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JOINT COMMITTEE ON TREATIES

Monday, 9 December 2002

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

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

Terms of reference for the inquiry:

Treaties tabled in November and December 2002.

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Committee met at 10.04 a.m.

ATWOOD, Mr John, Principal Lawyer, Office of International Law, Attorney-General's Department

FEWSTER, Mr Alan, Executive Director, Treaties Secretariat, Legal Branch, Department of Foreign Affairs and Trade

FRENCH, Dr Greg, Director, Sea Law, Environmental Law and Antarctic Section, Legal Branch, Department of Foreign Affairs and Trade

KENNEY, Ms Sarah Bridget, Desk Officer, Environmental Strategies Section, Environment Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

FLANIGAN, Mr Mark, Acting Assistant Secretary, Marine Conservation Branch, Marine and Water Division, Environment Australia

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties and welcome representatives from the Attorney-General's Department, Environment Australia and the Department of Foreign Affairs and Trade. Today, as part of our ongoing review of Australia's international treaty obligations, the committee will review one treaty tabled in parliament on 12 November 2002 and three treaties tabled in parliament on 3 December 2002. I understand that representatives from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us for the proceedings, with witnesses from other departments joining us for discussion of the specific treaties for which they are responsible.

To begin our hearing, we will take evidence on the amendments made at Bonn on 24 September 2002 to appendices 1 and 2 of the Convention on the Conservation of Migratory Species of Wild Animals done at Bonn on 23 June 1979. I understand that the same representatives will then give evidence on the amendment made in Cambridge, United Kingdom, on 14 October 2002 to the Schedule to the International Convention for the Regulation of Whaling done in Washington on 2 December 1946.

Although the committee does not require witnesses to give evidence under oath, I should advise that these 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 Flanigan, do you wish to make some introductory remarks before we proceed to questions?

Mr Flanigan—I will make some opening remarks, if you do not mind. I assume you wish to handle these sequentially?

CHAIR—Yes, that will be convenient.

Amendments to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals

Mr Flanigan—The treaty action that we will deal with first, as you have pointed out, regards amendments to appendix 1 and 2 to the Convention on the Conservation of Migratory Species of Wild Animals, known as either the Bonn convention or CMS. The amendments were adopted at the seventh meeting of the conference of parties, which was held from 18 to 24 September 2002 in Bonn. The amendments to the appendices include some proposals that were put forward by Australia; these included adding to the appendices six great whale species, the great white shark and orca. In addition to those species, the convention agreed to add 21 species to the list of endangered species, and that is appendix 1; and 20 species to the list of animals for which there is an unfavourable conservation status, and that is appendix 2. Other than those species for which Australia nominated, the remainder of the species listed do not occur in Australian jurisdiction and, therefore, there is no implication for Australia. So the implications for us only relate to those we propose for nomination.

The meeting resulted in the fin, sei and sperm whales and the great white shark being listed on appendices 1 and 2 of the convention; and the Antarctic minke, Byrde's, pygmy right whales and the orca being listed on appendix 2. Australia is a range state for these species and, as a consequence, we now have become responsible for undertaking certain actions under the convention. It is important to point out, though, that this does not particularly change the legal status of these species in Australia because they are already provided with legal protection under the EPBC Act, as it currently stands. The species on this list automatically come into force 90 days after the making of the agreement in Bonn, which will be 23 December 2002.

CHAIR—These comments of yours relate only to the amendments made at Bonn?

Mr Flanigan—Yes.

CHAIR—Perhaps you could clarify a few matters about the relationship between the individual agreements and the Bonn convention. The status list provided with the national interest analysis and the text of the amendments shows a series of agreements that are signed and ratified by various countries. Can you, or perhaps even the department, elaborate on the relationship between these individual agreements and the Bonn convention?

Mr Flanigan—One of the major consequences that flows from species being listed on the Bonn convention is that it provides for range states to develop subagreements under the convention for the conservation and management of those species listed. In fact, one of the reasons we pursued the listing of the whales was so that we could proceed to discussions with our neighbour states in the Pacific on putting in place arrangements that could be used to help to improve the conservation and management of the great whales in the South Pacific, including the protection of their habitat, and activities that interact with them. So there is a range of subagreements, if you like, that can ultimately be entered into under the Bonn convention. By way of example, recently Australia entered into an agreement regarding the conservation of albatross and petrel under the agreement.

CHAIR—Under which agreement?

Mr Flanigan—Under the Bonn agreement—under the CMS convention. That was an activity that Australia as a range state led with our neighbours—Argentina and the Southern Ocean states—which provides a much more structured framework for the management of those species.

Mr WILKIE—The national interest analysis states that the listed species of great whale are threatened by not only whaling but also a range of other factors including shipping strikes, pollution, habitat degradation and unregulated interaction with tourists—that is in paragraph 13. Can you tell us some of the specific measures that the Commonwealth has taken under the Environment Protection and Biodiversity Conservation Act to protect these species listed in the amendments?

Mr Flanigan—Under the EPBC Act already—under part 13 of the act—all citations, including the six that are the subject of this listing, are provided with protection. Under part 13 it is an offence to take an action that might have a significant impact on a citation species unless that action is either for contributing to its conservation status—and that means things like taking skin samples and the like for genetic testing and scientific monitoring—or the action is not likely to have a significant impact on the species.

CHAIR—What are the consequences of an offence?

Mr Flanigan—Under the EPBC Act?

CHAIR—Yes.

Mr Flanigan—The EPBC Act has within it two particular elements. One is part 3, where it would be an offence for somebody to take an action that would have a significant impact on a threatened species. The legislation lays down penalties and provisions if people take an action that has a significant impact. The fines and the like are laid down in the legislation. I do not have them with me here.

CHAIR—What are they in the order of?

Mr Flanigan—I am advised that they are in the order of 500 penalty units or 5,000 penalty units, depending on whether the offence is conducted by an individual or a corporation.

CHAIR—So it is 500 for the individual and 5,000 for the corporation, I presume?

Mr Flanigan—Yes. So that is in relation to people who might take an action, under part 3, that should have had an environmental impact assessment. As I was saying, part 13 provides for the situation whereby people, if they are taking an action that may interfere with citations, are required to have a permit. Again, there are penalty provisions associated with that part of the legislation as well.

Mr WILKIE—In that section in paragraph 13, I can see that some of the issues there would be real problems for whales and for migrating whales in particular—things like shipping strikes, pollution, habitat degradation, climate change, sonar and seismic activity. How real is the threat from unregulated interaction with tourists?

Mr Flanigan—It is not a particular threat in regard to killing citations or necessarily endangering the population, but we believe that if unregulated tourist activity, like large vessels approaching at speed pods of whales that might have young calves with them or that are on a migratory path, is repeated in locations that are important to the whales for resting or the like, it can actually prevent them from being able to use important areas.

As a consequence, Australia, through ANZECC, has agreed to a series of guidelines that govern whale-watching activities. Essentially, those guidelines lay down the ways in which boats should approach whales: the recommended distance within which you should approach and the way you should behave in the vicinity of the whales. A place like Eden harbour, for example, where humpback whales are known to come with calves on their return migration south, is an important landfall for them if conditions are particularly bad and they need to rest before heading into the Southern Ocean. If there are large numbers of operators constantly coming at speed towards the mothers with calves and disrupting them, that will rob them of that important resting zone before they move to the Southern Ocean. The guidelines provide for the way in which people will have that interaction.

Mr WILKIE—Are they enforceable?

Mr Flanigan—Like many things that occur on the open ocean, they are difficult to enforce. They are applied as a code of conduct, particularly to people running commercial activities. If we feel that commercial operators are not abiding by the guidelines, we have the ability to take action against them, using the penalty provisions. We find that the interest of most of the operators, by and large, is in conserving and protecting the whales and doing the right thing. The vast majority of them provide briefings for tourists before they begin the session. If a boat is at sea with 20 or 30 people on it who are also whale lovers, we believe there is a very strong incentive for people to comply with the guidelines.

Mr WILKIE—What sort of education campaign do you run for private individuals?

Mr Flanigan—We have not, of late, run any particular campaign. We have in the past undertaken things like poster campaigns and that type of thing. It is very difficult to get to that large section of the boating public that has a small runabout boat and is out fishing, but we have the guidelines and information up on our web site. In the past, we have undertaken general awareness campaigns through our education programs in schools and that type of thing, but nothing that was particularly targeted at the yachting and powerboat community.

Mr WILKIE—It may be worth considering, particularly on the coast of Western Australia where there is the highest per capita boat ownership in the world.

CHAIR—In the universe!

Mr WILKIE—It is not surprising; it is a wonderful place to be with a boat.

Mr KING—The luxurious coast.

Mr WILKIE—The whales come in quite close there. It would not hurt to have a decent education campaign.

Senator TCHEN—I want to continue along this line of questioning. There are basically three types of danger that these migratory species face. The first is the posing of intentional danger to the species. We can regulate that by law. The second is the unintentional threat through interaction with tourists, which you can deal with through education. What about those interactions where the threats are posed by legitimate activities, such as entanglement in fishing gear? I presume there is also entanglement with protective beach meshing. Not only are those

legitimate activities; in some cases they might be considered by the community to be essential protection. How do you deal with that?

Mr Flanigan—That represents one of the more complicated areas which we have to deal with. With regard to legitimate businesses, particularly fishing activities, the government is currently going through a process of undertaking environmental assessment of all fisheries management arrangements. One of the factors we look at in those processes is whether or not the fishery is set up in a way that will minimise as far as possible the potential interactions with whales. The types of things that have occurred over the years, and that will in all likelihood continue to occur as whale populations recover and move into inshore waters, are things like whales getting themselves caught up in crab lines or lobster pots.

We have recently done the assessment of the western rock lobster fishery, which lays a lot of lobster pots off the Western Australian coast. As southern right whales and humpback numbers increase, that is becoming a very important migratory path. In that assessment it was found that over the last couple of years there have been, I think, three entanglements. The response teams had been out and there was no actual mortality, but it was felt that the reason for those entanglements was the way in which the fishers had set their lobster gear—when coming in from the deeper white fishing season into shallow water—with long ropes which curled up and allowed the fins and flukes to get caught. What we have done in that situation is, with the Western Australian Department of Conservation and Land Management, the Conservation Commission of WA and Fisheries Western Australia, agreed new guidelines for the fishers in terms of the way in which they set their gear, so that they minimise the risk by having shorter ropes. We have a rigorous process of monitoring what interactions actually occur into the future so that we will have the information as to whether or not the interactions are significant.

In terms of response to entanglements when they occur, most of the states now have response teams that can get out quite quickly to help free whales. It can be a very dangerous activity, of course, with a large whale, particularly if the whale is injured and there are sharks and the like in the vicinity. The ready response arrangement is the type of thing that is used as a last resort. With regard to beach netting for protection of swimmers from sharks, that is a matter for the states, because that meshing occurs within states' waters. There is very little the Commonwealth can do directly because it does become a question of the balance between interaction to protect the species with that gear and the human safety questions. We are, however, working with states, through the whale recovery plans that we are preparing, to try to encourage the states to adopt more benign methods of protecting their beaches from sharks—methods that actually take fewer species like whales.

