpayer, so I am just wondering: what is the level of information that one government can obtain from another government about an individual's or an entity's tax matters?

Mrs Holdaway—I think this is where the treaties are very helpful in that the exchange of information article contained within the particular treaty has a lot of guidelines available as to how it can operate. For example, the OECD has articulated a number of guidelines on how EOI articles can apply. So within that context it does address the privacy issues, and it is done within the strictest sense when the exchange of information occurs between two countries. If you would like to know about the specific guidelines, we can take that on notice and provide you with more information. It is in that context that the treaties will prevent fiscal evasion because they allow both countries a framework within which specific information can be exchanged on entities if required. Having said that, I say it is in the context of the guidelines provided on how such articles should be implemented.

CHAIR—Theoretically, could the Australian government find out more about a taxpayer's affairs through a request to the Malaysian government than they could otherwise?

Mrs Holdaway—Theoretically, yes.

Mr McBride—In the absence of an exchange of information agreement there is nothing to facilitate that flow of information.

Mrs Holdaway—If the information, for example, were not captured on the Australian side, theoretically as a result of the exchange of information article we could actually obtain more information about the entity in question.

CHAIR—Say an Australian entity is doing business in Malaysia, for example, and the Australian Taxation Office is not able to capture all the information it wants through procedures

in Australia. Could the tax office inquire of the Malaysian government for information on the entity's tax affairs in Malaysia?

Mr Martine—These are elements of the double tax agreements that are administered by the tax office and essentially facilitate the information that they can provide to the other country and vice-versa. Mrs Holdaway has outlined the general principles of exchange of information agreements. I think that as a general issue we could provide on notice to the committee reasonably quickly an outline of how these exchange of information articles are actually administered in practice by the tax office along with the revenue authority in the other country.

CHAIR—And how that actually leads to a reduction in international tax evasion, because I assume that is what the information is being sought for.

Mrs Holdaway—Yes.

Mr Martine—We will take that element on notice and provide some supplementary briefing to the committee.

Mr WILKIE—I note that Malaysia actually asked for an extension of the tax-sparing arrangements and that normally we would not agree to such incentives. Why did we agree on this occasion? What made this agreement different?

Mr McBride—It was only a limited extension, and it allowed us to exclude Labuan, so it was a negotiated position. They were quite strong in pushing for tax sparing and allowed us to exclude Labuan, so it was a balance in the negotiation positions.

Mr WILKIE—Normally, though, we wouldn't agree?

Mr McBride—No.

Mr Martine—There is a government policy not to proceed and to bring to an end the tax-sparing arrangements, but like most treaty negotiations sometimes you need to give up something to get something back in return. It is a limited extension that does not particularly cost much to revenue, and the balanced decision was that it was something we could afford to continue for another 12 months in return for getting Labuan excluded from the treaty benefits.

Mr WILKIE—And there is an understanding on the Malaysian side that it would permanently expire next year?

Mr Martine—There is certainly a general principle that we do not continue with tax sparing or reintroduce tax-sparing arrangements.

Mr WILKIE—In paragraph 9, I saw that we traded something for that. Was that worth it? We agreed to exclude people who received benefits from the Labuan offshore business activity regime. So that was our trade-off for the extension. Do you believe that that was worth while?

Mr McBride—Absolutely.

CHAIR—You said it was not possible to quantify the cost to Australia of tax-sparing arrangements. In the past have you been able to quantify what those sorts of arrangements have cost?

Mr Martine—In the supplementary information we have attempted to quantify the tax sparing. We recognise that it is difficult. I think we came up with a figure of $1 million to $2 million. As for whether it is $1 million or $2 million, it is a difficult judgment call.

CHAIR—Where is that? Sorry, I am trying to follow you.

Mr Martine—This is on page 5 of our supplementary brief to the committee.

CHAIR—Page 81?

Mr Martine—That is correct. It was provided, I think, early last week. It is on page 5.

CHAIR—Page 5?

Mr Martine—In the context of the limitations in trying to cost some of these things we have estimated it.

CHAIR—In the order of $1 million to $2 million.

Mr Martine—It is small. Whether it is closer to $1 million or $2 million we are not 100 per cent sure, but it is in that small range.

Mr ADAMS—This seems to be the issue. Our brief here is the public interest. We are trying to justify treaty making and these agreements with other countries. We do have to try to qualify what we have given up as a country.

Mr Martine—Yes.

Mr ADAMS—And we have to have some methodology to do this. I take it that Treasury is taking that on board, to some degree. You say that it is very difficult; you have given us a figure of $1 million. The original arrangements of double taxation were that if a company had an agreement to invest in another country we wrote that down and only claimed the taxation from that agreement; we did not tax the agreement that they had made with the other country. Why can’t that stuff be transparent? Why can’t we just cost it? I find it difficult to understand why we cannot do that.

