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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Monday, 16 June 2003

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

Terms of reference for the inquiry:

Treaties tabled in May and June 2003

WITNESSES

Committee met at 10.05 a.m.

CHAIR—Welcome. I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will review six treaties tabled in parliament on 14 May 2003. The committee will also receive further evidence relating to the free trade agreement between Australia and Singapore which was tabled on 4 March. The committee first heard evidence on this treaty at a public hearing on 24 March and has received 26 submissions to date. These submissions were authorised for publication and are available from the committee's web site or the secretariat.

I understand that witnesses from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us throughout today's proceedings, with witnesses from other departments joining us for discussion of the specific treaties for which they are responsible.

[10.06 a.m.]

CHARLESWORTH, Ms Lucy, Director, European Union Section, Department of Foreign Affairs and Trade

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

STONEHOUSE, Mr Phillip, Director, India and South Asia Section, 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

BOUWHUIS, Mr Stephen, Acting Assistant Secretary, Attorney-General's Department

Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, done at Canberra on 12 November 2002

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I advise you 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. Would you like to make some introductory remarks and then we can proceed to questions.

Mr Wild—The investment protection and promotion agreement with Sri Lanka has a rather long history. It was first mooted in 1994 but it received a new impetus in January 1999 with a visit to Australia by the Sri Lankan foreign minister. The Sri Lankan government's interest in the investment agreement was subsequently confirmed, the first and only round of negotiations occurred from 27 to 29 May last year in Canberra, and the agreement was signed on 12 November 2002.

The agreement closely follows Australia's model investment protection and promotion agreement text, of which Australia has 19 others currently in force. It is important to note that the agreement covers only the post-establishment treatment of investments, so decisions to admit new investments, for instance through the Foreign Investment Review Board, are retained for Australia. Amongst other things, in the provisions as set out in the national interest analysis, it provides a guarantee of most favoured national treatment, compensation in the event of expropriation of investments, protections for the transfer of moneys in relation to investments, and provisions for the settlement of disputes. As also set out in the national interest analysis, Australia is the second largest foreign investor in Sri Lanka and the Ansell Lanka rubber products plant in Sri Lanka has the largest foreign investment in an industrial plant in Sri Lanka and is the largest single industrial enterprise in the country. As set out in the consultations annex to the NIA, a large number of companies have expressed their support for an investment protection and promotion agreement with Sri Lanka.

CHAIR—Just in general terms, could you comment on the process by which these agreements are negotiated? You say Australia is currently party to 19 similar agreements.

Mr Wild—Yes.

CHAIR—How is a country selected? Who initiated the negotiation? Could you give us that overview?

Mr Wild—We believe that the Sri Lankans initiated the negotiations in this instance. Before a country is placed on what we refer to as the priority list, the agreement of the Minister for Foreign Affairs, the Minister for Trade, the Treasurer and the Attorney-General needs to be given to the entering into of negotiations. Ministers look at a number of factors in deciding whether a country should be added to the list. These obviously include the levels of investment between the two countries, actual and potential; the bilateral relationship between the parties and matters such as those. Negotiations usually take the form of the parties exchanging their model investment agreements and then either entering into formal communications or face-to-face negotiations. In the case of the Sri Lankans there was one round of face-to-face negotiations in Canberra and negotiations were conducted on the basis of the Australian model text.

CHAIR—I note that in the national interest analysis reference is made on a number of occasions to the peace process. For example, in paragraph 6 there is a reference to 'if the peace process remains on track'; in paragraph nine you refer to the 'current peace process and the prospect of a return to strong economic growth'. I think there is another reference in paragraph 13, where it refers to the acceleration of the 'current peace process'. To what extent is the success of the proposed treaty action dependent upon the success of the peace process?

Mr Wild—I think Mr Stonehouse would like to address the peace process in general.

Mr Stonehouse—I will not address the specific question of the dependency or relationship between the peace process and the success or otherwise of the treaty; I will address the peace process itself.

CHAIR—Is there a connection? You might not be addressing it, but is there one?

Mr Stonehouse—I think your question was seeking to make that connection and I think my colleague Mr Wild might be better placed to comment on that.

CHAIR—Perhaps you could talk about the peace process generally and then we will go back to Mr Wild to talk about the connection between the success of the treaty action and the success of the peace process.

Mr Stonehouse—That is right. As you may know, since 1983 there has been an active insurgency in Sri Lanka and, on occasions, a hot war between the Liberation Tigers of Tamil Eelam and the Sri Lankan government. On a number of occasions, there have been processes to try to broker some kind of long-term political settlement between the two. Previous attempts have not come to anything. As I understand it, this is the fifth attempt. It is the most hopeful and it offers the best prospects. In February of last year, the Sri Lankan government and the Tamil Tigers signed an indefinite ceasefire. By and large, that ceasefire has held to date. There have

been violations on both sides but mainly by the Tamil Tigers, including some serious violations. But that ceasefire is holding despite the fact that a couple of months ago the Tamil Tigers suspended their cooperation with the peace process and made certain demands of the government that the government has not been able to meet.

Nevertheless, as I have said, the ceasefire is holding and the Tamil Tigers have specifically said that their suspension of cooperation with the peace process does not call into question their adherence to the ceasefire. We remain hopeful that this process may bring about the political settlement that we are all looking for. The treaty we are considering today is certainly connected with that but I will leave it to my colleague to perhaps underline the exact nature of that connection.

Mr Wild—I do not think that we would see the success of the investment agreement being dependent on the success of the peace process. As set out in the national interest analysis, there is already a large amount of Australian investment in Sri Lanka which, if the treaty enters into force, will obtain the protection of the agreement. The most that can be said for linkage is that if the peace process is successful and the amount of Australian investment within Sri Lanka increases as a result, there will be more Australian investment to receive the protection of the agreement.

CHAIR—To what extent does the security situation in Sri Lanka impact on Australians working in or trading with Sri Lanka?

Mr Stonehouse—The current security situation is quite stable. Our travel advices for Sri Lanka have been changed to reflect the fact that it is now a reasonably safe place to visit, do business and live. So, for the time being, the peace process is having a very positive effect on security for not just Sir Lankans but Australians and other international residents and visitors there.

Senator MASON—I think you said in your introductory remarks that Australia is the second largest foreign investor in Sri Lanka—is that right?

Mr Wild—That is right.

Senator MASON—How large is Sri Lankan investment in Australia?

Mr Wild—We understand that foreign direct investment by Sri Lankans within Australia is quite negligible. There is approximately $30 million worth of Sri Lankan investment within Australia.

Senator MASON—So any agreement seeking to promote and protect investments would work very much in our favour, given that the balance of trade is well and truly in our favour.

Mr Wild—Yes, that is true of Australian investors receiving protection versus Sri Lankan investors receiving protection. Of course, the Sri Lankans see it as being of benefit to them because of the chance of its increasing Australian investment in Sri Lanka through companies being more confident in investing with an investment protection promotion agreement in place.

Senator MASON—Did you mention a rubber plantation?

Mr Wild—I do not know if it is a rubber plantation; Mr Stonehouse might know. I understand that it is a factory that produces—

Mr Stonehouse—Rubber gloves.

Senator MASON—Rubber gloves?

Mr Stonehouse—Rubber goods and specifically rubber gloves.

Senator MASON—Mr Stonehouse, what percentage of Australia's total investment in Sri Lanka is in those rubber products?

Mr Stonehouse—That factory is worth about $100 million. Total Australian investment in Sri Lanka is put at about $A600 million, so that makes it about a sixth of that investment. As Mr Wild said, it is also the largest industrial enterprise in the whole country.