Senator TCHEN—I take it there would be no criminal charges against any fishermen who might have set their nets that way.

Mr Flanigan—No. The nets for beach meshing are set under contract to the state government. It is effectively a pre-existing activity, and the interaction there would be considered to be one that is associated with protecting human life. So, no.

Senator TCHEN—What does 'artisanal fisheries' mean? I did not think you could raise whale fisheries in an artisanal way.

Mr Flanigan—Artisanal fisheries is a term we use for Indigenous fisheries with low technology—low input fisheries.

Senator TCHEN—I see. What happens if your rescue team goes out to rescue a great whale which has been entangled and injured and you find it encircled by a number of great white sharks? What do you do? Which side do you take?

Mr Flanigan—We look after the teams, in the first place—whoever is managing the team looks after the rescue team. The predation of whales and injured whales and the like by great white sharks is part of the natural system. As both populations recover we would expect that there will be an increase in the predation of young and injured whales. That is just the way in which the gene pool is kept strong and healthy in the marine world.

Senator TCHEN—So you would cut the whale loose and let nature take its course?

Mr Flanigan—We would do what we could without risking the recovery teams, and let nature take its course.

Mr ADAMS—I do not know who looked after the process, but the automatic entry of this treaty action can happen prior to the public's knowledge if it is in the interests of the country for it to happen before the public gets a go at it. On this occasion, that occurred. Is there any way we can get these to come before this committee before they get given the tick? Did you look after that, Mr Flanigan?

Mr Flanigan—It happened under my watch, Mr Adams. When we prepare these nominations, we go through extensive consultations, particularly in the case of the whales, with the green NGO groups. The triggers under the convention which bring them in automatically after 90 days do mean that we often do not know what the actual outcome is until it is very late in the piece. In this case, I wrote to the secretariat in August advising them of the fact that we were proposing the nominations and I will endeavour to write even earlier in the piece if we can. The difficulty that we face is that we had no certainty when we made our nominations that they would succeed and, equally, we were not aware of whether or not the other proposals that were being determined at the time would succeed.

Mr ADAMS—This committee has a brief to make sure that what you are doing is in the interests of the country and the treaty. I am not knocking what you have done, or anything like that; please do not think that. We need to make sure that you have consulted with all the groups in Australia that need consulting with. I do not know what you have done with the states, or whatever, before we get the nod on this. I think the process is going to have to be looked at; otherwise this committee will have to start saying something.

Mr Flanigan—We are aware of the concern. I will undertake to provide advice. This time we provided it on 9 August. We could have provided it a little earlier on what the terms of the proposed Australian nominations were. We can provide that as early in the piece as we can. Obviously, the limiting factor is our minister making his decision to proceed with the nomination.

Mr ADAMS—That might be the way for us to go.

Mr Flanigan—I would have to ask the secretariat about whether or not we would then have the hearing before the nomination is made. We can look into that.

CHAIR—Perhaps Mr Fewster can add something to this.

Mr Fewster—We are conscious that the committee has raised this a number of times. The last time we were here there was an issue in relation to one of the transport treaties. We are conscious of this as a broader policy issue in terms of the management of this process. We are currently looking at ways to try to avoid things happening in the way that they did in the particular transport case at the last hearing. It is an issue that we need to talk about with our colleagues in other departments. It is one that we are working on.

CHAIR—What do you have in mind? What could be done?

Mr Fewster—At the moment, it is at the preliminary stage. We need to talk to our colleagues to find ways of managing it more efficiently. The issue of automatic entry into force is one which we know the committee has views about. We are conscious of that. At the moment, I do not have anything concrete that I can put before you. It is something that we are conscious of and we are working on it.

CHAIR—Otherwise the committee is functus officio, as they say, and I share Mr Adams' concern on that.

Mr ADAMS—I cannot see that it is compromising the Australian position by letting this committee know what is going to happen prior to us getting there. That is why it should be explored. Is there a reason why you cannot tell us about what you are doing, about what species was going to be nominated et cetera prior to it occurring?

CHAIR—What would we do with the information then?

Mr ADAMS—I suppose that we could at least scrutinise it to see that it is going in the direction of our national interests.

Mr Flanigan—Once the minister has made a decision to proceed with a nomination, there should be no difficulty in providing you with advice about the nature of the nomination, the nomination documents themselves and the species that might be being proposed by Australia. I can certainly do that. I understand that the letter I provided this time provided information on the nomination proceeding but did not provide much in the way of background necessarily. Other questions might be a little more sensitive in terms of things such as how we would intend to progress the nomination. Those types of questions that might be matters of tactics, going into particular—

Mr ADAMS—I do not want to get into that; we have enough trouble with security issues on this committee. I would have thought we could get the information prior to it being given the tick. I will leave that up to the departments, hopefully, to do something about it. We are proposing eight species for listing. Under this convention, do states like Norway—who have been eating whale since Thor cast his hammer—pick up any obligations in connection with the protection of these migratory species or not?

Mr Flanigan—They certainly are involved in the process. These species now having been listed, the obligations that rest on states are to take measures to conserve the population and protect the habitat—effectively, not to make it any worse off. We use this nomination process to bolster our efforts through the International Whaling Commission to conserve whales and to create a mechanism by which we could enter into arrangements with our neighbours in the South Pacific to help bolster our proposal for a South Pacific whale sanctuary. What the Northern Hemisphere whaling nations would or would not choose to do is really up to them.

Mr ADAMS—Is it correct that all the whale species are recovering?

Mr Flanigan—Now with this additional listing, all the whale species are covered by the CMS.

Mr ADAMS—Have these other issues that I have flagged in relation to threats posed to these migratory whales—shipping strikes, oil pollution et cetera—increased in recent times? Is there a bigger threat now than there was 50 years ago?

Mr Flanigan—No. I think the biggest threat to whale populations was their active harvesting. That debate remains a live one in world circles. Pollution effects and the like have not increased but, as the whale populations recover, as they are now starting to do in a number of cases, the potential for interaction with things like shipping, beach nets and the like do increase. The risk itself has not changed but the size of the population is increasing, and so we would expect to see more of these interactions.

CHAIR—On the question of consultation, I note that the national interest analysis says that a generally favourable response was received from all jurisdictions. Obviously, that is somewhat qualified. By 'generally favourable', what do you mean or what did the national interest analysis particularly refer to? Specifically, you say that support is varied for the listing of the orca. What is the position of the different jurisdictions?

Mr Flanigan—There was widespread support for the listing of all the other species of whales. There were issues raised about the degree to which orca, as a particular species, might or might not need protection. There were also questions raised about whether or not the populations are truly migratory.

CHAIR—So these are more scientific questions, if I can put it that way?

Mr Flanigan—Essentially.

CHAIR—Who raised these concerns?

Mr Flanigan—Northern Territory, Western Australia and Victoria.

CHAIR—What did they say?

Mr Flanigan—Essentially, they raised two sorts of technical questions: firstly, do orca populations meet the definition of being migratory; secondly, are the populations at a state where they require conservation protection? The second question is largely because orca

populations were never particularly subjected to the sort of heavy harvesting that other great whales were exposed to.

CHAIR—I take it that Environment Australia's view is that orcas are migratory?

Mr Flanigan—That is true.

CHAIR—Is there a debate about that in the scientific community?

Mr Flanigan—There has been a debate. The scientific committee for the commission also addressed these particular issues before proceeding with listing the species; that is largely why they are listed on appendix 2 and not both appendices. A similar sort of issue arises with the great white shark; there is very little known about the actual distribution and movements of the species. They are large animals that in some cases predate on species that can be quite sedentary, such as seals and the like; but they also predate on other species that are highly migratory, such as tunas and those types of things. With the low level of information about what the actual migratory arrangements are for the great white shark and orcas, there is some question about whether or not the different populations around the southern oceans are migratory or not. After analysis, and following consideration by the CMS scientific advisory committee, the convention secretariat and the convention members accepted that, in all probability and on a precautionary basis, they probably are migratory and certainly deserve the conservation protection that would come from application of the convention.

CHAIR—Procedurally, what has happened to the concerns raised by the Northern Territory, Western Australia and Victoria? Has there been a response back to them?

Mr Flanigan—Yes, there has.

CHAIR—Basically advising that orcas are deemed migratory and that the population is such that—

Mr Flanigan—Providing them with advice from our point of view and the outcomes from the convention meeting.

CHAIR—You also refer in the NIA at paragraph 31 to the NGOs and environmental organisations that were presumably consulted. Were any other industry or interest groups consulted in this process?

Mr Flanigan—In the case of this particular listing, we consulted with our colleagues in AFFA—Agriculture, Fisheries and Forestry—and with the Australian Seafood Industry Council, because of the obvious potential interaction between great white sharks, whales and the fishing industry.

CHAIR—Mr Fewster, I think we mentioned on the last occasion that it would be useful, under the consultation part of the NIAs, if all groups that were consulted—whether industry, trade or whatever—were listed in the NIAs. It would be useful for the committee to know precisely how wide the consultation was. In relation to a previous treaty, the committee heard evidence about and discussed at public hearing the appropriateness of the NIA containing a list of all parties consulted. Do you see a difficulty with that?

Mr Fewster—No, we do not but, in a sense, we are in the hands of our colleagues who draft the NIAs. The line agency responsible for the treaties is the one that has the consultation role or responsibility. So, in a sense, we are guided by what appears in the NIA.

CHAIR—Perhaps the committee can pass down the line that we would like to see a list of the parties who are consulted. Under ‘consultation’, we only have the states—we presume it is the states; it says states and territories—and then a reference to the NGOs, but now we find that industry was consulted. Having a list of all parties that were consulted would be useful for our understanding.

Mr Fewster—We can amend the guidelines accordingly.

CHAIR—Thank you.

Mr Flanigan—And we will, certainly.

Mr ADAMS—You have just said that whether or not the great white shark is a migratory species relates to the ‘precautionary principle’. Is that the term you used? Is that Environment Australia’s policy?

Mr Flanigan—I am not quite sure that I follow the question.

Mr ADAMS—You talked about the evidence that came out of the scientific thinking. I think the chair was asking about what was going on scientifically and whether the great white shark was a migratory species. We have been told that it is, under the analysis of what we have been doing. You said that, basically, science came down on the side of the ‘precautionary principle’.

Mr Flanigan—Rather than getting into a debate about precautionary principle and precautionary approaches, it is probably better to say that, when these discussions are had regarding what is the balance of scientific information and whether or not a species is migratory, they are, effectively, in the end, questions of judgment. It is up to each party to put their case for what they believe to be the situation. Because of the low levels of information, particularly with regard to marine species, as opposed to birds and the like, we are required to make conservative judgments. To that extent, there is an exercise of precaution in the decision making. But it would not be appropriate to say that—

Mr ADAMS—But you do not use the precautionary principle as a decision making tool in the department?