Mr Martine—As we discussed with the committee on 27 August, we will cost all the elements of the treaty. They will be published as a government measure. We will quantify, as best we can, the benefits flowing out of double tax treaties. It becomes difficult when you start talking about dynamic benefits: as a result of a change in the tax system, what can we anticipate in terms of a change to taxpayers’ behaviour which might then affect the benefits? That is where it becomes very difficult to quantify these sorts of changes to the tax system. We are not talking about a change in the company tax rate, for example; they are quite small. Where there is a

direct cost to Australian revenue we will certainly cost that. Where there are benefits to Australian business—for example, in the Canadian protocol there are reductions in Canadian withholding taxes—we have made an attempt in the supplementary information provided last week to quantify those. It gets difficult beyond that static analysis to try to identify and quantify the dynamic benefits that might flow as a result of those changes.

Mr ADAMS—The technology skills gained or the information gained by an Australian company: is that what you mean by 'dynamics'? What do you mean by 'dynamics'?

Mr Martine—Using the Canadian protocol as an example, there is a reduction in dividend withholding taxes in Canada. In terms of the dynamic benefits, one would then need to start making assumptions about what the subsidiary of an Australian based multinational that is operating in Canada might do as a result of that dividend withholding tax change. Will it retain those profits within Canada and seek to invest there or will it repatriate those profits back to Australia? If so, does it invest the profits here or distribute them to shareholders?

Those are the sorts of assumptions you make. Once you start making one assumption you get a series of them and they just build and build and you get to the point where you can produce a figure but it becomes meaningless—it is so much driven by assumptions that it would not be beneficial to pretend that we have this magical number. The other change is this: what behavioural changes might we expect as a result of Australian companies that do not actually operate in Canada but which, as a result of the reduction in Canadian withholding taxes, may now start to invest in Canada? Once again, it is very difficult to start making those sorts of assumptions. When we talk about dynamic benefits it gets very difficult to start quantifying them.

Mr KING—I found your supplementary report very helpful, detailed and informative, thank you. Is that supplementary report the result of our negotiations with the minister's office over the US double tax treaty?

CHAIR—Yes, it is a result of the meeting we had on 27 August to discuss better ways of producing information for the benefit of the committee.

Mr Martine—On 27 August, the original NIA had been fed through the system, so we endeavoured to revise the current version of the NIA. For all future NIAs we will try to produce something that looks like the supplementary briefing from last week.

CHAIR—On that point, if members of the committee have suggestions that they would like to provide to Mr Martine as to the proposed national interest analysis form, please do so.

Mr MARTYN EVANS—It is important that as much as possible goes into the public arena. However, if it is essential that some goes into the confidential section that is fine, but make it patently clear which bit you want in the confidential bit and make that really obvious and I am sure the committee will respect it.

CHAIR—Different coloured paper or something.

Mr MARTYN EVANS—Keep as much as possible in the public section because that is important, that is our job, and I think the public would want it kept that way. Obviously we do understand the need for some departure from that.

CHAIR—I think it is quite clear, Mr Martine, that if more ended up in the confidential brief than was necessary we would obviously be very concerned about that and would rather the balance be the other way, as Mr Evans says.

Mr Martine—As a general rule I would expect most of the information to be in the public version.

Mr KING—At paragraph 34, page 41 of my document dealing with the DTA with Canada, you mention an arrangement regarding dispute resolution and a GATS with Canada. What is that arrangement?

CHAIR—This is paragraph 34 of the original NIA.

Mrs Holdaway—That is an agreement procedure that is provided under the World Trade Organisation general agreement. We have built that into the Canadian protocol as a specific article because under the existing agreement if there is a dispute between two countries they can use that particular measure to bring the dispute forward. However, there is no requirement that the two countries have to agree that there is a dispute and do it in a bilateral sense, if you like. Only one country is able to bring the dispute forward. Under our agreement, if the dispute is in relation to a tax dispute, both countries can agree that the dispute be taken forward. It is just to utilise the system that is already available to us in a more effective bilateral sense.

Mr KING—They agree to disagree and then ask someone to resolve the disagreement?

Mrs Holdaway—Yes, that is right—basically.

Mr KING—I presume it is the WTO disputes committee that is being referred to there as the resolving body. Is that right?

Mrs Holdaway—That is correct.

Mr KING—What happens if they do not agree?

Mrs Holdaway—Do you mean what happens if the two countries do not agree?

Mr KING—Specifically in relation to GATS, what happens if one country says, 'I've got a dispute,' and the other country says, 'We're not going to do anything about it'?

Mrs Holdaway—In the absence of the article in the protocol, I will have to take that question on notice.

Mr KING—This is a somewhat controversial scheme.

Mrs Holdaway—Yes.