CHAIR—The largest single industrial enterprise.

Mr Stonehouse—Yes, and obviously the largest foreign investment in Sri Lanka as well.

Senator MASON—It is easy to understand why this is important then.

Mr KING—Are the dispute resolution arrangements the normal arrangements? What experience do you have in that area?

Mr Wild—They are the normal arrangements in Australia's investment protection and promotion agreements. There is state-to-state dispute resolution, which is the traditional type in treaties between two countries. There is also investor-state dispute settlement, which allows an investor to take action against the host government in the event of a dispute relating to an investment. Under the 19 investment protection and promotion agreements that we have in force, we have never gone to state-to-state dispute settlement or investor-state dispute settlement. There have of course been issues in relation to the investment protection and promotion agreements, usually regarding Australian investments within other countries, but these have alway been worked out before recourse to the dispute settlement procedures in the agreements.

Senator SANTORO—I apologise for my late arrival; I missed your introduction, which may have covered the points I am going to ask about. Our briefing papers mention that there is a substantial Sri Lankan community of about 60,000 in Australia. What was the consultation process with members or representatives of the Sri Lankan community in Australia in reaching this agreement?

Mr Stonehouse—The Sri Lankan community is more in the vicinity of 100,000, although officially we put it at about 70,000, I think. I am not aware that it was involved in consultation; perhaps Mr Wild can correct me.

Mr Wild—No, I do not think they were involved in consultations, mainly because Australia's main interest comes from Australian investors within Sri Lanka. I think that the Sri Lankans within Australia were mentioned more as a potential source of funding for some investments back into Sri Lanka, but I understand that there was no formal consultation with them.

Senator SANTORO—So would Australia's interest in the economic exchange between Australia and Sri Lanka be mostly from Sri Lankans not resident in Australia?

Mr Stonehouse—I think it is fair to say that the Sri Lankan community here is not only well integrated but it is also substantially a professional community. It is not particularly commercially focused on its original homeland, if you like, but we are hoping that this treaty might spur some sort of bridging role by the community.

Senator SANTORO—Do you see any value in members of the Australian Sri Lankan community being of assistance in terms of some of the political sensitivities that may apply in Sri Lanka, or is there a disconnect between Sri Lankans here and back in Sri Lanka, where that will not be of much interest or use in your view?

Mr Stonehouse—That is probably a good question to put to Mr Bartlett. He often receives input from Sri Lankan community members and is very sensitive to the views of the Sri Lankan community. There are strong sensitivities within the community about politics there and we certainly take them into account, but in terms of this particular treaty action I am not sure that they are particularly relevant, if I can put it that way.

CHAIR—As to the consultation annex, there is the summary of the industry consultation. How was that contact list developed? Are these the businesses that are currently trading, or are they businesses that you deemed might wish to trade? How was that list arrived at?

Mr Stonehouse—The list consists of actual investors and major traders. One of them, I notice, is ANZ, which has sold its Grindlays arm now, so it no longer has a presence in Sri Lanka. But it was a mixture of those two and the consultations were by letter, exchange of correspondence and, in some cases, interviews. Some of these companies were actually interviewed in Sri Lanka by our high commission there.

CHAIR—Where there is 'no comment' in the comment column, does that mean they made no comment, no comment worthy of inclusion or a negative comment?

Mr Stonehouse—I think it would mean that there was no comment at all. They probably did not respond. That is what I would assume. Mr Wild?

Mr Wild—I don't know.

Mr Stonehouse—From my reading of the file, Madam Chair, I think it meant that they simply did not respond to letters and they were not interviewed face to face.

CHAIR—Could you ascertain that? You say it is a summary of industry 'consultation'. It might be a summary of contact, but not necessarily consultation if they didn't respond. Perhaps

it could be clarified for us as to whether those against whose name there is 'no comment' responded at all.

Mr Stonehouse—I note that some of the companies that we approached were not investors or potential investors but traders, and they made that comment. For that reason, in some cases they did not make a particular comment on the value of the treaty except to say that they thought it would be a good thing, but that it would not affect their interests because they did not intend to invest.

CHAIR—Perhaps we could have it clarified whether they responded or did not respond or thought it was a good idea or a bad idea, or whatever their view may have been.

Mr Wild—I will take it on notice.

CHAIR—Is there any difference at all between this treaty and any of the other 19 treaties that Australia is a party to?

Mr Wild—Yes, there are differences between all of them. It is probably simplest to go through some of the differences between the one with Sri Lanka and the model agreement rather than with the other 19. One difference you will see is in article 1, paragraph 4, which has a discussion of 'ownership or control'. The investment agreement applies to investments that are owned or controlled by investors of the other party. Occasionally negotiating partners ask for some clarification as to the issue of control.

CHAIR—Where is that again?

Mr Wild—Article 1, paragraph 4—the one that starts 'the question of ownership or control'. Countries are sometimes concerned that there is not enough guidance as to what 'control' and 'ownership' mean. That article is designed to provide some clarification in that respect.

CHAIR—And that is not in the model text?

Mr Wild—It is not in the model text, but it has appeared in various forms in other of our investment agreements.

CHAIR—Should it be part of the standard agreement?

Mr Wild—The issue of ownership or control is very fact dependent, and we prefer to leave it simply as the wording 'ownership or control' in the model. We find that the approach taken in the Sri Lankan one is probably not the one we would choose to adopt. If countries request it, then we will insert it, but it is not something that we would consider needs to go in the model.

Another difference you will see is article 2(2), which is a denial of benefits clause. This is somewhat different to the model text. Basically what this clause says is that a country can deny the benefits of the agreement to a company of the other country if that company is owned by foreign interests. Some countries are concerned that a company from some third country will set up, say, a subsidiary in Australia and then use that subsidiary to invest in a country—in this

instance Sri Lanka—therefore obtaining the benefits of the investment agreement through, for want of a better word, stealth.

CHAIR—So they would gain the protection of this agreement by Australia—

Mr Wild—Yes, although they are not Australian, so to speak. The test for nationality is done on incorporation. So, if a company is incorporated in Australia, it prima facie receives the benefit of the agreement. This clause is designed so that, in the circumstances where, as an example, a company from a third country does set up a subsidiary in Australia and then uses that to invest in Sri Lanka, a party can reserve the right to deny the benefits of the agreement to that company.

In article 4(1) there is a quasi national treatment clause. Normally the investment agreements provide only most favoured nation protection. You will see that article 4(1) provides for national treatment but, quite importantly, this is made subject to laws, regulations and policies. So any laws, regulations or policies that did not provide national treatment would still be allowed. So, although it provides for national treatment, I think it is fair to say that it is giving national treatment with one hand and pretty much taking it away with the other.

CHAIR—Can you take me through that again? What is the difference between article 4(1) and the model text?

Mr Wild—The model text does not have a national treatment clause. This one refers to grant to investments treatment no less favourable than that which accords to investments of its own investors, which is the national treatment clause. The model normally has only a most favoured nation treatment clause, which is what you will see in article 4(2). But, as I pointed out, you will see in article 4(1) that the clause is made subject to laws, regulations and investment policies. That is why I say that it is a national treatment clause in name only; that is, because it does reserve what is in the laws, regulations and investment policies—similar to what you would have seen with the negative list, say, in SAFTA, which lists exceptions to the national treatment clause and lists certain laws and regulations that are exempt from the national treatment obligation. Article 4(1) exempts all laws, regulations and investment policies from the national treatment obligation.

CHAIR—Isn't that a little broad?