Mr Flanigan—That is really going beyond the intention of the comment.

Mr ADAMS—I am asking you a question as to whether that was the position that you made a decision about. That is what I am asking you.

Mr Flanigan—In terms of the EPBC legislation, in making judgments about whether or not activities are likely to have an impact, when we are exercising delegated authority, the minister and our department are required to exercise—I will have to take on notice exactly what the

phrasing of the language is in the legislation. We do not have a copy here with us right now and we are mindful of how sensitive the exact use of this terminology can be in these situations.

Mr ADAMS—It is pretty sensitive terminology. Please let me know. So you use what is in the legislation?

Mr Flanigan—As the basis for our decision making.

Mr ADAMS—If you could let us have that, that would be great.

CHAIR—That concludes the discussion on this treaty.

[10.43 a.m.]

Amendments to the Schedule to the International Convention for the Regulation of Whaling

ATWOOD, Mr John, Principal Lawyer, Office of International Law, Attorney-General's Department

FEWSTER, Mr Alan, Executive Director, Treaties Secretariat, Legal Branch, Department of Foreign Affairs and Trade

FRENCH, Dr Greg, Director, Sea Law, Environmental Law and Antarctic Section, Legal Branch, Department of Foreign Affairs and Trade

KENNEY, Ms Sarah Bridget, Desk Officer, Environmental Strategies Section, Environment Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

SPYROU, Mr Arthur Milton, Executive Officer, Environment Strategies Section, Department of Foreign Affairs and Trade

FLANIGAN, Mr Mark, Acting Assistant Secretary, Marine Conservation Branch, Marine and Water Division, Environment Australia

CHAIR—The committee will now hear evidence on the amendments done at Cambridge, United Kingdom, on 14 October 2002 to the Schedule to the International Convention for the Regulation of Whaling done at Washington on 2 December 1946. 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. Who would like to make some introductory remarks?

Mr Flanigan—The special meeting was called in large part to deal with this particular issue and related to providing for indigenous harvest of bowhead whales, covering indigenous people in remote Siberia, Russia and remote Alaska. These peoples, previously under the convention, had granted to them an indigenous harvest. The issue was not able to be resolved at the 54th meeting of the IWC in May. It was taken over to this special meeting in Cambridge.

The ultimate effect of the decision is to grant for a five-year period an indigenous quota of 280 bowhead whales, the harvest of which is to be spread over five years with a limit with regard to how many can be taken in any particular year. The species is a species that does not occur in Australian waters, so it was largely an issue for other jurisdictions. Our participation, of course, was taken with regard to our longstanding policy position relating to indigenous take of a small number of citations. Like the other one, this change takes effect 90 days after formal notification. According to my records here, that will be 19 January 2003.

CHAIR—Mr Flanigan, what changed between the May meeting, when agreement could not be reached, and a couple of months later in Cambridge?

Mr Flanigan—Principally, there was a longer period for negotiation.

CHAIR—Can you elaborate on the circumstances of the negotiations?

Mr Flanigan—Not particularly—I was not there.

CHAIR—Was anyone there from Australia?

Mr Flanigan—Our delegate who was there is currently overseas.

CHAIR—Who was that?

Mr Flanigan—Ms Robyn Bromley. It is fair to say that the 54th meeting at Shimonoseki got fairly acrimonious and some issues were unable to be resolved. This one required a little more time for the international parties to get together and arrive at an agreement, which was essentially to provide for a continuation of the situation that had occurred for the previous five years.

CHAIR—So it is just a continuation of the five-year period?

Mr Flanigan—The creation of another five-year period with another discrete quota.

CHAIR—So it is the status quo?

Mr Flanigan—Essentially.

CHAIR—So those who were negotiating for a change did not get their change?

Mr Flanigan—I think you will find that this issue was swept up as a byplay to issues that other parties were trying to achieve at the 54th meeting.

CHAIR—Was a separate meeting specifically convened for this issue?

Mr Flanigan—No. There were other issues on the agenda, but this was the one that resulted in a change to the instrument.

CHAIR—In what sense?

Mr Flanigan—This one actually changes the schedule to provide for the continuation of the quota. It essentially changes the years that were referred to previously to a new set of years, to make up the new five years. The other items that were discussed at the special meeting have not yet resulted in particular changes to the convention itself.

CHAIR—Will there have to be another meeting for them?

Mr Flanigan—There is a series of ongoing meetings in the IWC. A series of issues are under constant debate at the moment, particularly in regard to things like the establishment of a management framework. These issues are tense in international terms, and the meetings are quite protracted and, depending on which side of the fence you sit on, progress can be slow.

CHAIR—So, in effect, all that was achieved at this meeting in Cambridge was an amendment to a schedule that continued the five-year period for another five years?

Mr Flanigan—I would not go so far as to say that was all that was achieved.

CHAIR—That is the outcome.

Mr Flanigan—The change to the indigenous harvest was all that was achieved that actually changes the convention.

CHAIR—It must be a very frustrating process.

Mr Flanigan—It can be very frustrating.

Mr MARTYN EVANS—Especially if you are a whale.

CHAIR—I do not think the whales are represented at the meetings.

Mr Flanigan—Sadly.

Senator TCHEN—I am not sure whether I should direct this question to Mr Spyrou or Mr Flanigan. With the international convention on whaling, I noticed the list you have includes countries like Austria, Mongolia and San Marino. I do not remember any whale ever getting close to any of those states. Why are they on this international convention?

Dr French—The International Convention for the Regulation of Whaling, like all international conventions with global scope, is open to all sovereign states. The fact is that there are a number of states in the International Whaling Commission, which are states parties to the International Convention for the Regulation of Whaling, that have themselves not engaged in whaling, at least not in recent historical time, who nonetheless have a strong interest in the broader issue of the conservation of whales and have therefore become parties to the convention.

Senator TCHEN—So it is really subject to branch stacking, isn't it?

CHAIR—Country stacking.

Senator TCHEN—For this particular amendment, you talk about a quota for aboriginal subsistence whaling. Is that the term actually used in the convention or is it just an interpretation?

Dr French—Yes, there is a schedule to the International Convention for the Regulation of Whaling relating specifically to aboriginal subsistence harvesting of whales. It is under that specific schedule that the amendments are made. It is expressly provided for.

Senator TCHEN—I know that in Australia the hunting of dugongs for food by Aboriginal communities is permitted even though dugongs are protected. This is a similar sort of thing, I presume. However, in terms of scale it is rather different. Whereas you might argue that hunting dugongs is actually contributing to the food stock, and therefore is subsistence, an annual hunting of a rather large animal like a whale can hardly be related to subsistence living. It is more ritual, isn't it?

Mr Flanigan—No, in these particular cases they are genuinely for subsistence. These people live well up in the Arctic Circle, inside the Arctic Circle, and they live for long periods in very remote locations. Their access to other forms of protein is extremely limited, so this hunt, which has a maximum limit of 280 over five years—not 280 each year—is purely for subsistence purposes. It is for actually providing protein to these highly remote and isolated peoples. There is, of course, in anything like that, in the culture that has developed around this type of activity, a cultural dimension as well, but the principle that is underlying the decision to permit the continuation is that it is genuinely subsistence.

Senator TCHEN—If it has a cultural basis as well, is there any requirement that hunting has to be done in the traditional manner?

Mr Flanigan—As I understand it, hunting is required to be undertaken in a way that does not result in trade or the establishment of a commercial basis. It is traditional.

Senator TCHEN—I would like to ask you for an explanation of the provision in the convention itself. This is just for my curiosity. I draw your attention to clause 8 of the schedule, which says that the number of baleen whales taken during a particular period cannot exceed the number of blue whale units. Then part (b) of that goes on to describe the equivalence of what I take it are smaller whales than the blue whale units. It describes fin whales, humpback whales and sei whales. It does not describe anything else. I take it baleen whales are represented by only these three groups. Is that correct? Is there no other type of baleen whale?

Mr Flanigan—I am advised that those provisions relate to the old commercial whaling element and do not relate to the traditional subsistence harvest.

Senator TCHEN—I am not talking about subsistence now; I am just trying to get my head around this convention itself.

Mr Flanigan—Sorry, could you repeat the question.

Senator TCHEN—The convention sets limits on the basis of blue whale units, and it says that the number of baleen whales taken every year cannot exceed so many blue whale units. Then it goes on, in clause 8 of the schedule, to define the relationship between blue whales and what are presumably smaller whales than blue whales. It says that two fin whales equal one blue whale, 2½ humpback whales equal one blue whale and six sei whales equal one blue whale. They are the only three so defined. Are there other types of whales that belong to the baleen whale group that are not listed here? Does that mean there is an open season for those?

Mr Flanigan—I will have to rely on my whale expert sitting behind me.

Dr French—Could I just add that, again, not having the text in front of me, I apologise for a lack of entire clarity, but our understanding is that those provisions are relating to the no longer occurring commercial whaling, and that particular schedule to the convention, and that this method of counting various species of whales relates to that schedule, which no longer applies, to the extent that the moratorium is in place. It is a different means of assessing creatures than the one under the aboriginal subsistence whaling, and it is an Australian policy and expectation that therefore this method of counting will never again be applied. That would be our aim from the fact that the moratorium is in place.

Senator TCHEN—I have gone off the topic a bit. I am just trying to understand how this convention actually works. I am not talking about aboriginal subsistence and hunting now, just about how this definition will work. It seems to me that all sorts of whales are not defined in terms of limits. Minke whales are not mentioned in this convention at all. Does that mean you can just go out and hunt as much as you like? Also, there are things like right whales. My understanding is that that is a baleen whale, but it is not defined either.

Mr Flanigan—We might have to take that question on notice and look at that particular set of provisions. We are not particularly familiar with them.

CHAIR—Finally, there were Australian representatives at this meeting in Cambridge?

Mr Flanigan—Yes.

CHAIR—So we had one person there essentially observing.

Mr Flanigan—We were active participants in this meeting, as we are in all IWC meetings.

CHAIR—What was our interest in this specific amendment?

Mr Flanigan—In terms of Australian domestic legislation and jurisdiction, none particularly, but we were active participants in that meeting, as we are in all IWC meetings.

CHAIR—Putting across Australia's point of view.

Mr Flanigan—Yes.

CHAIR—Thank you for your time this morning. Thank you for your attendance. We will now move on to the next treaty.

[10.59 a.m.]

International Treaty on Plant Genetic Resources for Food and Agriculture

ATWOOD, Mr John, Principal Lawyer, Office of International Law, Attorney-General's Department

BURDON, Dr Jeremy James, Assistant Chief, Division of Plant Industry, Commonwealth Scientific and Industrial Research Organisation

BURNS, Mr Craig Stuart, General Manager, Trade Policy, Market Access and Biosecurity, Department of Agriculture, Fisheries and Forestry-Australia

HERRMANN, Ms Kristiane Elfriede, Manager, FAO Plant Genetic Resources Treaty, Trade Policy, Market Access and Biosecurity, Department of Agriculture, Fisheries and Forestry-Australia

MORRIS, Mr Paul Charles, Executive Manager, Market Access and Biosecurity, Department of Agriculture, Fisheries and Forestry-Australia

FEWSTER, Mr Alan, Executive Director, Treaties Secretariat, Legal Branch, Department of Foreign Affairs and Trade

WHITE, Mr Adrian, Executive Officer, International Intellectual Property Section, Services and Intellectual Property Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade

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

CHAIR—I welcome witnesses giving evidence relating to the International Treaty on Plant Genetic Resources for Food and Agriculture, agreed to at Rome on 3 November 2001. 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. Then we can proceed to questions.