Mr KING—Paragraph 43 of your submission refers to ‘land-rich entities’. What is meant by that in the context of the decision mentioned there?

Mrs Holdaway—That was a specific paragraph that we built into the article on alienation of property where, for example, taxpayers hold shares in companies but the asset which supports the company is, say, land. In the Lamesa case a disposal of the shares in such companies did not trigger that particular article, so we have built in a new paragraph to ensure that if the property is situated in Australia we secure taxing rights over the sale of shares in such companies.

Mr KING—Is that for capital gains tax purposes?

Mrs Holdaway—Or income tax purposes. This is to make sure that, if the profit is generated through sources in Australia—that is, the land or the property in Australia—we secure our taxing rights over such income or capital gains.

CHAIR—Perhaps you can explain something for me about implementation. In your submission you state that the regulation impact statement for the DTA with Malaysia ‘will accompany implementing legislation’. Is it not the usual practice that it gets tabled with the national interest analysis and the treaty text?

Mr Martine—I think it is attached to both.

CHAIR—I have not found it.

Mr McBride—Except in the case of Malaysia. We were advised by DFAT that, for Malaysia, the regulation impact statement did not need to be attached.

CHAIR—Can you tell me why?

Mr McBride—No, but I am happy to follow that up with our DFAT colleagues.

CHAIR—On page 78, at paragraph 40, under the heading ‘National Interest Analysis’ with Malaysia it says, ‘A Regulation Impact Statement will accompany implementing legislation.’

Mr McBride—That was our understanding when we wrote it. Then when we went to table it, DFAT said it was not necessary, so we did not attach it. I am happy to follow up the reason why.

CHAIR—Can you find out why, so that I will have an understanding of when there will be a regulation impact statement and when there will not be. There is one for Canada.

Mrs Holdaway—Yes.

Mr Martine—We can certainly provide it to the committee, because we have it for the legislation.

CHAIR—That is great, but I would like to know procedurally why it was not tabled with the treaty text, as I thought was the usual practice. If there is a reason for that, let us know. If there is any reason why we cannot see it before the legislation is tabled, then perhaps you can let us know that as well.

Mr KING—You have told us that there is $5.1 billion of Australian investment in Canada, but you have not told us how much they invest in Australia. Do you know how much it is?

Dr Hammer—As of 30 June 2001, Canadian investment in Australia was about $A2.5 billion.

Mr KING—Quite an imbalance in a sense—perhaps.

Dr Hammer—Yes, perhaps.

CHAIR—Senator Tchen, do you have any questions?

Senator TCHEN—No, not any more.

CHAIR—Mr Evans?

Mr MARTYN EVANS—No.

CHAIR—Mr Adams, don't tell me you have asked all of the questions you had to ask on this.

Mr ADAMS—I have finished at the moment, thanks.

CHAIR—Mr Martine, you have obviously answered a great number of concerns that the committee normally has on double taxation agreements.

Mr KING—He has done very well.

CHAIR—Thank you very much for your time this morning.

[11.40 a.m.]

CLEMENT, Mr Trevor, Assistant Secretary, Policy and Services Branch, Protective Security Coordination Centre, Attorney-General's Department

FROST, Ms Robyn Louise, Principal Legal Officer, Office of International Law, Attorney-General's Department

McCARTHY, Ms Margot, Head, Defence Security Authority, Department of Defence

SHEEAN, Ms Raelene Karen, Assistant Director, International, Industry and Projects, Defence Security Authority, Department of Defence

WISHART, Mr John Maxwell, Acting Director of Agreements, Defence Legal Service, Department of Defence

SCOTT, Mr Peter, Executive Officer, Legal Branch, Department of Foreign Affairs and Trade

SPILLANE, Ms Shennia Maree, Executive Officer, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

CHAIR—I now call witnesses from the Department of Defence, the Department of Foreign Affairs and Trade and the Attorney-General's Department to give evidence relating to the Agreement between Australia and the United States of America concerning Security Measures for the Reciprocal Protection of Classified Information. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would one of you like to make some introductory remarks before we proceed to questions?

Ms McCarthy—The purpose of the proposed agreement, commonly referred to as the general security of information agreement, is to update, simplify and strengthen the legal framework for the exchange of classified information between the governments of Australia and the United States of America. The proposed agreement will set uniform standards and procedures for exchanging classified information between government departments and agencies in the two countries. It will facilitate bilateral cooperation and further strengthen the relationship between Australia and the United States. It will continue to benefit industry in both countries by enabling companies to tender for and participate in contracts which involve access to security classified information. The proposed agreement is not controversial in nature. It is substantially similar to other legally binding agreements that Australia has entered into with a wide range of countries with which it exchanges classified information. For example, last year this committee considered similar agreements with the Republic of South Africa and the kingdom of Denmark.