Mr Wild—It is a little broad, but it has been the government's policy in investment protection agreements not to provide national treatment. Going back to the Singapore free trade agreement, you will have seen from the list of reservations in that agreement that there are a number of Australia's laws and policies that do not provide national treatment to foreign investors. So the decision was made that, rather than going for the negative list approach that is used in SAFTA, our agreements would provide only the most favoured nation treatment. I am talking about areas like broadcasting and things like that, where national treatment is not provided to investors.

CHAIR—Just because we have mentioned laws, is there any legislation that will be required to be implemented or amended as a result of entering into this?

Mr Wild—No.

CHAIR—No legislation at all?

Mr Wild—No legislative change is required—simply because the major obligation is the most favoured nation treatment obligation. To implement that does not require any change to law.

CHAIR—Do you have any further comments on the differences between this and the model text?

Mr Wild—I think the only other one of substance is in article 9(2), which is a provision relating to transfers. A bit at the end of article 9(2) says 'subject to the right of each party to exercise in good faith powers conferred under its laws'. This is not in the model text. This is designed mainly for countries that might have a balance of payments crisis and might wish to place some capital controls. If a country wishes to do that, it can do so but it needs to exercise those powers equitably and in good faith—basically in a non-discriminatory manner. I think they are the only changes of substance.

CHAIR—Are all of these treaties for 10-year periods?

Mr Wild—No, the model provides for them to be for 15-year periods. If my memory serves me correctly, the Sri Lankans had requested a lesser period and we agreed to a 10-year period, which is still a reasonably lengthy period of time.

CHAIR—There is nothing in the fact that it is 10 years?

Mr Wild—No, although, as you will see in article 15 paragraph 2 that, if the agreement is terminated, it does continue to operate for another 10 years in relation to investments that already exist.

CHAIR—In the national interest analysis there is a reference in paragraph 7 that says:

The Agreement does not limit either Government's ability to pass laws pertaining to pre-establishment investment or to regulate sensitive sectors.

Can you specify what is classified as a sensitive sector?

Mr Wild—I think that that reference is to the matters I mentioned before; areas like broadcasting that, because of the most favoured nation treatment, do not attract the need for additional protection.

CHAIR—We were talking about the fact that no legislation will be required on Australia's side. There is a reference in the national interest analysis in paragraph 9 to 'the implementation of much needed reforms', presumably in Sri Lanka. Are you able to comment on what these reforms are—the nature and extent of them and their progress?

Mr Wild—I do not think that it relates to much needed reforms in Australia.

Mr Stonehouse—My understanding is that they relate to economic reform of the kind that you have in a country that, until 1977, was socialist. Little by little, Sri Lanka is emerging from

that and these sorts of reforms are to create a more stable market economy. I think that they are also to reform the problem of red tape—they are reforms that aim at improving bureaucratic processes. The impression that I have of Sri Lanka is that it is a reasonably transparent investment environment but red tapism—that is, bureaucratic intervention and the very slow turning of the wheels of government—is an issue for business, not just for investors, but for companies. It is that kind of reform to make Sri Lanka more efficient and effective as a market economy that we are talking about.

CHAIR—Sri Lanka is very much a driver in the trade liberalisation stakes. Do you know the current situation regarding its economic reforms? How would you describe the country's reform agenda to date? Is there a long way to go?

Mr Stonehouse—They are very keen on trade reform because, like Australia, they are a small country and they see trade and economic interaction with their region in particular as being in their national interests. One of the ways that they see this particular treaty that we are talking about today being advantageous to us is that it may encourage Australian companies to take advantage of their free trade agreement with India.

CHAIR—When was the free trade agreement with India signed?

Mr Stonehouse—I think that it was a couple of years ago—not more than that. I think that it is reasonably recent.

CHAIR—Was it in 1998or 1999?

Mr Stonehouse—Maybe a bit more recently. I am sorry, but I am not too sure. Sri Lanka are very active on the trade liberalisation front.

CHAIR—Are they pursuing other free trade agreements in the region?

Mr Stonehouse—Yes, they are—including with us. They have approached us as well. They are very much into this kind of thing.

CHAIR—What did we say?

Mr Stonehouse—We told them we would take it step by step. Let us say that we are not discouraging them but we are moving very cautiously. We are looking at ways to improve the overall trade relationship before we look at formal arrangements of that kind. They seem to be quite happy with that approach to it. They are very active on trade liberalisation but economic liberalisation may be a bit further behind. I suspect the paragraph in the NIA relates to, as I said, government and bureaucratic processes that need reforming, because that red tapism—if I can put it that way—seems to be the area where Australian companies do complain a bit.

CHAIR—There is also a reference in the NIA to education services. We have a couple of examples of educational institutions being established in Sri Lanka, such as the Australian College of Business and Technology in Colombo, and the University of Southern Queensland has launched a distance education facility. Is that an area for growth? Are other Australian universities looking at expanding?

Mr Stonehouse—I am not aware that others are, but I notice that Anutech, the entrepreneurial arm of ANU, was one of the respondents, and so they may be interested. I am not specifically aware of other Australian tertiary or other educational institutions being interested in investing in Sri Lanka, but my feeling is that this is an area where we would be looking to make some inroads because of the number of Sri Lankan students currently in Australia—I think it is about 2,000. Generally, we are attracting a lot of students from that part of the world to Australia—we have got about 10,000 Indians and large numbers of Bangladeshis and Pakistanis. It would be part of that regional focus, if you like, to attract students to Australia and then, from that, you sometimes see investment going in in the form of campuses and joint venture educational enterprises. So I could confidently expect that that would be a growth area for us and that this treaty would assist that.

CHAIR—Finally, just for my interest, in article 9 of the agreement, when referring to transfers, you talk about a 'freely useable currency'. What is a freely useable currency? Is that a standard term in this?

Mr Wild—A freely useable currency is an IMF term. There is a list of them, which I believe is—apologies if I get this wrong—the US dollar, the yen, the euro and the pound. You will see in our definition of freely useable currency, in article 1(e), that it defines a freely useable currency as one classified as one by the IMF, which are the ones I just mentioned, or 'any currency that is widely traded in international foreign exchange markets.' That additional bit is to catch the Australian dollar, which is not listed as an IMF freely useable currency but is widely traded. So it does have a term of art in the finance world—

CHAIR—Does it include the Sri Lankan rupee?

Mr Wild—I would be surprised.

CHAIR—So it is the ones on the IMF list or the Aussie dollar?

Mr Wild—Or any other that is widely traded.

CHAIR—Is there any final statement you want to make in relation to this treaty and why it is in Australia's national interest to enter into it?

Mr Wild—No, I think we have said enough.

CHAIR—You think the national interest analysis says it all.

Mr Wild—Yes.

CHAIR—Thank you very much for your time with us this morning. I appreciate the papers that have been submitted and your appearance before us this morning.

Mr Fewster—Before we leave this treaty, I ask your indulgence to ask a question of the committee.

CHAIR—Yes.

Mr Fewster—You asked a number of questions about where this treaty departed from the model text. Would it help the committee if in future we indicated—perhaps in italics, for example—where articles in model treaties differ from what we call the template of the treaty?

CHAIR—That would assist a great deal. We can discuss how best that should be presented—whether actually in the text or as an annexure with a schedule setting out the five or six paragraphs and a short summary as to how or why it differed from the model text. It would be very useful if that could be done for all of these and similar treaties.

Mr Fewster—We could talk about modalities.

CHAIR—Is that something that the department would be happy to undertake?

Mr Fewster—Given that you asked the question—

CHAIR—We like to know.

Mr Fewster—it has to be answered at some stage, so we may as well do it beforehand rather than—

CHAIR—That would be time-saving and efficient. Thank you very much. I appreciate that.

[10.42 a.m.]