Mr Morris—Thank you for the opportunity for AFFA to appear before your committee today. I would like to make a few introductory comments on some of the key features of the International Treaty on Plant Genetic Resources for Food and Agriculture and to highlight its importance for Australia, especially for our food and agricultural sectors. In practical terms, the treaty establishes a system that defines access by Australian plant breeders to worldwide collections of plant genetic material. It also provides a framework through which to conserve plant genetic diversity in food and agricultural species, to use these species sustainably and to enable them to be shared equitably and fairly. In doing so, it supersedes a non-binding undertaking which was established in 1983.

The international competitiveness of our food and agricultural sector depends heavily on a steady flow of plant breeding improvements. To be able to deliver these improvements, plant breeders must have access to plant genetic material which, for virtually all of our commercial agricultural crops, needs to be sourced from overseas. It is important that this plant genetic material is effectively conserved, either outside its natural environment, which is ex situ, or in its natural environment, which is in situ. The treaty is central to the achievement of those objectives and so is important to Australia’s interests.

The core of the treaty is a multilateral system of access and benefit sharing which establishes arrangements for transfer of plant genetic material between contracting parties to the treaty. In practice, this system will provide the legal basis for the open flow of plant genetic material for research, development, training and conservation through a standard material transfer agreement. The treaty sets out how the multilateral system would operate. It will apply to a specific list of plant genetic resources, which is annexed to the treaty, under the management and control of the contracting party and in the public domain. For example, the list includes varieties such as wheat, maize, sorghum, rice, potatoes, apples and citrus as well as a number of other fairly important plants for Australian agriculture. Relevant public domain plant genetic resources for food and agriculture under the management and control of the Commonwealth government would be included, with the treaty providing full potential to include plant genetic resources for food and agriculture under the management and control of others, including state and territory governments. There is provision for inclusion of material from other sources, including from international collections of significance for food and agriculture such as those of international agricultural research centres.

The treaty’s multilateral system specifically provides for existing property rights to be protected, for material under development to be made available at the discretion of the developer and for access to in situ resources to be according to national legislation. As such, there is no need for change to existing Australian arrangements involving conservation of or access to in situ resources.

As I said, the treaty would be implemented administratively in Australia and would not require legislative change. Within Australia, there are a wide range of stakeholders, particularly Commonwealth, state and territory governments and non-government agricultural research organisations and plant breeders with direct interests in being able to access material from the international multilateral system.

The treaty provides for payments to be made by those seeking to utilise and commercialise plant genetic resources derived from the multilateral system who do not make them available for ongoing research and development. The detail of such payment obligations, based on commercial practice, will be settled through the governing body of the treaty, to which Australia will become a party upon ratification. Ratification will also give us a say in the agreed plans and programs developed under the treaty’s funding strategy.

It should be noted that the treaty does not deal with matters which are the subject of other international agreements in other fora. Thus, the treaty does not deal with trade in and use of genetically modified organisms. Nor does it deal with standards or criteria for protection of patents, plant breeders rights or traditional knowledge. It is recognised that the treaty has a potential for benefiting both developed and developing countries, as evidenced through the list of 77 countries and the European Community which have signed the treaty and the 11

ratifications to date. That is two more than the national interest analysis which we submitted last week, reflecting the addition of two more ratifications since then.

CHAIR—Who are they?

Ms Herrmann—Sierra Leone and Nicaragua.

Mr Morris—India and Canada are also among the countries that have ratified the treaty. The treaty negotiations were difficult and took around seven years. They touched on complex intellectual property, access and benefit sharing considerations under discussion on other international fora. There have been wide-ranging consultations with states, territories and non-government agricultural research, plant breeding and community interests throughout the negotiating process. Those consultations have continued during the decisions on signature and also now in the lead up to ratification. Australia is participating in meetings preparing for entry into force of the treaty. Stakeholders are being closely consulted on those meetings as well.

In summary, there has been wide recognition of the advantages that can be gained by Australia from the treaty. Australia, as a member of the treaty's governing body, would be able to advance its interests in securing access to plant genetic resources for food and agriculture through their long-term conservation, sustainable use and a fair and open multilateral system. To be able to do so, Australia would need to ratify the treaty. This concludes our opening statement, which we have on disc for the secretariat. We would be happy to answer any questions from the committee.

CHAIR—You said that the treaty does not deal with a number of specific areas that are covered by other treaties perhaps. You mentioned GMOs. What is the relationship, if any, of plant genetic resources to genetically modified crops?

Mr Morris—It is possible that some of the plant genetic material which is held in plant banks around the world may actually be used to assist in research into genetically modified organisms. The treaty is a general treaty. It deals with all plant genetic material for whatever research purposes it is actually being used for, whether that is to make genetically modified organisms or to make conventional varieties of plants. It is not specifically on GMOs.

CHAIR—Who actually holds these plant genetic resources within Australia?

Mr Morris—They are held by a number of different agencies and sources. For the Commonwealth government, probably the prime holder of those is CSIRO and we have a representative from CSIRO here today. There are also banks of genetic resources which are held by the state and territory governments or government agencies as well. There would also be some holdings of plant material by private research groups. These are the main ones; that would basically cover it.

CHAIR—So would we have a very clear idea of who owns what in this country?

Mr Morris—Yes.

CHAIR—So what CSIRO holds, what the private banks hold?

Mr Morris—Do you mean whether we as a Commonwealth government have a broad register of holdings of plant genetic materials across the board? I might ask CSIRO to answer that question. I am not aware that we do have that sort of list.

Dr Burdon—Each germ plasm bank or seed store has a comprehensive catalogue of the material it holds. In Australia there are five or six major germ plasm banks around the states and there is one in CSIRO. It is a very small one relative to the banks which are, for example, in New South Wales.

CHAIR—Are these registers publicly available for inspection?

Dr Burdon—The material in them is made available to bona fide users—to plant breeders, scientists and so forth. The material is maintained under particular conditions so that it maintains viability and has to be regenerated. In terms of access, it is not generally available to the general public because of the issues involved in producing sufficient seed and so forth, but it is available to any bona fide user.

CHAIR—How does Australia stand in its stocks of this sort of material if we compare it to a similar country? Are we a leader in this or are we novices?

Dr Burdon—We have people who have contributed significantly to the international germ plasm banks. There are a number around the world which constitute major holdings. For example, there is one at IRRI which is a rice collection that has well over 100,000 different collections of rice lines. Around the world there are major international centres, individual countries have a range of arrangements and we have our own series of arrangements.

CHAIR—Can you perhaps elaborate on the character of plant genetic resources for food and agriculture and how they are actually used; what do we actually do with it?

Dr Burdon—In essence, as you would know, the vast majority of things we grow in Australia are in actual fact derived from overseas. We do not have any natural genetic resources for most of our crops. To improve yields and so forth or to get material which may have genetic traits that we need—for example, salt tolerance and so forth—we have to have access to material which has been collected in its native range. An awful lot of that material is already available in international or national collections overseas. So scientists who need that material make arrangements—they contact those germ plasm banks—and a range of material is brought in from overseas and is then screened for the particular trait needed.

CHAIR—So, essentially, in terms of the exchange of information, Australia stands to benefit under this treaty?

Dr Burdon—Absolutely.

CHAIR—Mr Evans, do you have some questions?

Mr MARTYN EVANS—Yes, I do have a number of questions. I might just ask a number of questions and you might indicate when others wish to intervene.

CHAIR—You will just keep asking until we stop you?

Mr MARTYN EVANS—Yes, I think that is basically the idea, as is our normal operating procedure. This is a very general treaty but there are a number of plant species listed in the annexure to the treaty. Am I to assume from that that the treaty applies only to the species listed in the annexure or that those in the annexure have a special status in some way?

Mr Morris—I think it is fair to say that the species there at the moment have a special status in that they are specifically identified under the treaty as those species to which the treaty would apply. Parties to the treaty could choose to use the same sorts of arrangements for other species in terms of negotiating material transfer agreements with other countries or other users and so forth. You could apply the same provisions in the treaty to other plant species if you wish. We would also like to see that list of species extended over time to a list of other species.

Mr MARTYN EVANS—Given that Australia now if it accedes to this treaty will have a number of obligations in relation to the germ plasm banks—which our colleague from CSIRO has referred to and which also exist in the state agriculture instrumentalities and, to some extent, in the private sector potentially in the future—how do we enforce those obligations on people over whom we have no legal control? Given that there is no register, given that we have absolutely no authority over these organisations, if we only implement this treaty administratively—you say that it requires no legal changes, no legislation by the Commonwealth, but we acquire a number of obligations and in the future we might well want to make a number of arrangements in relation to all of this, but we would have absolutely no legal right to do so—how can we sign this treaty and make no legal changes?

Mr Morris—I think it is probably fair to say that the obligations of the treaty will apply mainly to the Commonwealth holdings of plant genetic material. As that is mainly held by CSIRO, there is a direct interest in CSIRO conforming to the requirements of the treaty. It needs to be remembered that there are significant benefits in complying with the treaty because you have better access to the international overseas banks of stock of genetic material. So there is a direct interest for people involved to be parties to that.

We expect the states and territories to want to engage and they have indicated a willingness to engage in this treaty. There is no direct requirement under the treaty for us to enforce it directly with them, but they have indicated that, because of these benefits that they see in being involved in the treaty themselves, they are interested in administratively applying the treaty to their own stocks and resources as well. For private bodies it would really be on a voluntary basis as to whether they are directly involved in it or not.

Mr MARTYN EVANS—The CSIRO is not signing the treaty and the Commonwealth has no legal authority over the CSIRO. So, at some point, if Australia actually wished to implement the treaty so that it could provide some steps over it, it would have to actually have legislation because, other than that, it depends entirely on the voluntary cooperation of all of those involved.

Mr Atwood—Because the CSIRO is a Commonwealth agency—and perhaps I am not especially familiar with the nuances of how it operates and the legislation under which it operates—there certainly would be a capacity for the Commonwealth to provide some guidance to the CSIRO on how it undertakes these obligations. But I think that what has just been said is

a pertinent point: the benefits from the treaty go to those who participate in it. I think that provides an incentive for parties to act in compliance.

Mr MARTYN EVANS—I have no doubt that the CSIRO will be generous, cooperative and helpful, as the CSIRO has always been in its long and glorious history. I did not mean to suggest otherwise. It is simply that the whole thing relies on voluntary cooperation. To say that we do not need any legislation in the longer term may not really be quite true. But it is not a point that I really wanted to pursue. It is just an observation.