Upon entering into force the agreement will replace three existing documents for the protection of classified information exchanged between the two governments. These existing documents were not, in Australian terms, legally binding. Although there is no suggestion that either party has or would fail to comply with its commitments under the existing agreements, the United States indicated that it required a legally binding whole of government agreement. Following termination of these existing instruments, any information previously exchanged under those instruments will continue to be protected in accordance with the proposed agreement.

The Minister for Foreign Affairs provided approval for the Department of Defence to be the coordinating authority for the Commonwealth in the development of the proposed agreement. Defence consulted with the Department of the Prime Minister and Cabinet, the Attorney-General's Department and the Department of Foreign Affairs and Trade throughout the negotiations. They have confirmed that the proposed agreement meets the requirements of all Australian government departments and agencies that deal with national security classified information.

The Australian government currently exchanges a large amount of classified information with the United States. These exchanges include government-to-government information; details of defence acquisition projects; permitting the other country's industry to tender for, or participate in, classified contracts and information related to cooperation between the two countries' armed forces. The proposed agreement provides the necessary protocols and security assurance to facilitate the exchange of classified information. It ensures that such information is protected by legally binding obligations.

Under the proposed agreement classified information which the government of Australia passes to the government of the United States of America will be afforded protection similar to United States information of corresponding security classification. It will not be used for a purpose other than that for which it was provided and it will not be passed to any third party without the written consent of the Australian government. Access to Australian classified information will be limited to those United States government officers whose official duties require such access. Equally, information passed under the proposed agreement from the United States government to the Australian government must be protected in the same manner. Supplementary implementing arrangements can be separately negotiated to cover particular departmental or agency issues. The agreement will not in any way prejudice the existing procedures for access to classified information by elected representatives. The agreement will not change domestic law or policy.

In summary, the new agreement updates, simplifies and strengthens the framework for the bilateral exchange of classified information between Australia and the United States which has been in place and which has worked well since 1950.

CHAIR—On the issue of who makes the request, in this instance it was the United States who requested the status of a legally binding agreement.

Ms McCarthy—Yes.

CHAIR—What specifically gave rise to that request?

Ms McCarthy—The United States became aware that the existing instruments were not legally binding. In Australian terms, they had always been politically and morally binding and, as far as Australia was concerned—

CHAIR—Whatever that means.

Ms McCarthy—they were binding. The United States became aware that those documents had not been through the processes that would cause them to be treaty arrangements. The United States requested that that occur and Australia agreed.

CHAIR—When did they make that request?

Ms McCarthy—In 1994, I believe.

CHAIR—In 1994?

Ms McCarthy—That is right.

CHAIR—And what happened between 1994 and 2002?

Ms McCarthy—The negotiations continued.

CHAIR—For eight years?

Ms McCarthy—That is correct.

CHAIR—And what brought the negotiations to a head?

Ms McCarthy—Agreement was reached on all the relevant parts of the documents.

CHAIR—When was that reached?

Ms McCarthy—In 2001.

CHAIR—Do you know when in 2001?

Ms McCarthy—I can find the exact date for you. Negotiations were finalised and the agreement was approved by the Minister for Foreign Affairs, the Minister for Defence and the Attorney-General in March 2001. There was then a request for an amendment to the agreement in July 2001. That was agreed. Ministerial approval was granted in August 2001. The agreement was finally signed on 25 June 2002. The delay between the granting of ministerial approval and the actual signing was due to the events of September 11 and then the Christmas period.

CHAIR—Between what date—

Ms McCarthy—Final ministerial approval was granted in August 2001. As I recall, there was some thought that the agreement would be signed in September 2001, but events at that

time overtook those arrangements and it was finally signed between our Minister for Foreign Affairs and the US ambassador on 25 June of this year.

CHAIR—Has there been any need to revisit the terms or the negotiated terms as a result of September 11 and the reassessment that many countries, including Australia, have made of their security arrangements?

Ms McCarthy—No. The arrangements in the proposed agreement provide all the necessary safeguards for the exchange of classified information even given that change in world circumstances.

CHAIR—Has a review been undertaken? Was it necessary to review it?

Ms McCarthy—It was not necessary. Of course, those events were very serious, but in terms of the protocols needed for exchanging classified information, they remain relevant and sufficient.

CHAIR—Back in 1994, when the US made the request that we have a legally binding agreement, had it not occurred to Australia that it was not legally binding? Was there any reason why we had not requested it to be legally binding or for treaty action?

Ms McCarthy—I will ask my colleague from the Defence Legal Service to comment on that.

Mr Wishart—Our practice is that we will only do treaties where we are requested to or required to do so. At that time, between 1950 and 1962, the treaty procedure was very different. Unfortunately, I do not know why they were not processed as treaties because at that time treaties were just coming into force on our signature. I am sorry; I cannot answer that question.