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

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

CICCHINI, Mr Raphael, Senior Adviser International, Superannuation, Retirement and Savings Division, Department of the Treasury

MURRAY, Mr Nigel Patrick, Manager, International Superannuation, Retirement and Saving Division, Department of the Treasury

CHARLESWORTH, Ms Lucy, Director, European Union Section, Department of Foreign Affairs and Trade

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

TWOMEY, Ms Margaret, Assistant Secretary, Northern, Southern and Eastern European Branch, Department of Foreign Affairs and Trade

BOUWHUIS, Mr Stephen, Acting Assistant Secretary, Office of International Law, Attorney-General's Department

Agreement on Social Security between Australia and the Kingdom of Belgium, done at Canberra on 20 November 2002

Agreement on Social Security between the Government of Australia and the Government of the Republic of Chile, done at Canberra on 25 March 2003

Agreement on Social Security between the Government of Australia and the Government of the Republic of Slovenia, done at Vienna on 19 December 2002

CHAIR—The committee will now take evidence on these three proposed agreements relating to social security. 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. Does somebody want to lead off? Mr Barson, perhaps you can make some introductory remarks and then we will proceed to questions from the committee.

Mr Barson—Thank you. There are three separate treaty actions proposed in the documents tabled on 14 May. These are that Australia enters into new social security agreements with

Belgium, Chile and Slovenia. Of these, the new agreement with Belgium was signed in November 2002, Chile in March 2003 and Slovenia in December 2002.

CHAIR—Before you go any further, I have to ask you a question: is it 'Chilee' or 'Chilay'? I have this argument with people all the time. Can somebody tell me is it 'Chilee' or 'Chilay'?

Mr Barson—There are three experts at the back of the room. The ambassador has confirmed that it is 'Chilay'.

CHAIR—Thank you. After I came back from 'Chilay' that is what I said to everybody, and I was corrected.

Mr Barson—These agreements are additions to Australia's existing network of 13 international social security agreements. It might assist the committee if I précis the overall impact of these agreements. The key fact is that they address gaps in social security coverage for people who live and work in either country; it prevents them falling between the gaps between the systems of two countries. They help people maximise their income and allow them a greater choice of which country to live in or retire in and they contribute to the overall bilateral relationships between the countries. Agreements in general involve countries paying a pension in the other country as if it were in their own territory.

So far, this department has presented 10 new social security agreements to this committee and its predecessors, and the three agreements before you today are based on the same general principles as those agreements and all of Australia's existing social security agreements. They allow people to lodge pension claims from either country. They help people meet the minimum qualifying requirements for benefits in either country. They overcome time and other limitations on portability of payments between the countries. They can apply a specific income testing regime for Australia, and they provide avenues for mutual administrative assistance and the implementation of social security schemes. Of course, they can also go into areas of superannuation and double coverage of seconded workers, which is a responsibility of our colleagues from Treasury. Of these agreements, the ones with Belgium and Chile are the most significant in that sense because they include provisions to avoid double coverage of seconded workers. We have only done this in three countries prior to this; this makes it five countries.

CHAIR—What were the previous three?

Mr Barson—They were the Netherlands, Portugal and the USA. As I said, for Australia those provisions affect the operation of superannuation guarantee laws. The agreement with Slovenia does not, at this stage, include double coverage. That is primarily because that agreement dates from an earlier time. The negotiations on that one were in October 1997 and, at this stage, that is one of our new agreements that do not include double coverage.

In terms of consultation, we have had contact with relevant community groups in Australia on all three agreements and sought their comments, along with comments from other community organisations and state and territory governments. We consulted with the ACTU over double coverage principles and, as noted in the three national interest analyses, the consultation process shows that the community is generally supportive of the agreements and that no significant issues or concerns have been raised.

The agreements will deliver important benefits to people and will not disadvantage any individuals. They contain all the major features of Australia's existing agreements and—subject to the views of the committee and the completion of necessary action—we aim to implement the agreement with Belgium from 1 July 2005, with Chile from 1 January 2004 and with Slovenia from 1 January 2004.

CHAIR—Is there any reason for the difference in the start dates?

Mr Barson—No. The only differences are processes that need to be completed in both countries. Some countries need a longer lead time for their own parliamentary and approval processes.

CHAIR—Will amendments to legislation or the introduction of legislation be necessary in Australia to implement these?

Mr Barson—A social security agreement becomes an annexure to the Social Security (International Agreements) Act. So, yes, it will be passing through the parliament.

CHAIR—Is that the only legislative amendment that will be required?

Mr Barson—Yes.

CHAIR—If it suits the committee, we might look at some general questions on the three and then go to specifics for Belgium, Chile and Slovenia after that. In relation to the similar treaties signed by Australia—how many did you say there were?

Mr Barson—There are 13.

CHAIR—So this would make 16. Do we have some sort of assessment process to review or consider whether these shared responsibility agreements are working? That is, are we aware whether the beneficiaries are satisfied or not? Are there complaints that we have to take into account? How do we assess what is happening with the 13 that have already been established?

Mr Barson—In fact, five of those 13 established agreements were recently reviewed, and revisions of those passed through the committee and the parliament. There were two things that happened. Firstly, legislation changes in either country can make particular parts of the agreement out of date and requiring revision. Similarly, changes in the arrangements in the countries—such as superannuation guarantee, means tests or other changes—also can require those sorts of alterations. For example, we have been discussing with Malta changes to the agreement there in relation to disability. So, yes, those are constantly under review.

CHAIR—Triggered by a legislative change, though?

Mr Barson—No, that particular one was triggered by a routine review of our agreements—Malta and Ireland being two countries that are currently out of step with our standard agreement approach. So progressively we have been changing those agreements and Malta was the next one that we started to move on in that revision. Shortly we will be negotiating with Ireland on a

similar revision. So those agreements are constantly under review and either country is able to initiate a review and a renegotiation.

CHAIR—Do we get feedback from the beneficiaries?

Mr Barson—Yes, we do. The beneficiaries in both countries are in contact with us through Centrelink, and Centrelink International Services, which is based in Hobart, provides regular feedback to us from people born in those countries or people who are in receipt of an agreement pension through those countries.

CHAIR—How many people are we talking about in each instance?

Mr Barson—These three particular agreements will benefit some 1,800 people. In terms of the total agreements, there are 105,626 pensions that are paid from current agreement countries into Australia.

CHAIR—From the 13 countries?

Mr Barson—Yes.

CHAIR—And there will be an extra 1,800 as a result of these three agreements?

Mr Barson—Yes.

CHAIR—Where are they living?

Mr Barson—Those 1,800 people are people who will benefit from these three agreements in both countries. The number of people in Australia who will benefit is much smaller; it is in the order of 250 people. That is the number of people in Australia who will immediately benefit.

CHAIR—Out of the three agreements?

Mr Barson—Yes, that is correct. A large number of people in the other countries will benefit.

CHAIR—Are those 250 people living in all states and territories?

Mr Barson—Yes.

CHAIR—Have you had any complaints about the effects of exchange rates?

Mr Barson—There are occasional—well, relatively frequent—misunderstandings about exchange rates, and also complaints about them. The exchange rates have had two impacts. Obviously they have an impact on the amount of foreign pension that a person receives in Australia as the interest rates fluctuate up and down—that is something that is not within our control, of course, because that is a commercial matter—but they also have an impact on Australian pensions that are paid because any change in the income received by a person impacts, through the means test, on the amount of Australian pension. Yes, we do get questions

from time to time as to how the exchange rates work, what happens in a more volatile exchange rate climate and why is a person being given a different rate by their bank than the rate which they are deemed to have received in the means test process. I think you would appreciate that it is difficult, with that number of pensions coming into Australia, to deal with individual exchange rates, individual banking arrangements and the exchange rate actually achieved on the day. The process that is in place is that a notional exchange rate is taken, which normally is based on the Commonwealth Bank rate five days before the beginning of the month—it was previously 15 days; it is now five days—and that is the rate that is used for that period.