In the longer term, I am very interested in the constant use throughout the document of a lot of terms, which I think probably come from the Europeans. There are a lot of references to farmers' rights, fair agriculture, ecological principles and sustainable development. Not one of these is defined in the treaty. I think that is fairly interesting. I do not know how we really define any of those, or 'equitable participation in the sharing of benefits' and so on, and they never actually get around to defining how any of those things are to be actually spelt out in a treaty like this.

When someone uses the genes from a listed crop which has been in the public domain for generations or years and no-one knows where it was ultimately developed—and no individual farmer can claim that he actually developed wheat, because it is 2,000 or 5,000 years old—and when the CSIRO discovers a useful gene in this and then applies it to some Australian crop, which then becomes valuable, how do you define where the intellectual property originated? Which indigenous farmer in which original country then claims to have the intellectual property to which the 'fair use' applies under the treaty? Who do we pay?

Mr Morris—I think that assumes implicitly that any payments that are made under the treaty will go to the country from which the genetic material originated. That in fact is not what is intended. Any payments that are made in terms of compensation under the treaty firstly are only made in instances where the material produces a commercial end product and that end product is not fed back into the system and is not available for further research and development. In those circumstances, when payments are made—that is, when the breeding company tries to protect commercial rights in the plant material—a payment will be made to the governing body or central body of this treaty. Then the members of the governing body—and in the case of Australia, we would be a member if we ratify—will make a determination on how that money will be allocated to assist plant genetic development and conservation and so forth in developing countries. So there is not a direct one-to-one linkage of the payments to the originating country.

Mr MARTYN EVANS—How do we determine what that payment will be?

Mr Morris—That is a very good question, because at this stage it is not determined. That is going to be an issue—perhaps one of the first issues—for the governing body to determine once the treaty comes into force. That is a key reason why Australia wants to ratify early before the treaty comes into force, so that we are actually a party to the governing body that makes a determination on how that payment will be determined.

Mr MARTYN EVANS—I am interested in some of the issues that are raised in article 6, 'Sustainable Use of Plant Genetic Resources', which states:

The Contracting Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.

Does this contemplate that we are promoting and developing the policy and legal measures in our own countries or in other people's countries? Article 6 goes on to refer to 'pursuing fair agricultural policies'. I am not quite sure who defines what 'fair' is in this context. It says that we are going to apply 'ecological principles in maintaining soil fertility and in combating diseases, weeds and pests'. What are ecological principles? Is this organic farming or is this Ingard cotton? What precisely are 'ecological principles'? What is 'fair agriculture'? Is it the farmer in France who burns down McDonald's? What are these terms in treaties that are never defined but are defined presumably in each country according to its own domestic politics, I suppose?

Mr Morris—I think there were a number of questions there. I will try to answer them as best I can.

Mr MARTYN EVANS—I think they all have one root, really.

Mr Morris—I will try to answer them as best I can, but I might ask my colleague, who participated quite actively in the negotiations, to give you a bit more detail. Just to answer in general terms to start with, this article on sustainable use of plant genetic resources provides a number of general conditions on parties to the treaty to promote the sustainable use of plant genetic resources within their own country. Australia's set of national laws and legislation means, I believe, that we are probably fully in compliance with this particular article and so it would not require any significant changes for Australia. As for terms like 'farmers' rights' and those sorts of things, I think it is fair to say that they were deliberately not defined in the treaty. They are terms which were probably better not defined in a number of ways and for a number of reasons, because different countries seem to have different views on that and we could have ended up in quite endless debates on those terms. Since they were not fundamental to the nature of the treaty, we felt that it was better to make sure that we had the substance of the treaty negotiated in terms of the multilateral system and that we had the material transfer agreements tied down and some of those more difficult to define terms not actually tied down in the treaty, which would have formed a distraction. I think they were included in order to get sign-off by some of the developing countries, in particular. I might ask my colleague whether she would like to add anything to that.

Ms Herrmann—Thank you, yes. This treaty has been negotiated to harmonise the non-binding undertaking with the convention on biodiversity, the objectives of which are conservation and sustainable use. So this reflects an application of the sustainable use considerations into the framework of plant genetic resources for food and agriculture.

Mr MARTYN EVANS—But what are we committing ourselves to when we say that we will pursue fair agriculture policies and that we will apply ecological principles? What does it mean?

Mr Atwood—The obligation in article 6 is in fact contained in article 6.1. We have heard a bit about the background as provision. It is partly to provide guidance to those jurisdictions that do not yet have domestic policies and programs that provide for sustainable use of agriculture. Article 6.2 provides a list of illustrations of the sorts of actions that parties may take in pursuit

of the obligation under 6.1. But none of the particular items in article 6.2 are required to be undertaken by any particular country.

Mr MARTYN EVANS—I realise that, but I think the truth is that no-one would admit to what any of those things actually recommend. No-one would admit publicly to wanting any of those things recommended.

Mr Atwood—Some of these questions are matters which it probably would be appropriate for the governing body in due course to provide guidance on for the parties.

Mr MARTYN EVANS—I suppose the only other sort of question which I would actually like to talk about is—

CHAIR—Are you then inviting me to interrupt you?

Mr MARTYN EVANS—Absolutely. Article 9.2 states:

(b) the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources...

That is one of the few farmer's rights that is defined. I am not quite sure what that right constitutes, because the contracting parties are agreeing to recognise this right. So how do farmers, who are identifiable persons, acquire this right to equitably participate in sharing these genetic resources and their benefits? How does one allocate that equitable right?

Mr Morris—I will have a go at answering this to start with, and then perhaps I will ask my colleague Ms Herrmann to give a little more detail. When we talk about the benefits of this agreement we are talking quite broadly. There are many benefits in the agreement—for example, for Australian farmers—associated with the fact that having access to plant genetic resources from overseas means that our breeders continue to make productivity improvements in our crops, which will be of direct benefit to farmers in Australia. Farmers in developing countries may benefit, for example, if funds collected in the governing body are allocated to assist in conservation of genetic material in their countries.

Mr MARTYN EVANS—So it is that kind of benefit?

Mr Morris—That is the way I interpret that, but I might ask my colleague whether she wants to add anything more to that, having experienced the discussions first hand.

Ms Herrmann—As to the farmers' rights question in article 9.2.—I would also refer to the Office of International Law for some advice on this—the right is actually subject to national legislation. So again, as in the previous question, it relates to how it is actually defined in national legislation. It describes some of the elements which a national government may wish to implement if it chooses to do so.

Mr MARTYN EVANS—But it would be up to the international government in, say, a developing country as to how they evolve it back down on the farm—

Ms Herrmann—That is right, exactly—as to how they choose to implement this.

Mr MARTYN EVANS—as in the Andes, with the original breed of tomato or something?

Ms Herrmann—Yes.

Mr MARTYN EVANS—Thank you, Madam Chair, for your indulgence.

CHAIR—Thank you, Mr Evans. Mr Ciobo?

Mr CIOBO—I have a couple of questions to tease out the way in which this sharing of information and knowledge and IP, to the extent that it is relevant, relates between the private and public sector.

Mr Morris—I am not sure I fully understand the question, but I will have a go at it and if I have not quite got it—

Mr CIOBO—For those private companies that are engaging in R&D and those types of things.

Mr Morris—Under the treaty they could access material in international gene banks and international plant genetic resource banks. They would be required, though, to either make the products of that research available for further research and development as part of the benefit sharing aspects of this or, if they wanted to retain intellectual property rights to that material and prevent other people from accessing that material that they have developed, there would potentially be a payment associated with the use of that material. That is basically so that there are, I guess, benefits from these international gene banks that are either gained through access to material as developed or through this payment mechanism. So I guess that is an answer to your question in terms of the role of the private researchers.

Mr CIOBO—In terms of the split in the retention of this knowledge and this data between public and private institutions, can you give me some percentages? Does the bulk of this knowledge reside within public institutions or private institutions?

Mr Morris—I think it is fair to say that the bulk of it is in public institutions. I am not sure whether you were here a bit earlier when our colleague from CSIRO mentioned that there are 100,000 rice varieties held within a particular international gene bank, for example. There are many varieties of wheat and so forth that are held in CIMMYT. CSIRO holds large banks of plant genetic material and so forth. By far and away the majority is actually held in public institutions of some sort.

Mr CIOBO—So at present what is the means for the swapping of this information?

Mr Morris—At the moment, there is an informal undertaking which preceded the treaty and that assists in transfer of material. I suppose what the treaty does is build on the existing undertaking and puts more substance around that undertaking so that there is a more defined process of transfer of material and also there is this benefit sharing aspect to it which enables the material to be fed back into the international research community or for payments to be made. That is really what the treaty adds to the existing system.

Mr CIOBO—Would it be fair to say that the bulk of the information that is being put into the international public domain would reside with developed countries already, so the ones that truly stand to gain the most are developing countries?

Mr Morris—It depends how you define the international agricultural centres which hold a lot of this material. I think they are jointly owned, in a sense, by developed and developing countries. Some of them are actually based in developing countries. Ms Herrmann, do you have anything to add to that? Do they have direct ownership?

Ms Herrmann—The international agricultural research centres hold collections in trust subject to agreements with the FAO, and the treaty will clarify the arrangements in the future through agreements with the governing body. The treaty, of course, respects private property rights. So it covers material that is under the management and control of the contracting party and in the public domain and in respect of that material which is held in trust under agreements between the Food and Agriculture Organisation and the international agricultural research centres.

Mr CIOBO—I am a little ignorant on agricultural matters. Correct me if I am wrong, but I would have thought that Australia retained a competitive advantage in this type of area over a number of other countries with respect to the R&D that we have invested in a lot of the types of crops and the gene technology associated with this type of thing. Is that a fair comment?

Mr Morris—We have some advantage, but in order for us to continue to develop new plant varieties, we actually need continued access to these plant genetic resource banks in other countries.

Mr CIOBO—But at the moment we do not get that access?

Mr Morris—We do at the moment, but the treaty will actually define—as I implied before—the conditions under which future access will be obtained and also the benefit sharing arrangements which will be associated with that access.

Mr CIOBO—So it would be fair to say then that what this does is formalise a loose agreement, so to speak, without any additional burdens in terms of buying into—

Mr Morris—That is pretty close. I think there are some additional obligations here. It would be fair to say that if plant breeders in Australia choose to actually retain the intellectual property associated with the development of material which was sourced originally from one of these international gene banks, there is an additional obligation on them or on CSIRO to actually make a payment. So in a sense there is an additional obligation there. But it does largely formalise the existing arrangements to a certain degree in terms of transfer of genetic material around the world.

Mr CIOBO—The flip side of that coin though is that if another country were to use Australian sourced material and they were to make a payment, I take it from the response you gave earlier that that money need not necessarily—and most probably would not—come to Australia but rather would go to the governing body for determining where it is most needed in terms of promoting the ideals of this treaty. Is that right?