CHAIR—Has Australia ever had cause to make this request of other parties—that is, to propose treaty action in relation to the protection of classified information?

Mr Wishart—Not that I am aware of. Current practice with these agreements—as has already been indicated because two have come before you this year—is that we will initially propose an international law treaty level document.

CHAIR—We will propose it?

Mr Wishart—Yes, with those countries whom we are approaching or, if we are approached, we will propose that the document be negotiated as a treaty.

CHAIR—Previously, agreements with South Africa and Denmark have come before this committee. Is this agreement with the United States in similar terms to the documents with South Africa and Denmark and, if not, in what way does it differ?

Ms McCarthy—The documents are substantially similar. I am not aware of any notable differences. In each case the protocols and procedures are relatively straightforward.

CHAIR—So this is a fairly standard agreement?

Ms McCarthy—That is correct.

CHAIR—Article 3 on the marking of classified information is of interest to me. There are obviously differing national security classifications between Australia and United States of America so you have your little chart on page 113 of our documents, which is article 3 of the agreement. Is there any reason why there is not an international classification for what is secret, highly protected, protected or confidential restricted? There are all these different classifications.

Ms McCarthy—There is no reason that I am aware of other than that different bureaucracies give different names to substantially the same things.

CHAIR—In other words, where Australia has a national security classification of restricted, there is no United States equivalent.

Ms McCarthy—That is correct.

CHAIR—So that would be declassified information in the United States?

Ms McCarthy—No. The United States will treat restricted information in the same way that it treats its own confidential information—that is, it will treat it in its own system as being at the next level up to our restricted information.

CHAIR—So what is the difference in Australia between confidential or protected and restricted?

Ms McCarthy—There are different definitions of the harm that will come to national security if the information is compromised. I do not have the exact definitions with me, but the difference is in the use of the terms—for example, 'grave damage' in relation to the highest level of classification to, at lower levels of classification, lesser descriptions of the harm that would come to national security.

Mr WILKIE—We would be interested in seeing those classifications.

Ms McCarthy—Certainly.

Mr WILKIE—And any definitions. You might have 'grave' for top secret information, but how do you define 'grave'? There is obviously an explanation of top secret with 'grave damage' but how do you actually grade 'grave'?

Ms McCarthy—There is always an element of subjectivity in those judgments. The responsibility for classifying the information is with the originator of the information. The originator of the information will have a good knowledge and understanding of where that information sits in the scheme of things, and so we will make a judgment guided by those definitions. But, as I have said, it will always be, to some extent, subjective.

Mr WILKIE—The next question relates to access to information. Article 4 states:

Access to the information shall be granted only to those individuals whose official duties require such access and who have been granted a personnel security clearance in accordance with the prescribed standards of the Parties.

How does that affect members of parliament in the operation of their duties?

Ms McCarthy—Members of parliament and their access to classified information are addressed in an exchange of notes that was signed at the same time that the treaty was signed. And that exchange of notes makes it very clear. It states:

In respect of the requirements for security clearances in the Agreement, the Parties acknowledge the special status of elected representatives at the federal level, and confirm their intention to continue to apply their current practices to them.

That is, they do not require a personnel security clearance if they have a need to access classified information.

Mr WILKIE—Is that actually attached to the information that we have been provided?

CHAIR—Yes, it is on page 123.

Ms McCarthy—I understand that the exchange of notes was tabled at the same time as the treaty.

CHAIR—What is the current practice regarding elected representatives as referred to in the exchange of notes?

Ms McCarthy—The current practice is that they do not require security clearances—that is, they do not require to have their backgrounds investigated in the way that unelected officials do.

Mr WILKIE—I suppose the other question, going on from that then, relates to visits to facilities. Although members do not necessarily need clearance, I have noted that, particularly in the workings of this committee when we have wanted access to facilities to make recommendations on a treaty action—and I can quote Pine Gap as an example—we had no more information to base the treaty on than that which could be obtained from a public library—

CHAIR—Off the Internet.

Mr WILKIE—or off the Internet and we had no access to the facility, the staff or any other information relating to its operation on which to base our findings. Is there any protection from members who actually have access under this sort of arrangement?

Ms McCarthy—By protection, what are you referring to?

Mr WILKIE—Pine Gap was an example. But, if we needed to access facilities, what sort of procedure would be put in place for us to do that if they were restricted?

Ms McCarthy—It is my understanding that members of parliament make a request to the relevant minister, in this case, the Minister for Defence. I do not have knowledge of the specific incident that you are referring to, but I know members of parliament regularly visit defence facilities around the country and those arrangements are made in consultation with the minister’s office and the establishment concerned.

CHAIR—That is Australian Defence.

Mr WILKIE—In terms of visits, I believe that members of the American congress have far greater access to some of our facilities as members than we do—to their facilities or even to some of our facilities.