CHAIR—Why the change from 15 days to five days?

Mr Barson—We managed, with Centrelink, to bring the calculation date closer to the start of the month through technological improvements, basically. That is the rate that applies for that month. Where a customer is concerned that the actual rate received varies considerably from that, by five per cent or more, they are able to have a review of their circumstances and that rate, and a change is made if necessary. It is a compromise solution to try to keep a relatively stable exchange rate rather than have day-to-day variations, but one that is as close as possible to the period of payment.

Mr ADAMS—The Queensland government had some views about a whole of government approach in negotiations. Is that to do with other issues like being able to negotiate family services issues or family custody matters as well when we are negotiating these things—to have a bit more in the mix so that we have opportunities of getting them on the table and actually sorting them out?

Mr Barson—Queensland has certainly raised it. It is an issue, though, that is also raised by us and by the other countries. The agreement with Belgium, for example, came out of discussions between the two countries on health and social security arrangements. In many of these countries the health insurance system is funded and dealt with as part of the social security system, so, yes, a number of the countries are negotiating combination agreements with each other. We have not done that yet. I think we considered that in the case of Belgium. The two negotiations on agreements proceeded at the same time with the same intent but, because of the different administration arrangements and very different nuances between the two systems, they actually went forward as separate agreements. It has mostly been raised simply because the other countries have combined those systems and they find it easier to deal with both. As I said, so far we have not done that, although we have said that we are certainly willing to do that in any case where it is feasible at the time. At times social security arrangements have a different priority for us and the country than perhaps do health insurance arrangements: social security arrangements for us have a far greater level of reciprocity and are, therefore, more important to us in terms of a mobile society.

Mr ADAMS—It is really about whether the Australian citizen is getting the same benefit as somebody somewhere else, isn't it?

Mr Barson—Yes. Those issues come up in part in terms of contribution to health insurance systems in Australia and in the other country, which I guess relates more to our superannuation guarantee issues than it does to social security. I can certainly see the time coming where we negotiate these as one parcel. It simply has not happened yet.

Senator SANTORO—Mr Barson, I note the figures that have been provided for the potential number of beneficiaries under these agreements—700 for Belgium, 600 for Chile and 450 for Slovenia. My question has a bit of retrospectivity about it: how reliable in your view are those figures and could you give the committee some idea of how they are calculated? In addition, what is the experience with the figures that have been calculated for the other 13 agreements—like the agreement with Italy or Ireland; have the figures come, with the passing of time, close to the estimates? You may want to take the latter part of my question on notice. Can we be confident in the reliability of those figures?

Mr Barson—Yes, I would certainly like to take the detailed comparison question on notice. It is difficult to estimate these. Of course, in many cases, we are not aware prior to an agreement of who there may be in Australia who is receiving an agreement from that country. We may have overall estimates of numbers that are provided to us but, again, the mobility of people means that that may change fairly quickly. We have been reasonably close to our initial estimates in most cases. There have been cases certainly, such as the recent renegotiation with New Zealand, where the numbers of people taking up citizenship and therefore remaining eligible for some social security payments are, at the moment, considerably different from our original estimates. But in terms of pensions, particularly age pensions, we are able to do fairly accurate estimates of the number of people who may be eligible on population data. The problem is once we try to include means test assumptions: until we are actually dealing with the people as potential claimants, it is difficult to know exactly what income they have. We are able to do estimates from the changes to existing people and we are able to do estimates based on information that we exchange with the other country. As I said, so far, I would describe them as reasonably accurate, and we would be happy to give you a breakdown comparison.

Senator SANTORO—Thank you.

Mr KING—I have a question in relation to Slovenia, which I think should be directed to Ms Twomey. Firstly, did you find the negotiations with the new government in Slovenia difficult, or were they quite easy?

Ms Twomey—I will have to give that to Mr Barson, because DFAT does not itself conduct the negotiations.

Mr Barson—We conduct all our own negotiations in the social security area. The answer is that the negotiations were—one should never say ‘very easy’—not difficult. We found that the government of Slovenia was very interested and very positive about the value of this agreement. In fact, it was anxious to see it concluded earlier rather than later. So, no, we have not had any disagreements on matters of any substance.

Mr KING—Do you expect to negotiate a similar agreement with the Czech Republic?

Mr Barson—In relation to this particular batch of agreements the other that is relevant in this area is the one we have concluded with Croatia, which was announced at the same time as the agreement with Slovenia. At the moment, we are discussing with the minister the priorities that should be put on other countries that are potential agreement countries. They of course include other countries in that region, such as the Czech Republic and Slovakia, but no decision has been made on those priorities yet.

The negotiation of agreements is a fairly fluid matter because, while in principle it may be a good thing for the two countries to do, in Europe particularly a lot of the countries have been preoccupied with their own internal arrangements. For example, while it was agreed some time ago that our agreement with Switzerland would be a good thing to do, it has had to wait until other priorities have been dealt with. Once we are able to set our priorities for the next 12 months or two years, we will be in a better position to answer. At this stage, there is no pressure on us for a negotiation with either the Czech Republic or Slovakia.

Mr KING—Thank you.

Mr CIOBO—What about the beneficiaries of these agreements? What is being done to inform them of the benefits that will flow and the actual changes that have taken place? Is there a planned implementation notification period?

Mr Barson—Yes, on both sides. For our part, Centrelink has country of birth information on its customers. Centrelink's through its own correspondence with those people will draw attention to it. We will have an advertising program prior to the introduction of each of these agreements, informing the public generally that they will be coming into place. We are also writing and sending publicity material to the relevant community groups.

CHAIR—Is that what you have done in the past in making the community aware? Are there any gaps in the process? Is there anything further you should be doing? Does anybody come along and say, 'I didn't know about this'?

Mr Barson—We do get people, of course, who come in contact with Centrelink at some stage and say that they did not know about it. I think all we can do there is continue to provide the information to the public. Of course, there are cases where people are out of the country and come into Australia and miss that publicity campaign, and we pick them up through their identifying their country of birth on first contact with Centrelink. But I must admit that it is difficult for us to bring it to somebody's attention unless we know they exist. Certainly there will be people who are future beneficiaries who will not have seen this as relevant to them at the time that it was advertised.

CHAIR—So, if you know they exist, they are going to get notification of it.

Mr Barson—If we know they exist, they will get notification of it. If we do not know they exist, they will be notified the first time they come into contact with Centrelink.

CHAIR—Just before we turn to the individual agreements, there was reference to the concerns of the ACT government in relation to Belgium and Slovenia; I do not believe it was in relation to Chile. The ACT government has expressed concern about the impact on the budget, but the national interest analysis says that the impact is negligible. What impact was the ACT government expressing concern about, and is there anything that the Department of Family and Community Services has done to address the concerns of the ACT government?

Mr Barson—We have responded to the concern that was raised by inviting some more information so we can look at it more closely. I understand, although I cannot be certain, that the concern was about an expansion in the number of eligible pensioners and therefore costs to a

state or territory in terms of concessions that the state or territory may extend to people. I think the reality with these agreements is that around 120 people nationally will become eligible for the first time. Our view is that that does not create a great impost on states and territories. In fact, that impost is far greater from changes in population or migration.

CHAIR—Has there been any response from the ACT?