Mr Morris—That is correct.

Mr CIOBO—I share the concerns that Martyn Evans raised with respect to article 6 and article 9, in particular, 6.2(a). To what extent does that tie in with the loose arrangement that currently exists?

Mr Morris—I think the key thing there is that, as far as Australia is concerned, we have a fairly good set of arrangements in place already to promote the sustainable use of plant genetic resources within Australia. As my colleague from Attorney-General's mentioned earlier, this is largely directed at a set of suggested measures that other countries—particularly developing countries that do not have such good arrangements in place as we have—might put in place to help them promote the sustainable use of plant genetic resources in their own country. I think the direct implications of this for us would be reasonably minimal.

Mr CIOBO—I recognise that article 6.1 provides for the commitment. Do you see that article 6.2(a) would have the scope to provide ballast for an argument that there needs to be, for example, agricultural subsidies and these types of things as part of ensuring that we maintain a diverse farming system, taking into account cultural aspects of particular farming methods and things like that?

Mr Morris—No. One of the key issues that we raised a number of times during negotiations, including in a statement at the end of the negotiations, was that this treaty would in no way obviate the obligations of countries with respect to other international agreements, including agreements under the WTO. So to the extent that a country was required to reduce subsidies for agriculture under the WTO, that would supersede any requirements under this particular condition.

Mr CIOBO—Is that spelt out in this treaty?

Mr Morris—It is spelt out in the preamble, which states:

Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements.

That is a language which is implying, in particular, a broad range.

Mr CIOBO—Thank you. Thank you, Chair.

Mr ADAMS—I am just wondering if there is a value on the gene banks or bio banks that we have. Has there ever been an effort to try to cost them or put a value on them?

Mr Morris—Not that I am aware of specifically. There have been a number of studies which have looked at the value of outcomes from those gene banks. For example, research has been done—I think by New South Wales Agriculture—on the benefits of new wheat varieties that were derived from the CIMMYT database, which is one of those international agricultural research centres. In the 20 years to 1993, New South Wales Agriculture estimated about $A2.64 billion in benefits to Australia as a result of CIMMYT derived wheat varieties. There have been international studies too looking at broader benefits to the world from those germplasm banks, and the benefits there are in the multi billions of dollars as well. There is no benefit per se in

having a lot of material held in a gene bank. Where the benefit arises is when that material is used for research and you get the outcomes in terms of commercialisation of new plant varieties and so forth.

Mr ADAMS—Or we are keeping an old species; nobody wants to grow that wheat any more because it is not commercially the flavour of the month or it is not quite as productive as others. I understand we still keep those species. It is just like some people try to keep the old chook species that are not popular any more. Isn't that right?

Mr Morris—There may be some conservation benefit. Quite often researchers will actually go back to older varieties and bring them forward again and use them as the basis or as an element of new varieties of plants that they are breeding. There may be some conservation benefit, but there is also that benefit in holding those older species for potential future use as well.

Mr ADAMS—There are a lot of other banks in the world which we are endeavouring to pull together here or to work together with so that we have actually got a public bank of these things, as opposed to multinational companies getting their hands on these things and using them for their own profit motives.

Mr Morris—Certainly this supports the international regime of holdings by the international agriculture research centres, which have been an important source of research material for a long period of time. So, yes, that is true.

Mr ADAMS—For how long?

Mr Morris—Some of these have been around for decades. I think CIMMYT was one of the first ones. Our CSIRO representative may have a longer term memory than I have in terms of the length of time involved.

Dr Burdon—I am afraid I cannot give you the actual date, but there was a major push through FAO in the fifties and early sixties to get these much more organised. CSIRO and Australia played a major role in that. The IARCs are now very large organisations and they contain what is invaluable material. One hates to say that something cannot be valued, but the material that they hold is irreplaceable.

Mr Morris—It is probably fair to say that they really came into their own during the late fifties, early sixties and into the seventies when we had that green revolution of dramatic improvements in rice, maize and wheat varieties. That is really when they came into their own.

Mr ADAMS—Before genetic modification?

Mr Morris—There was a lot of manipulation of plants long before genetic modification.

Mr ADAMS—Very much so; I agree with you. Thank you, Chair.

CHAIR—I have a couple of questions about the governing body. Is there a timeline applicable to the establishment of the governing body and which parties will or will not be on it?

Mr Morris—The governing body will become established upon the treaty coming into force. The treaty comes into force once 40 parties have ratified the treaty. At this stage, as I mentioned earlier, 11 countries have ratified. We expect that a large number of other countries will ratify over the coming few months. I guess we would like to be one of them.

CHAIR—You guess we would like to be one or we absolutely would like to be one?

Mr Morris—Absolutely, in terms of the benefits to us. Sorry, I shouldn't have used 'I guess'.

CHAIR—I am just trying to get, for the committee's understanding, the timing—if one were to proceed to ratify—of Australia's participation, if that is what the committee recommends and the government decides to do.

Mr Morris—Once we ratify we become a party 90 days after that, assuming that the treaty has not come into force in the meantime. If the treaty has come into force I think there are slightly different arrangements.

Ms Herrmann—The treaty enters into force 90 days after the 40th ratification, so the timing of when we lodge our instrument of ratification will determine when the treaty enters into force for us.

CHAIR—So we want to be one of the first 40?

Ms Herrmann—Yes.

CHAIR—If a party joins after it coming into force and during the 90-day period, is that party entitled to be on the governing body?

Ms Herrmann—All countries that ratify or accede or approve the treaty are entitled to be on the governing body.

Mr Morris—But we would not be on there until 90 days after we ratify. So to answer your question specifically, if 40 countries ratify and, say, a month later we ratify we wouldn't be able to be a member of the governing body until 90 days after we actually ratified.

CHAIR—So the governing body will ultimately be comprised of all contracting parties?

Mr MARTYN EVANS—But we would miss out on an early opportunity to influence the first decisions if we were not amongst the early ratifiers?

Mr Morris—Very likely. So ideally we should be in there from day one.

CHAIR—Eleven countries have ratified so far. Have you an idea of where this rash of other countries ratifying is going to come from? Will it be all of the European Union or something like that? What is our expectation?

Ms Herrmann—Some 77 countries, including the European Community, have signed and all of those countries have indicated their intention to progress towards ratification.

CHAIR—As a matter of interest, article 25 talks about signature and includes the International Atomic Energy Agency. How did they get into the act?

Ms Herrmann—It is because it is a UN organisation. It is a legal question in terms of eligibility, because it is a question of eligibility for the governing body.

CHAIR—I understand the United Nations as such can be a signatory and it adds the International Atomic Energy Agency. I wonder if that is a standard inclusion or whether it is specific to this treaty.

Ms Herrmann—It is those countries that are member states of those organisations. So it does not actually mean that the International Atomic Energy Agency would be a member, but in fact those countries that are eligible to be members of the International Atomic Energy Agency.

Mr Morris—In terms of the specific question you are asking, Attorney-General's do not know the answer to that.

CHAIR—I find it hard to believe that the Attorney-General's Department does not know the answer to this.

Mr Atwood—The formulations on the state parties that can sign or ratify a treaty do vary from one treaty to another depending on which is the sponsoring organisation. So we can look into why that is the case.

CHAIR—I will just tell you how it turns up. Article 19.5 says that the UN, its specialised agencies and the International Atomic Energy Agency can be an observer. That is fine. Article 25 says that they can also be signatories. Is that a standard arrangement?

Mr Atwood—I think article 25 is just referring to countries. If the country is not a member of the FAO but it is a member of the UN then it can sign. If it is not a member of the FAO or of the UN but it is a member of the International Atomic Energy Agency it can sign. So I do not think this provision is talking about those organisations becoming members; it is talking about the countries.

CHAIR—Can you give me an example of a country that is not a member of the United Nations, not a member of the FAO, but is a member of the International Atomic Energy Agency?

Mr Atwood—I am not sure—perhaps Switzerland, but they are now a member of the United Nations. We could find out for you and let you know.

CHAIR—I would appreciate that. It probably does not affect this treaty at all, but I would like to know for interest's sake.

Mr Morris—I think the aim is also to make sure we have as broad a range of countries involved in this treaty as possible. The more countries the better in terms of the potential for wider benefits to be gained from the treaty.

CHAIR—But they have to be a member of something as opposed to saying, 'Anybody who feels like signing up, sign up.' You have got to be a member of one of the listed agencies?

Mr Morris—That is correct.

CHAIR—Senator Stephens, did you have some questions?

Senator STEPHENS—Yes. Mr Morris, this question is to you. I am interested to know whether the work that is currently under way in relation to plant genetic material in the area of farm forestry would fit within this treaty or would be dealt with under some other instrument.

Mr Morris—The treaty is specifically for plant genetic resources for food and agriculture; the way that is defined apparently does not include forestry at this stage.

Senator STEPHENS—Thank you.

CHAIR—Mr Fewster, you might note that attached to the NIA was a list of all of the organisations consulted. So I acknowledge that sometimes we get it right. You were very polite not to mention it, but I wanted to acknowledge that. I thank the witnesses very much for their attendance and their assistance in the hearing this morning.

[11.52 a.m.]

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management

ATWOOD, Mr John, Principal Lawyer, Office of International Law, Attorney-General's Department

McINTOSH, Mr Steven, Government Liaison Officer, Government and Public Affairs, Australian Nuclear Science and Technology Organisation

MACNAB, Mr Donald Ian, Director, Regulatory Branch, Australian Radiation Protection and Nuclear Safety Agency

IRWIN, Mr Stephen, Branch Manager, Science and Technology Policy Branch, Department of Education, Science and Training

PERKINS, Dr Caroline, Director, Radioactive Waste Management Section, Department of Education, Science and Training

BEVEN, Dr Terence Patrick, Director, Nuclear Policy and Missiles Section, Arms Control Branch, International Security Division, Department of Foreign Affairs and Trade

FEWSTER, Mr Alan, Executive Director, Treaties Secretariat, Legal Branch, Department of Foreign Affairs and Trade

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

CHAIR—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 in the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Mr Irwin, do you wish to make some introductory remarks before we proceed to questions?

Mr Irwin—Yes, I would like to make a short opening statement. The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management is a convention of the International Atomic Energy Agency which promotes the safe and environmentally sound management of spent fuel and radioactive waste. Australia signed the joint convention subject to ratification on 13 November 1998. The joint convention entered into force generally on 18 June 2001 and would enter into force for Australia on the 90th day after the date of deposit of Australia's instrument of ratification with the Director-General of the International Atomic Energy Agency.

The objectives of the joint convention are: firstly, to achieve and maintain a high level of safety worldwide in spent fuel and radioactive waste management through the enhancement of national measures and international cooperation including, where appropriate, safety related

technical cooperation; secondly, to ensure that during all stages of spent fuel and radioactive waste management there are effective defences against potential hazards so that individuals, society and the environment are protected from the harmful effects of ionising radiation now and in the future in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations; and, thirdly, to prevent accidents with radiological consequences and to mitigate their consequences should they occur during any stage of spent fuel or radioactive waste management.