Ms McCarthy—I am not able to comment on whether or not that is the case. I imagine that it would, of course, be the case that application would need to be made to the United States government if an Australian elected representative wished to visit a US facility. I am not able to comment, I am afraid, on what the US government’s position is, other than that. I imagine they would give it consideration.

Mr WILKIE—If members of congress, for example, wanted to visit Australian facilities, would they have to have our minister’s permission to do that?

Ms McCarthy—I believe so. I can see no reason why they would not make application to the Minister for Defence. I do not know whether any of my other colleagues have any further information. It is my understanding that our minister would need to be involved in that.

Mr MARTYN EVANS—The way that the exchange of notes about members of parliament is phrased is that each party will apply their own current practice in relation to their own elected members. That is quite relevant in each of our own countries. Obviously, in the United States, the United States applies its own security practices to its own members of parliament and, in Australia, Australia applies its own practice to its own members of parliament. That is obviously very logical and rational, and clearly one understands that. I think the deputy chair is raising the issue of a situation in a joint facility in Australia where you have members of the United States Congress elected at the federal level, to which that exchange of notes refers, inspecting a joint facility in Australia. They appear to have access to a joint facility which members elected at the federal level in Australia do not have. That is the concern which we are expressing, because the exchange of notes relates expressly to the access by that country, not by the other country. It seems to me very carefully worded to exclude the reciprocal rights in each other’s country. It is worded to protect the rights of US congresspeople who, I agree, have every right to inspect their joint facility in Australia. But I would have thought it ought to imply the same right that, if we accompanied them on a visit to an Australian joint facility with the United States in Australia or, for that matter, in the United States—but we do not have any joint facilities in the United States, so that does not arise—we would get the same briefing. Would we? I think not, but I would like to know the answer.

Ms McCarthy—The joint facility at Pine Gap is covered by a separate agreement which includes the protocols relating to visits. I do not know the details of that agreement—and I am not aware of any instance in which access has been refused—other than to say that there is a

separate agreement covering that which includes visits. Unfortunately, I cannot comment on the specific concern you have about that joint facility.

Mr MARTYN EVANS—My concern is not really about Pine Gap.

Mr WILKIE—It is the principle.

Mr MARTYN EVANS—I have no concern as a member of parliament about Pine Gap. I am perfectly happy with our relationship with the United States government. I have no concern about our defence relationship in that context at all. I am not expressing that kind of security concern, and I am quite happy that they are there at Pine Gap. That is not my complaint. Pine Gap is probably a bad example in some ways, because it evokes other memories that I do not want to evoke. But the exchange of notes, it seems to me, is carefully worded so that it specifically excludes that very point that, because there happen to be joint facilities in Australia but not in the United States—because we do not really have a reason for that, but they have good reasons for having joint facilities here—we have an exchange of notes about the equality of elected members at the federal level. I somehow doubt that, if we had a US congressional visit to a joint facility in Australia and if elected members at the federal level were to join that congressional visit, we would be able to share the briefing. That is my point. Under this exchange of notes which seeks to create the impression that such things are possible, I somehow doubt that that would be permitted. Perhaps that can be elucidated.

Mr Wishart—The first point I would make is that I would have no idea of what the US government briefed its elected representatives on. That would be between the US government and its elected representatives. But I do understand that in the joint facilities they have specific national areas. For example, no Australian can go into or would be only rarely allowed into the US area. Similarly, we have specific Australian areas. I presume that the specific briefings they get would relate to their own areas. For example, if US Congress members came to visit Australia, unless appropriate permissions were obtained I doubt if they would be allowed into the Australian-specific area. Similarly, I doubt, unless we obtained relevant permissions, if our representatives would be allowed in the US-specific area.

I would assume that, given the nature of the joint facilities, the briefings as to the rest of the area would be fairly similar but, again, you do not know and I am not aware of the US practice in respect of its elected representatives. I do not know, for example, if they do give them security clearances. In Australia’s case, we do not, but I cannot speak for the US. I would suspect that the differences would relate to those areas of the joint facilities which are very specifically either a US national area or an Australian national area.

Mr MARTYN EVANS—I am not actually making a complaint, because we do not have any facts before us. My concern is not about the US government. It is really about what the Australian government, not the US government, would make available to elected representatives. My concern is not directed at the US government’s position.

Mr Wishart—The agreement does not go to what the government would release to its elected representatives. That would be a matter for the elected representatives to take up with the government or the minister concerned. That is not covered—

CHAIR—The point is that the exchange of notes makes it clear that it is dealing with current practices between US congressmen and senators and the US government and then Australian members and senators and the Australian government. Given that this is a matter of interest to the committee—it does arise under this agreement—would it be possible to provide us with a summary of how this does operate? You have said you would assume that this would be the case and that the Australian government would provide this sort of access.