Mr Barson—Not yet. We responded to them when we received their concern and we will continue to talk with them. That is my understanding of it. If it is different then we will have to work with them on what it is.

CHAIR—I will start with the Australia-Belgium agreement. I note that the Chile and Slovenian agreements contain a currency control provision but there is not one in the agreement with Belgium. Is this a standard provision? If so, why wasn't a currency control provision negotiated with Belgium—if my reading is correct?

Mr Barson—Operating from memory, the negotiations with Belgium certainly took as a starting point our typical agreements. One feature of the agreement with Belgium was that it was negotiated in English from the Belgian side and therefore a large number of the wordings in this agreement are not our normal text. If I remember correctly, that clause was not seen as being relevant to the particular situation in Belgium. They did not propose it in their English version of the text and we did not see a need for it to continue.

CHAIR—So it is not a standard provision per se?

Mr Barson—It has been in our previous agreements. It is not a provision which has an actual day-to-day impact. It is not one which we see is necessary for including in future agreements.

CHAIR—Overall?

Mr Barson—Yes.

CHAIR—Paragraph 22 of the Belgium NIA states:

> It should be noted that people in Australia will be paid the outside Australia rate if that rate would be higher than the inside Australia rate.

Could you provide the rationale for that provision? It is article 17 of the agreement. Is that a standard provision of our social security arrangements? Could you clarify for us the circumstances under which the outside Australia rate could be higher than the inside Australia rate?

Mr Hutchinson—There are two different methods of calculating pension rates under our agreements. For people in Australia who do not have 10 years residence and who use their periods of insurance or contributions in the other country to get early access to an Australian age pension, until they have 10 years Australian residence any foreign pension they receive is directly deducted from the rate of Australian pension otherwise payable. So if the maximum Australian pension rate is $10,000 and they are getting a $6,000 Belgian pension, we would pay

them $4,000, subject to their having no other income. Inside Australia everybody is paid based on a flat rate subject to the income test. Outside Australia we proportionalise pensions, so that somebody who has lived in Australia for less than 25 years will get a pro rata Australian pension. So someone living in Belgium would get 15/25ths of an Australian pension if they had had 15 years of Australian working life residence.

What we have done in some agreements—and it has been a negotiated process—is to say that, if the rate the person would get outside Australia, under that pro rata calculation, is higher than the rate that they would get in Australia under a direct deduction method, then we will pay the person in Australia the higher outside Australia rate. It is possible that somebody on X level of foreign pension income could get more outside Australia because of the way the income test is applied outside Australia compared with the direct deduction method. It is a concession we give to ensure that the person gets the benefit of the higher outside Australia rate.

CHAIR—If there are no other questions on Belgium, we will turn to the Australia-Chile agreement. At this point I will formally welcome His Excellency the Ambassador for Chile as an observer to our meeting. If there are other excellencies or diplomats here this morning, we welcome you as observers to our committee proceedings.

Of particular interest is the Chilean pension of mercy payments. That is referred to throughout the agreement, and it obliges Australia to disregard, from all its social security income tests, Chilean pension of mercy payments—which relate to issues in Chile between 11 September 1973 and 10 March 1990. Could you explain to us how article 17 arises and then briefly explain how these payments came about, what prompts their inclusion in this agreement, and then some details on how many Australian residents currently receive this benefit. Are you able to do that?

Mr Barson—Certainly. As a starting point, in the Australian pension system any income has an impact on a pension, inasmuch as the means tests take income of all sorts into account. This means that there are people who have been receiving the Chilean pensions of mercy and have had those pensions treated as income for Australian means test purposes; therefore, the Australian pension that would be payable to that person has been reduced accordingly. There has been quite a bit of dissatisfaction with this from the community, who have argued that those particular payments are not made in the nature of a pension, or with the intention of being a pension. They are reparations for human rights abuse or political violence, and it is not appropriate to treat those payments as income.

This has been resolved in this particular agreement by the clauses which exclude the pensions of mercy from treatment as income under Australian means tests. It is an appropriate way of dealing with those particular payments—which, in negotiations, arise from assurance in evidence given to us that the payments do not in fact represent income foregone or a payment for income that was lost—

CHAIR—So it is an ex gratia payment?

Mr Barson—It is to be treated as an ex gratia payment relating to people who were victims of human rights abuse or political violence.

CHAIR—And that is how it is treated in Chile?

Mr Barson—That is how it is treated in Chile, and the basis of the agreement is that, wherever it is possible to separately identify those payments from any other pension payment the person may be receiving, then the Chilean pension of mercy will not be treated as income. So it is incumbent on the person to be able to demonstrate that a particular part of the payment is a pension of mercy, and they are able to do that with documentation from the Chilean government.

CHAIR—How are the payments made? Are they made on a regular basis?

Mr Barson—Yes, they are. They are made in a similar way to a pension, and this has been part of the confusion about its treatment. One way of looking at these payments is as a regular source of income. However, we have been convinced that the appropriate way to regard them is as a payment of reparation for previous damage.

CHAIR—So they are not lump sum payments—

Mr Barson—No, they are not.

CHAIR—Could a person have chosen a lump sum rather than a pension-style payment?

Mr Barson—No. My understanding is that these payments are all periodic mercy pensions made under a particular Chilean law.

CHAIR—How many Australian residents currently receive that benefit?

Mr Barson—We think that there are around 400 people who are entitled to receive a Chilean pension of mercy. Of those, 70 are currently in receipt of social security income support in Australia. So, depending on their other income, we would expect those 70 people and perhaps a few more to benefit from that particular provision.

CHAIR—Is this group expanding or decreasing in size? Obviously we are moving through generations now—this is decades ago. Are there more who are entitled to this pension as time goes by, or is there a decreasing number? There must be a cut-off point at some stage.

Mr Barson—Our understanding is that it is a relatively fixed group and, yes, over time that group will decline.

Mr CIOBO—Are the pension of mercy payments on a sliding scale? Are various quantums available, or is it a single amount and just a question of eligibility?

Mr Hutchinson—As far as I know, it is a variable amount based on a rather complex calculation.

Mr CIOBO—Are you able to provide any parameters as to what sorts of Australian dollar figures we are talking about?

Mr Hutchinson—My understanding is that most would probably be under $1,000.

Mr CIOBO—Per fortnight?

Mr Hutchinson—No, per year.

Mr Barson—In this case it has been primarily a matter of principle for the community that the payments, which are clearly stated in Chilean law as not being subject to income tax or any other reductions, not be reduced simply because they are paid into Australia.

CHAIR—There is some reference in annexure A to the NIA to the forum organised by the Chilean community in New South Wales and the ACT which studied the agreement. It says:

The Forum also observed that in relation to the provision exempting pensions of mercy for social security rate calculation purposes the exemption is not retrospective and that there is not an amnesty for those who may not have declared that they receive Chilean pensions (including pensions of mercy), as required by the Australian Social Security Law.

Could you comment on that?

Mr Barson—That comment was received from one significant group in Australia. I think the best answer to that is that we have already had an amnesty for declaration of foreign pensions. The government had a general social security amnesty from 20 September 2000 to 19 January 2001 under which people were able to declare the receipt of a foreign pension without penalty. The view of the government is that that was an appropriate amnesty and there is no need for a further amnesty on this occasion because it is assumed that people will have already declared under the previous amnesty any income that they are receiving. Some 284 people declared for the first time as part of that previous amnesty that they were receiving Chilean pensions.

CHAIR—And if someone were to come forward now?

Mr Barson—The amnesty is no longer in place. We would be happy to discuss with them what income they have been receiving from Chile and how that would affect their Australian pension. There is of course an existing obligation that people declare their income from all sources. Centrelink would be talking with them about what impact, if any, receipt of that money should in retrospect have had on their Australian pension, and there may be a debt.