Australia played a key role in drafting the joint convention and is well regarded by the international community in terms of our approach to nuclear issues. Ratification of the joint convention would be an effective demonstration of Australia’s adherence to international standards with respect to spent fuel and radioactive waste management and would also assist the states and territories by promoting systematic and secure management of radioactive waste.

I should point out that the joint convention imposes a series of obligations on contracting parties. The primary obligation is that each contracting party shall submit a national report to each review meeting of the contracting parties. The review meetings will be held every three years and the national report shall address the measures taken to implement the obligations of the joint convention as well as spent fuel management policy, spent fuel management practices, radioactive waste management policy, radioactive waste management practices and criteria used to define and categorise radioactive waste.

As stated in the national interest analysis, it is important to recognise that the joint convention sets the standard for international best practice in the management of spent fuel and radioactive waste. This is particularly relevant to Australia because the Commonwealth’s radiation protection and nuclear safety regulator, ARPANSA, must take into account such best practice in its licence application process. In other words, ratifying the joint convention helps the regulator and licence holders identify what is best practice in spent fuel and radioactive waste management, which in turn has implications for protection of people and the environment.

I would also like to point out that arguably the best value of the joint convention comes from attending the review meetings. As the committee would be aware, Australia has ratified the convention on nuclear safety and has participated in the two review meetings held under that convention so far. Review meetings of the Convention on Nuclear Safety are conducted in the same way proposed for the joint convention. Member states’ country reports setting out how the country meets the requirements of the convention are presented to a pre-assigned country group. That group peer reviews the report, offering comment on positive achievements and areas for possible improvement. This process has worked very well and I have no reason to doubt that the process would work equally well under the joint convention.

More important, however, are the beneficial outcomes of these country group meetings and the overall review meeting itself. The review meetings of the Convention on Nuclear Safety have been frank and open, allowing Australia to gain a good understanding of the regulatory framework and level of safety achieved by our neighbouring countries and other contracting parties. It has provided Australia with detailed information on how other countries approach nuclear safety, lessons learned by those countries and by the meeting as a whole, and has given us insights into how our approach might be improved. Again, I have no doubt that review meetings under the joint convention will achieve similar highly desirable outcomes.

The Commonwealth's obligations under the joint convention are covered by the Australian Radiation Protection and Nuclear Safety Act 1998. No new Commonwealth legislation is required to give effect to the obligations contained in the joint convention. The joint convention requires implementation by states and territories in areas under their jurisdiction. All states and territories with the exception of New South Wales have formally advised the Commonwealth that the legislation in their respective jurisdictions would allow implementation of the joint convention.

The New South Wales Environment Protection Authority has indicated that the Radiation Control Amendment Act 2002, which provides the framework which would allow compliance with the joint convention, has been passed by the New South Wales parliament but not yet proclaimed. Under the act, regulations will be required to enforce the provisions in the act which regulate the use of radioactive sources. The outstanding regulation is expected to be passed by July 2003. The regulation must be passed for New South Wales to comply with the joint convention.

The process of confirming state and territory compliance with the joint convention has significantly delayed the ratification process and it is hoped that the committee's approval to ratify the joint convention as soon as all jurisdictions comply with its requirements will encourage New South Wales to expedite its processes. Failure to ratify the joint convention may call into question Australia's commitment to the highest level of safety in the management of spent fuel and radioactive waste. It may also indicate that Australia is not prepared to take the required steps to ensure that there are effective defences against potential hazards so that individuals, society and the environment are protected from the harmful effects of radiation. Failure to ratify would also deny Australia the opportunity to gain a detailed understanding of waste practices in other countries through the review process.

In conclusion, I believe there is ample evidence that ratification of the joint convention would be of benefit to Australia. Firstly, there is an effective and visible demonstration of Australia's adherence to international standards with respect to spent fuel and radioactive waste management. Secondly, it will promote the systematic and secure management of spent fuel and radioactive waste across all Australian jurisdictions. Thirdly, participation in the triennial review meetings will allow Australia to remain in touch with international best practice in the safe management of spent fuel and radioactive waste. Finally, I note that widespread adherence to the joint convention will ensure that governments have in place the necessary physical and regulatory infrastructure to prevent terrorists from gaining easy access to spent fuel and radioactive waste. Thank you.

CHAIR—Mr Irwin, I note that the national interest analysis in paragraph 4 and paragraph 8 makes reference to the threat of nuclear terrorism in a post September 11 world. While I understand what you are getting at, based on intelligence reports, is this type of activity occurring now, such that this type of treaty is necessary to counter that threat?

Mr Irwin—Those matters are obviously subject to review in the normal context and have been more so in the post September 11 period. Whilst I am not aware of any specific threats regarding this type of material in Australia, certainly the changed broader international circumstances would warrant additional attention being paid to those particular issues and the risks that might be associated with that.

CHAIR—When you have a look at the countries that have signed and ratified, they are not exactly the countries that are giving rise to our concerns about nuclear terrorism threats, are they? I am just interested in your comment that if we fail to ratify the convention it is going to call into question Australia's commitment in some way. I guess it is all relative.

Mr Irwin—It may be relative. I am not quite sure what you are driving at in your comment about the countries that have ratified the convention. I guess these are International Atomic Energy Agency member countries. The intention—

CHAIR—They are not the countries that are causing the potential threat of nuclear terrorism.

Mr Irwin—One instance may be of interest on this particular issue. The Russian Federation has signed the convention. On that basis we would assume it is looking to proceed to ratification.

CHAIR—Do we have evidence to that effect? Do we have information that suggests that the Russian Federation is going to ratify?

Mr McIntosh—My understanding is that the Russian Federation has indicated an intention to ratify. All things in the Russian Federation take time; their bureaucratic processes are somewhat more convoluted than ours. We have certainly heard indications from people in Minatom that we have been in contact with. In relation to your earlier question, I would think the threat of radiological terrorism stems more from non-state actors than from state actors.

CHAIR—That was the point I was trying to make.

Mr McIntosh—Ratification, for instance, by France and implementation of the measures would make it harder for a terrorist in France to steal a source or whatever.

CHAIR—Are you suggesting that, currently in Australia, we are not adhering to world's best practice in this regard?

Mr McIntosh—World's best practice would indicate that, in relation to spent sources, you should know where they all are and they should be appropriately secured. I will leave it to others to make a judgment. Obviously, ANSTO knows where all its materials are. I will have to leave it to others to make a judgment as to whether that is the case with all the spent sources in Australia. Certainly the fact that under this convention there has to be an inventory compiled every three years and regulators therefore have to know where they are will certainly improve the security of those sources.

CHAIR—Is there a suggestion that we are not currently doing what this treaty would require us to do?

Mr McIntosh—I am not sure that you could say that that is currently the case.

CHAIR—I am asking: is that the case?

Mr Macnab—I think the point of the convention is that it gives us a framework to be able to make those judgments. The value of the convention is that you can go through the articles of the convention and assess your own performance, as is required in preparing a national report, against those things that have been agreed as being good practice by the international community. Belonging to the convention gives us that framework and everybody else is using the same framework so we can make comparisons with one another.

CHAIR—Do we currently judge ourselves against this framework? We do not just sit around and wait for a treaty to be ratified to implement world's best practice, do we?

Mr Macnab—I think it is hard to say, given the number of jurisdictions within the country. We certainly look after the Commonwealth jurisdiction and the states look after their own jurisdictions. An advantage of this particular framework is that we have to draw all of that together. I do not believe that we have done that to the extent that we would need to in order to write our national report for the convention.

CHAIR—So are you aware of any Australian jurisdiction that does not currently practise the highest international standards in relation to safety of spent fuel management and radioactive waste as would be required by this treaty?

Mr Macnab—I could not comment on that because I am not aware of the details of all the jurisdictions.

CHAIR—Who is?

Mr Macnab—I do not know the answer to that question. I would say that the Radiation Health Committee that reports to the CEO of ARPANSA would have a better idea of that.

CHAIR—So we—that is, the federal government—don't currently know whether there are any Australian jurisdictions that fall way below the standard required by this treaty, way above or somewhere in between?

Mr Macnab—It might be a long shot to say that nobody knows, but I do not know because I am not a member of that committee. That committee is set up to promote uniformity of radiation protection processes across jurisdictions.

CHAIR—Which committee was this?

Mr Macnab—The Radiation Health Committee that is set up under the ARPANS Act and advises the CEO of ARPANSA on these matters.

CHAIR—And who are the representatives on that committee?

Mr Macnab—That committee is made up of the chief radiation safety regulatory officers of each state and territory in Australia plus the CEO of ARPANSA.

CHAIR—The national interest analysis places great emphasis on ensuring that all Australian jurisdictions are up to scratch so that we have appropriate standing and we are appropriately

regarded by the international community in terms of our approach to nuclear issues. I assume that we already have that concern that we are well regarded and that we have a world's best practice approach to nuclear issues. I am just trying to find out how it is that we, on a national basis, can make that judgment. If the international community regards us well, they must know whether different Australian jurisdictions do or do not meet these international standards.

Mr McIntosh—As the national interest analysis indicates, all of Australia's spent fuel and the majority of the radioactive waste come under Commonwealth jurisdiction. That, I guess, is the basis of our reputation, as to how we manage that. As to the small amount which falls under the jurisdiction of the states and territories, what we are saying is that this process will enable the Commonwealth to get a better handle on how that is being managed. It has traditionally been the responsibility of state governments. It is only in recent years that the Commonwealth has started this. Before the ARPANS Act was passed in 1998, the structures for that coordination were much less formal. This will enable a more coherent national approach than has been the case previously.

CHAIR—So we are going to rely on an international treaty to impose standards on the states of Australia that the Commonwealth could not have imposed by way of some sort of coordinated approach from 1998.

Mr McIntosh—No, I would not say that. The standards in the convention are very general in nature. It will be a matter of the convention setting up a process of international peer review of the standards. The process of writing the report, I would suggest, will set up a process of internal peer review. So for the first time there will be more coordination among the states and the Commonwealth.

CHAIR—So we don't have a national standard that we impose across the Australian jurisdictions?

Mr MARTYN EVANS—Isn't it the case that the Prime Minister has given an assurance that, in fact, this will not be used to impose a standard on the states?

Mr Macnab—No, the process for achieving uniformity between the states and territories and the Commonwealth in radiation protection matters is through the Radiation Health Committee on which all the state and territory regulators sit. That committee prepares codes of practice and standards, and each state and territory adopts those according to the way they want to do that. The process of developing the uniform codes of practice and standards is through that Radiation Health Committee.

Nuclear safety is normally the responsibility of the Commonwealth. I think the advantage of the convention is that it gives a framework and the national report assesses the performance of each nation—in our case Australia and its six or seven jurisdictions—against a common set of standards. That is a self-assessment drawn into one place in a uniform fashion. I think that is a big advantage because the process of us going through it and drawing it together is very helpful. We can see where we have shortcomings and where we can make improvements. The peer review of our practices will also be very helpful to us by having outside people look at our practices while we, in turn, look at the processes of other contracting parties to the convention.