Mr Wishart—Is your question directed to the actual practices?

CHAIR—Yes.

Mr Wishart—In that case I will ask Mr Trevor Clement to speak.

CHAIR—I am not asking for specifics. I am not asking specifically about Pine Gap, because I understand that is under a separate arrangement, but about your comments regarding the assumption that the US would only allow access to US facilities and the Australian government would only allow access to its own government facilities.

Mr Wishart—No, what I in fact said was 'unless appropriate permissions were obtained'. I would direct you to Mr Trevor Clement for answers to this.

CHAIR—Yes, Mr Clement or whoever has authority to speak on this aspect of it. As Mr Evans said, we are not complaining; we are trying to understand. Would it be possible to set out, for the benefit of the committee, how access to facilities—

Mr MARTYN EVANS—In general.

CHAIR—in general, either joint or Australian facilities, would operate vis-a-vis elected representatives at the federal level. I have certainly had a rather interesting experience in trying to get access to the SAS barracks, which I visit on a regular basis: all of a sudden I am told no, I cannot, for reasons best known to somebody.

Mr MARTYN EVANS—Yes, I think that would be useful.

CHAIR—Is it possible to set out the guidelines, the protocol, for elected representatives' access?

Ms McCarthy—Recognising that they fall outside this agreement, in that this is about the exchange of—

CHAIR—The exchange of notes actually talks about our current practice.

Mr MARTYN EVANS—It goes right to it.

CHAIR—I am trying to work out what is our current practice.

Mr WILKIE—Specifically, article 4 talks about visits to facilities—

Ms McCarthy—In each other's countries; to clarify, and we are happy to provide the information, you would like information—

CHAIR—I do not want to ask you to do something that is outside the terms of this agreement, but do you accept that this issue arises under the agreement in terms of its reference to access and also under the exchange of notes, as it talks of current practice? I would like to know what our current practice is.

Ms McCarthy—Certainly we can provide that. Can I just clarify: are you interested in access to Australian facilities by Australian members of parliament and access to US facilities by Australian members of parliament?

Mr MARTYN EVANS—Joint facilities.

CHAIR—Whatever it is that the Australian government has control over. I am not asking for an analysis of the US government's current practices with regard to US elected representatives, just the Australian government's practices relating to Australian elected representatives at the federal level.

Ms McCarthy—Certainly.

Mr WILKIE—Included in that I would like to see the number of US congressional visits that have been undertaken to joint facilities, as opposed to Australian members of parliament visiting joint facilities. If possible, I would like that to include Pine Gap but if that does not fall within this agreement that is fair enough.

CHAIR—Does that not depend on how many requests have been made?

Mr WILKIE—I would like to see how many visits and how many requests have been made generally, because I think that is important. As Mr Evans said, I have no problem with the United States and their operations at Pine Gap. I do have problems with access to those sorts of joint facilities by Australian members of parliament and I want to make sure that they have access equal to that of the US Congress.

Mr MARTYN EVANS—I want to change the topic to something a little more esoteric. You may be more or less happy to do that. I am very interested in the question of encryption policy in this context. The treaty refers to electronic information being transmitted by encryption. I ask generally: is most of the exchange of information these days done electronically or is it still done by paper based means? If we exchange classified information with the United States, do we do so in container loads of paper or do we do so electronically?

CHAIR—That is classified. They are not going to tell you!

Ms McCarthy—I am not able to provide a breakdown but it would be safe to say that information is shared both electronically and in hard copy.

Mr MARTYN EVANS—Yes. I assume that we are moving more and more into electronic means, although I imagine there is still a certain amount that is paper based. Obviously, I am not asking for specifics about how you do these things—that matter is clearly is a defence issue—but I am looking at policy in these areas. Is there still a view in our department—and perhaps flowing from the United States—that encryption is something which should be kept within the defence and security areas and should not flow into the commercial areas? Or do you take the view that it is something which can be shared in both communities now—that it is something which should also be encouraged in the commercial and public arenas?

There was a view some years ago that this should be discouraged in the commercial and public arena because that would allow the Osama bin Ladens of this world to have secure communication. Clearly, encryption is now available in the public arena, so it is very hard to put that back in the computer. What is the general view now in the defence community?

Ms McCarthy—It would perhaps be helpful to talk about wider government. The government's e-business initiative on delivery of online services et cetera actually requires the protection of information flowing between the Australian population and the government agencies that provide them with services—it requires encryption. In relation to that sort of equipment—and indeed the encryption that is on all government systems—the Defence Signals Directorate, in its role as the national information security authority, actually provides advice to government agencies on levels of encryption. I say 'levels of encryption' because a higher level of encryption will obviously be needed to encrypt, for example, highly sensitive information flowing between departments—

Mr MARTYN EVANS—Like intelligence.