CHAIR—But we are saying now that they do not have to declare their pension of mercy, because it is not income.

Mr Barson—We are saying that we want to know about it but, under the agreement, we will not treat it as income for the Australian means test. Once the agreement comes into effect that amount will no longer be considered, so people who are presently getting a reduction in the Australian pension because of that income will get an increase.

CHAIR—And it is not retrospective?

Mr Barson—No, it is not retrospective.

CHAIR—Do any of our other 13 social security agreements that are in force contain an exemption similar to that given to the Chilean pension of mercy payment?

Mr Barson—No.

CHAIR—This is the only one?

Mr Barson—Yes.

Mr Hutchinson—There is an exemption in our Italian agreement for a welfare supplement that Italy pays into Australia, but that is the only one I am aware of for payments into Australia.

CHAIR—How is that characterised? Why is that not income?

Mr Hutchinson—Essentially because it is a welfare supplement that Italy pays—and most countries have a welfare type payment similar to our payments. To the best of my knowledge, Italy is the only country that actually pays it outside Italy. What we do when we pay our payments into other countries is we normally exempt the welfare payments that they may make, because they are generally means tested as well and it is obviously necessary to avoid circularity in income testing. So the issue has not arisen with any other country except Italy, but it was agreed many years ago with Italy that we would exempt the welfare payment. Essentially, I guess Italy would be subsidising our welfare payments if we did not do it.

Mr Barson—There is an exemption which exists in law for Holocaust payments—payments made by several countries to people who are victims of the Holocaust in Europe. That was recently extended to include payments made by two other countries; from memory, France and the Netherlands. That is an exemption that has existed for some time in law but has not been done as part of a social security agreement. It was also done that way, I understand, because it was a payment that was made across a range of countries for a single event; so it was more appropriate at the time to deal with it in the law rather than in an agreement.

CHAIR—Are there any other countries with whom we have an existing agreement where an issue like this has arisen and we have not been able to negotiate it? You see where I am coming from: if this is a first in the agreement with Chile—and I have no problem with the concept at all; I think it is highly appropriate—then for other countries that have made requests for such an exemption which we have refused, that may inevitably lead to comparisons between communities. Is there any issue there?

Mr Barson—No, I am not aware of any countries where that has happened. Countries where that may have happened in different circumstances—for example, Austria and Germany—are already picked up through the legislative arrangement for Holocaust victims. I am aware of some interest in some other countries, such as Uruguay. If we were to proceed with an agreement with them, I am told by community groups that there are payments that they would wish to see exempted.

CHAIR—Reparation type payments?

Mr Barson—Yes, but we are not in negotiations with Uruguay so at the moment it is not an issue.

CHAIR—Thank you. There being no further questions on Chile I turn to the Australia-Slovenia agreement. Deputy Chair, it is about time we heard from you.

Mr WILKIE—Thank you. Sorry for being late, there were a few other pressing things that I had to deal with this morning.

CHAIR—I was not going to give the outcome.

Mr WILKIE—I will not go down that path.

Mr Barson—I was looking forward to asking the committee a question.

CHAIR—I think you should just put it on the table.

Mr WILKIE—We have had a lot of evidence in the past when we have looked at these sorts of agreements saying that there should be double coverage. I see that there is double coverage in the Belgian and the Chilean agreements, but nothing in the Slovenian agreement. What was the problem there?

Mr Barson—The double coverage issue is a relatively recent inclusion for us. As I said before, there are three existing agreements that include a double coverage and now there are these two new ones. The Slovenian agreement was one that we finished after negotiations started some years earlier. In that initial round of negotiations, the countries that we were dealing with did not, at that stage, want to include superannuation guarantee under the arrangements that applied. So the Slovenian agreement just followed through on that. It may be that we revisit arrangements with some of these countries over the next few years where superannuation guarantee was raised and was discussed but did not get included in the agreement for various reasons. I expect that we will be approaching those countries over the next few months and asking whether they would like now to reopen those discussions, at some future time, and include superannuation guarantee. So it is simply a matter of timing.

Mr WILKIE—In response to your possible question, Simon Crean is the leader of the Labor Party.

CHAIR—I have one last question, perhaps more generally, about the consultation process. We have lists of community organisations and the like that were consulted in relation to all three groups. How are those contact lists developed? Are they expanded? Are they reviewed?

Mr Barson—They are very individual. We rely on our own state officers, who have contact with a large number of community organisations and with the embassies for those countries, to identify cultural groups or groups with a large constituency that it would be useful to write to. We identify as many as we can, and we spread the word as widely as we can. That is not to say that there are not individuals who are not affiliated with those community groups who may not have an interest, but simply that we try and spread the word through the community as best we can. It is not only our consultation process; the embassies also have contact with their own former residents and have their own mechanisms for advising people of these. Increasing use of the Internet means that we are increasingly now getting inquiries from all over the world from people who have found out about this agreement and had three years employment there in 1972. We are getting better at doing it or the communication system is getting better at ensuring that people have that understanding.

CHAIR—Thank you very much for your attendance here this morning. We appreciate the time and effort put into the preparation of the submission documents as well as your presence here this morning.

[11.27 a.m.]

FFRENCH, Ms Jean, Director, International (ILO) Section, Department of Employment and Workplace Relations

KNIGHT, Mr Phillip Graham, Assistant Director, International (ILO) Section, Workplace Relations Policy and Legal Group, Department of Employment and Workplace Relations

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

OH, Ms Janaline Joo-Pek, Director, United Nations and Commonwealth Section, 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

International Labour Organisation Conventions (proposed denunciations):

No. 83: Labour Standards (Non-Metropolitan Territories) Convention, 1947

No. 85: Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947

No. 86: Contracts of Employment (Indigenous Workers) Convention, 1947

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 of the House and Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks?

Mr Knight—Thank you. I have some introductory remarks. The government proposes to denounce these three ILO conventions for a number of reasons. Firstly, the three conventions are considered by the ILO to be either out of date or in need of revision. Australia has taken the view in recent years that it should not remain party to outdated ILO conventions. This is in accordance with the spirit of a proposed amendment to the ILO constitution adopted in 1997 which would allow the abrogation or repeal of any ILO convention that had lost its purpose or that no longer made a useful contribution to attaining ILO objectives. Australia has formally accepted this amendment, but it has not yet received a sufficient number of acceptances to come into effect. The denunciation of the conventions will assist the ILO in the process of identifying obsolete labour standards which can then be dealt with under the constitutional amendment when it comes into force.

Secondly, the continued application of these conventions to Norfolk Island would serve no useful purpose. The ILO no longer promotes the ratification of any of these conventions, and ratifying countries are no longer asked to submit reports on the application of convention 86.

CHAIR—Did you say 'are no longer required'?

Mr Knight—It no longer requires reports on these conventions, that is correct. Thirdly, with respect to conventions 85 and 86, their ratification has had no practical effect as both were subsequently declared by Australia to be not applicable to Norfolk Island—this is allowed by the terms of each convention—and therefore Australia has not been required to report to the ILO on their implementation. These declarations were made following consultation with the government of Norfolk Island.

Fourthly, denunciation of convention 83 is appropriate as the United Kingdom is the only other ratifying state and therefore the convention lacks widespread support among ILO members. The practical effect of denunciation would be that Norfolk Island would no longer be required to report to the ILO on its implementation of some provisions concerning maternity protection and aspects of workers compensation. However, as these provisions have not been applied to Australia as a whole, it is not appropriate that they be applied just to Norfolk Island.