CHAIR—But can you tell us whether there is currently any Australian jurisdiction that does or does not need to make improvements in order to meet a particular standard?

Mr Irwin—As we indicated in the opening statement, the fact that New South Wales needs to change its legislation for us to be in a position to ratify would clearly indicate that, in that jurisdiction at least—

CHAIR—Yes.

Mr Irwin—some improvement would need to be made.

CHAIR—We have New South Wales; is there any other?

Mr Irwin—No; all the other states have said that their current legislative frameworks would permit us to ratify the convention in its current form. To add a point to an issue that was raised before, the thrust of the convention is aspirational. It is not intended to impose standards on any parties to the convention. As my colleague Mr Macnab indicated, the process is one of consultation and exchange of information, which enables jurisdictions to then take that information back to determine what they may or may not see as appropriate changes to their domestic arrangements, rather than a process of imposing standards.

Mr McIntosh—As Mr Irwin indicated in his opening statement, the Convention on Nuclear Safety is a useful guide. Under that convention, a very definite decision was made that there was to be no judgment to pass or fail parties in terms of compliance with the convention. It is a process of continuous improvement. If any state or regulator feels that its process is perfect, it will have trouble because there is always room for improvement on safety issues. The states party to the Convention on Nuclear Safety felt it was unhelpful to make judgments as to whether people were or were not in compliance. I think that would be the same under the joint convention.

CHAIR—The NIA also states that ratification will assist all Australian jurisdictions by providing an incentive to pursue the highest international standards. What incentive will be provided?

Mr Macnab—I believe that is part of the peer review process. I think that there are a number of parts to the convention. On the one hand we must make a frank review of our own jurisdictions and the way we address ourselves to the articles of the convention. We provide that for peer review and front up to a peer review meeting where we are questioned about it. On the other hand there are peer pressures from other nations or other contracting parties to achieve best practice. In the process of peer review, good practices are identified for each country and practices where improvement could be achieved are identified for each country. The pressure is on each contracting party to address those matters and to report how they have addressed and improved those matters at the next review meeting. The Convention on Nuclear Safety has shown us that the peer review process has worked and there have been improvements in the performance of a number of countries both in the regulatory regime and through the safety that is achieved in nuclear plant.

Mr MARTYN EVANS—There is a proposal by the Commonwealth to have a facility in South Australia; is that the kind of facility which is covered by the aspirational requirements of this treaty?

Mr Irwin—Yes, that is one of the facilities that we would have to report on under this convention.

Mr MARTYN EVANS—When the Prime Minister says that the government does not intend to impose on the states any obligation under this treaty, that is not the kind of obligation which he is talking about—or is it?

Mr Irwin—That repository would be a Commonwealth facility, so it would not be a question of state jurisdiction in relation to that facility. It would be owned and operated by the Commonwealth.

Mr MARTYN EVANS—What is the current status of that project?

Mr Irwin—That project is currently still going through the environmental impact assessment process.

Mr MARTYN EVANS—When would we anticipate an outcome from that?

Mr Irwin—It is possible, depending on decisions that are taken by the minister for the environment in relation to publication of the supplementary report to the draft EIS, that decisions from that process may eventuate as early as mid-March next year.

Mr MARTYN EVANS—If it is a Commonwealth responsibility in respect of the overall process and the contribution of the states to the overall issue is so small in terms of generating radiological waste, why does the Commonwealth see it as such a divided responsibility—given that we have such trouble in identifying the state contribution to this? Why are we breaking it up into so many jurisdictions?

Mr Macnab—I think that is just a matter of the law of the land. Under our Constitution each of the states regulates their own use of radioactive materials and radiation. So in general they are part of the department of health. In New South Wales they are part of the Environment Protection Agency. I guess the convention requires us to report on our legislative framework and our regulatory processes as well as the safety of the facilities. The legislative framework within Australia falls naturally within the Commonwealth and the state jurisdictions. Each of those jurisdictions has its own processes for regulating waste and the safety of waste and security of waste and each of those jurisdictions has some facilities associated with that. If we are to report in a comprehensive way against the articles of the convention for Australia as a whole, we must work in harmony with the states and territories to do so. We have put in place a process of coordinating that material. But it would be ARPANSA that would take the responsibility for documenting all of that information and putting it together in a final report that is agreed by consensus among the states and territories.

Mr MARTYN EVANS—So you are saying that at the Commonwealth level that responsibility is taken by the Department of Education, Science and Training, ARPANSA and the Radiation Health Committee. They are effectively the three groups. You have policy at

executive level from the Department of Education, Science and Training. You have the independent group, ARPANSA, and the radiation health committee at the Commonwealth level. Then you have each of the state departments of health, I suppose; does that summarise the total groups?

Mr Macnab—If we just take the jurisdictions, within each jurisdiction there is the proponent or the operator and a regulator. In New South Wales, for example, it could be hospitals or an industrial radiographer; the waste that arises from their operations would fall within this convention as well. Then we have the regulator in each state and territory as well as the regulator in the Commonwealth. The Radiation Health Committee does not hold any sway over a jurisdiction; its function is to prepare codes of practice and standards jointly across the jurisdictions that are picked up separately by the jurisdictions on a voluntary basis. So the Radiation Health Committee really acts as coordinator of this process.

Mr MARTYN EVANS—You have a list of all these people?

Mr Macnab—Yes.

Mr MARTYN EVANS—You would be happy to share that with the secretariat?

Mr Macnab—Yes, certainly.

Mr MARTYN EVANS—Excellent. I have no further questions.

Mr CIOBO—With respect to the position between the Commonwealth and the states, you said that the states have their own responsibilities and they share that with the Commonwealth. Martyn Evans said that the Prime Minister’s assurance was that this would not override states’ legislative frameworks. What are the concerns that the states have with respect to the treaty?

Mr Macnab—I am not aware that they have any particular concerns about it. It seems to be Australia’s practice that we satisfy ourselves that we are in compliance with the treaty before we ratify it. That is not necessarily the case for this, since it is an incentive convention. Looking at the states and territories there is only one that does not appear to have the full legal framework in place before we could ratify it. Otherwise each of the states and territories has indicated that they have the legislative regulatory framework in place for dealing with the safety and security of radioactive materials and wastes. What we would also need to do would be to look at the operation of the various facilities and the way waste is stored, the way that it is handled and so on, within each of the jurisdictions. Our national report would address both of those things—what is required by the law within the framework of the states and territories and how in fact compliance with that law is satisfied and achieved. By drawing that together for each of the states and territories against each of the articles of the convention, I think it would give us a pretty comprehensive view of the way Australia handles its waste.

Mr CIOBO—In what way is New South Wales deficient?

Mr Macnab—It appears to be deficient in the area of putting the act into force and having the regulations under the act.

Mr CIOBO—In terms of the practical application of putting the act into force, in what way currently does the New South Wales legislative framework differ from what is outlined in this convention?

Dr Perkins—I think they need a regulation to be able to license sources in the states. It is something that is very relevant to the convention, because it would give them the mechanism to know and identify exactly where sources were in the state.

Mr Macnab—I understand that in New South Wales at the present time they register sources under existing legislation.

Mr CIOBO—Rather than license.

Mr Macnab—Rather than through licenses of the operators and users of the sources.

Mr CIOBO—With respect to naturally occurring radioactive material, given that Australia is a source of uranium and those types of things, does any of that fall within the scope of this convention?

Mr Macnab—Naturally occurring wastes do not normally fall within this convention, but it does allow us to view the regulatory frameworks and the practices of those countries to whom Australia sells uranium to satisfy ourselves that it is dealt with in a proper manner.

Mr CIOBO—Are all of those countries that we supply to signatories to this?

Mr Macnab—I do not know the answer to that question.

Mr ADAMS—We only sell to countries that comply with this convention.

Mr McIntosh—We only sell uranium to countries with which we have a bilateral safeguards agreement, which may not be exactly the same field as this.

Mr CIOBO—So in essence what this treaty does is incentivise agencies—and, through agencies, governments—to strive for world's best practice, but that is all it does. It does not do anything in terms of in any way truly reassuring that any rogue states, so to speak—whether they sign up to it or not—will in any way be in a position where they need to comply to any more or lesser extent than they do with any previous conventions that they have been signatories to?

Mr McIntosh—I think Mr Macnab outlined how it has worked under the Convention on Nuclear Safety, which is basically this convention except you take out waste and spent fuel and you put in nuclear power plants. That has resulted in measurable improvements. I was at the first meeting and Don was at both the first and second meetings. That has definitely resulted in measurable improvements in safety in those countries. We have to take it on trust that it will work the same way.

Mr CIOBO—I accept that. I guess my point is that, for those countries that are trying to do the right thing, then certainly this is another feather in their cap. But for those countries that are

unwilling or unable to do the right thing, I am saying that this treaty does nothing to drag them up to standards that most developed countries in the world with this type of obligation are currently meeting.

Mr McIntosh—At the stage when the Convention on Nuclear Safety was first being drafted there was a philosophical debate as to whether you should set concrete standards, such as having to have so much concrete, a certain standard of pipes et cetera. It was felt that, given that safety standards are always improving, that would guarantee that in 10 years time your convention would no longer be pulling people up; if anything, it would be pulling them down. That philosophy was adopted for the Convention on Nuclear Safety and then transferred here so that, as international standards improve, the peer review process will drag national standards up with it.

Mr Macnab—For those countries that are outside the convention, it does not help. But for those countries inside the convention, article 5 of the convention states:

Each Contracting Party shall take the appropriate steps to review the safety of any spent fuel management facility—

the same for wastes—

at the time the Convention enters into force for that Contracting Party and to ensure that, if necessary, all reasonably practicable improvements are made to upgrade the safety of such a facility.

So it is an obligation under the convention that, if a party is a contracting party to the convention, they give the undertaking that they shall make those improvements that are reasonably practicable.

Mr CIOBO—Are there any additional requirements in this treaty on countries to report—other than what currently exists under other treaties—where they are unable to locate or to track or if, in some way, the system breaks down with respect to radioactive waste?

Mr Irwin—I do not think it imposes any additional obligations. As we have said before, the main benefit of the treaty is that it would link Australia into a broader international network whereby you would have the benefit of that interchange with other countries in terms of—

Mr CIOBO—It is all about systems, basically?

Mr Irwin—Yes, and continuous improvement—keeping abreast of what seem to be the best practices for handling particular issues. If they are not already being applied, you can consider whether their application in your own state would seem to be a good idea.

CHAIR—In view of the time, we might conclude the hearing at this point. It may well be that further issues will arise as we continue to consider this treaty. I thank you all for your attendance here this morning and for your assistance in relation to this matter.

Resolved (on motion by **Mr Adams**, seconded by **Mr Ciobo**):

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.

Resolved (on motion by **Mr Adams**, seconded by **Mr Ciobo**):

That this committee confirms the minutes of meeting No.29.

Committee adjourned at 12.27 p.m.