Ms McCarthy—correct—than would be required for e-business. But, as a general rule, it is accepted that encryption is necessary for the safeguarding of personal, financial and other information across the board.

Mr MARTYN EVANS—We have experienced something of a turnaround in that context: it is now not the case that you would seek to limit that in the commercial world in order to continue to allow intelligence to operate in that environment. There was a view that one should limit encryption standards in order to allow intelligence to operate in that environment, and I can understand why that would have been the view some years back. Now, one could take the view that having weak encryption in the public arena is a greater threat to public security than having strong encryption. Do organisations like the Defence Security Authority encourage the adoption of quite strong encryption in the public arena or do they try to limit it to encryption at strong enough levels to prevent casual break-in—but not too strong?

Ms McCarthy—To clarify, the Defence Security Authority advises internal Defence on policy in relation to matters like encryption. As I mentioned, the Defence Signals Directorate advises whole of government. It is not that the Defence Signals Directorate would or would not attempt to limit levels of encryption; it is that it would advise on appropriate levels of encryption for different types of information, recognising that there are high costs involved as you increase the level of encryption. In order to spend the Commonwealth's resources wisely it is important that when risk treatments are put in place for threats to our security they are appropriate to the threat.

Mr MARTYN EVANS—I think that is an excellent policy. If that is where we are at, then that is very sound.

CHAIR—On the issue of failure to comply with the agreement, if there is an unauthorised disclosure of classified information what happens? What is the procedure thereafter? Are there penalties that apply?

Ms McCarthy—The first thing that happens is that the parties will advise one another that there has been a possible compromise of their information. The two organisations concerned would need to consult about the level of compromise. It is very important that the originator of the information is involved in those discussions. It will then be up to the government concerned. Again, it would keep the other government informed and would seek advice on the level of penalty to be applied to the person or company that committed the breach. For example, in the defence context the penalties might range from a minor breach due to oversight rather than malice where the penalty might be that the person receives further training in awareness through to, at the most extreme end, possible criminal sanctions for the unauthorised disclosure of classified information. The government concerned would sanction the person concerned and would keep the other government apprised of what action it was taking. Obviously it would want to reassure the other government that appropriate steps had been taken and that any systemic problems, for example, that might be identified are addressed.

CHAIR—How is the agreement monitored to ensure that all the clauses are being complied with by the parties?

Ms McCarthy—There is not, as I understand it, a formal monitoring regime in place but, for example, the Defence Security Authority and its counterpart agency, indeed a number of agencies in the United States, are in reasonably regular contact. I would say that monitoring is not by way of a formal program but by way of ongoing counterpart visits and other contacts between the two agencies. I am speaking there only for Defence not in the whole of government perspective.

Mr Wishart—Article 12 of the agreement also permits the security representatives of each party to visit the other party.

CHAIR—Yes, for the purposes of discussing, observing and implementing procedures. I just wondered whether there was overriding monitoring.

Mr Wishart—It is a whole of government document and we can only speak for Defence. As Ms McCarthy has indicated, there are regular consultations within the defence realm; as to the other government departments who exchange classified information we cannot speak on their behalf.

CHAIR—We anticipate having security personnel in Australia visit the United States for the purposes of reviewing this agreement.

Ms McCarthy—I should point out that there are internal defence arrangements for audits of, for example, Australian companies.

CHAIR—Yes.

Ms McCarthy—Those Australian companies which are handling US classified information will obviously come under that regime. So there are internal monitoring and evaluation arrangements that relate to the protection of classified information in Australia. They do not relate specifically to this agreement but to the protection of the information which falls under this agreement. So we would be able to advise our government. And it is my understanding that the United States has similar audit arrangements in place for its own facilities. That is a means by which we could advise the other government if something came to our notice that was of concern.

CHAIR—For the purposes of ensuring that this agreement is being complied with you have the security visits that are anticipated under that article.

Ms McCarthy—Yes, the agreement allows for either country to visit the facilities. An important part of the preparatory work for these sorts of agreements is visits between the two organisations—for example, between the two defence organisations—to look at one another's facilities to see first-hand how those arrangements are being dealt with. That is important in the preparatory work.

Mr WILKIE—I have a question but it is not specific to the United States. Where we have defence personnel from other countries using our facilities for training purposes et cetera, what sorts of security arrangements do we have in place to protect classified information?

Ms McCarthy—Before a member of another defence force is able to use or enter an Australian facility, arrangements are in place to ensure that we receive notification that they have the requisite security clearance. If, for example, the visitor is an exchange officer involved in the day-to-day running of the defence organisation, arrangements can be put in place for them to access 'Australian government access only' information. Of course, it is never the case that 'Australian eyes only' information would be passed to anyone other than Australians.

CHAIR—Thank you very much for your attendance here today; it has been most helpful.

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

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.23 p.m.