Fifthly, the government has consulted the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions, the government of Norfolk Island and the state and territory governments. All have advised that they either support the denunciation of these conventions or have no objection to their being denounced. In view of the broad support for denunciation and in order to assist the ILO in identifying outdated conventions, we ask the committee to recommend that the government denounce conventions 83, 85 and 86.

CHAIR—Perhaps we could take convention 83 first. You have indicated that it lacks widespread support as the United Kingdom is the only other ratifying state. Are you able to advise what steps the United Kingdom is taking in relation to this convention, if any?

Mr Knight—We have contacted the United Kingdom representatives in Geneva through the Geneva mission to the United Nations. They have indicated that they have not yet given any consideration to what they are going to do in relation to that particular convention.

CHAIR—You have also said in the NIA, on the second page, in paragraph 9, that 'the ILO no longer promotes ratification of this Convention.' Do they discourage it?

Mr Knight—The terminology that they apply is that they do not promote ratification. That indicates their view that the convention is out of date and should remain dormant unless and until it is revised.

CHAIR—The national interest analysis proceeds with these words:

The Governing Body of the ILO has indicated that the question of shelving this Convention ...

'Shelving' is obviously an international term. The footnote says:

Shelving means that ratification of Conventions is not encouraged, their publication is discontinued, and detailed reports ... are no longer requested.

Is that right? Is that what shelving means?

Mr Knight—Yes, that is correct. The problem that the ILO has is that its 1997 constitutional amendment is not in effect yet, because only 74 countries, I believe, have ratified it. Before it comes into effect, 117 countries have to ratify it—that is, two-thirds of the member states. Once it comes into effect, the ILO will be able to abrogate outdated conventions, but at present they have to remain on the books, so to speak. Therefore, the way the ILO deals with outdated instruments is to, in their terminology, shelve them—that is, basically announce that in their view they are outdated and they no longer require reports.

CHAIR—What progress has the governing body made in holding consultations with member states—Australia and the United Kingdom?

Mr Knight—There has been no further indication from the governing body that it is proceeding with dealing with this particular convention. In early 2002 the governing body accepted a report from its committee on legal and international labour standards which indicated that, of its 184 conventions, only 71 were considered up to date. There were a very large number of other conventions considered outdated, many needing revision. Our understanding is that they simply have not got around to consulting with Australia and the United Kingdom on that convention.

CHAIR—When did the Australian government declare that these conventions had no practical application to, or were inapplicable to, Norfolk Island?

Mr Knight—The process was governed by article 35, I believe, of the ILO constitution, which meant that once the government had ratified the convention and the attachment on the current status list—

Ms Ffrench—Because these conventions apply specifically to non-metropolitan territories, the declarations were worked out in advance and were made on the same day that the instruments of ratification were lodged with the ILO in Geneva. A more normal process in relation to application of ratified conventions to non-metropolitan territories is that ratification takes place and the declaration gets made at a later date. But because these conventions applied specifically to the non-metropolitan territories they were made on the same day.

CHAIR—You also said that in consultation with the chamber of commerce, the ACTU and the like there had been support for denunciation or no comment. What was the position of the ACTU?

Mr Knight—The ACTU indicated by letter that they had no objection to the denunciations.

CHAIR—Could you give us a quick update n the progress of the amendment to the constitution. You said 74 ratified. Is there a delay? Is there some sort of problem here, or are people just busy with other things?

Mr Knight—The only delay is in the consideration that member states of the ILO are giving to the amendment. It is up to them to decide whether or not they wish to ratify or accept the amendment. The timing with which they decide to do it is entirely a matter for them as well. Unless the ILO, the International Labour Office, were to conduct a deliberate campaign of

encouraging states to ratify the constitutional amendment, it could well take a considerable time for it to reach the 117 acceptances.

CHAIR—And Norfolk Island is absolutely in agreement with the denunciation?

Mr Knight—Yes, that is correct. They advised the Minister for Regional Services, Territories and Local Government by letter, which was copied to us, that they fully agreed with any Commonwealth action to denounce the three conventions.

CHAIR—Thank you; I think that is fairly straightforward. Thank you for your time here this morning. We appreciate the national interest analysis and the detail in which you have presented your submission to the committee. Thank you very much.

[11.40 a.m.]

GUENTHER, Ms Clare, Policy Officer, Department of Transport and Regional Services

TONGUE, Mr Andrew Keith, First Assistant Secretary, Transport Security Division, Department of Transport and Regional Services

WOLFE, Mr Jim, Assistant Secretary Maritime Security, Department of Transport and Regional Services

BAIRD, Mr David John, General Manager, Australian Search and Rescue, Australian Maritime Safety Authority

BOUWHUIS, Mr Stephen, Acting Assistant Secretary, Attorney-General's Department

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

Amendments to the Annex to the International Convention for the Safety of Life at Sea, 1974, (SOLAS) including consideration and adoption of the International Ship and Port Facility Security (ISPS) Code, done at London on 12 December 2002

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 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 the parliament. Mr Tongue, would you like to make some introductory remarks?

Mr Tongue—Basically this amendment to the International Convention for the Safety of Life at Sea is an agreement amongst the global maritime community to enhance security in the sector. For Australia, we have twin drivers for adopting the amendments. One is a trade driver, which I will outline, and the other one is a national security driver. The trade driver is based on the fact that Australia is effectively a shipper nation: we are highly dependent on the international shipping fleet. Three-quarters of our trade by value goes by ship, 99½ per cent by weight. Because of our dependence on the international shipping fleet, about 3,500 internationally flagged ships a year carry our goods to the world. It is important that, as the international community moves to protect those ships, we similarly move to protect them. In part, the effect of this convention for Australia is that in order to have reputable international shippers continue to call at Australian ports we need to significantly enhance security in our ports. So the effect of the convention will mean that at around 70 ports Australia wide and at around some 300 port facilities we will need to put in place preventive security measures so that the international ships calling at those ports can continue to carry our goods overseas.

The domestic security driver is that ports—because 95,000 foreign crew annually flow through them and because they are such large and complex entities often embedded in cities or, in our geography, often at great distance from major population centres—provide a place of

entry for people; they provide a place where goods may be brought in, and where there is a ready supply of harmful and dangerous materials that might be used to effect a terrorist incident. For that reason this convention provides an important opportunity for us to enhance preventive security domestically.

In terms of how the government is proposing to implement the convention in Australia and to meet the 1 July deadline next year, $15.6 million was allocated over two years in the recent budget to the Department of Transport and Regional Services to become the transport security regulator. Our role in this sector would be analogous to the role that we play in the aviation sector where we regulate airports and airlines around security with the cost of the measures borne by the operators. We are proposing a similar approach here in Australia.

Parts of the convention relate to safety issues, which are the responsibility of AMSA and hence my colleague Mr Baird is here. The bulk of the convention though relates to how we have to approach the task of enhancing port security and enhancing ship security, bearing in mind that we only have about 70 or so Australian flag vessels to which the convention will apply.

CHAIR—Perhaps I could start with some questions on industry involvement. In terms of the consultation with industry, can you give us some idea of the response to this treaty from shipping related industries? Perhaps you could give us some detail on the results of consultation—for, against and in-between.

Mr Tongue—Certainly. Our sense of the global community's reaction to this convention is that most countries will comply by the due date, by 1 July.

CHAIR—That is 2004?

Mr Tongue—Yes, 2004. The reason for that is that most countries—and we have tested this—have an expectation that the United States in particular will adopt a zero tolerance approach to implementation of the code.

CHAIR—How many countries are we talking about? How many signatories are there currently?

Ms Guenther—There are 145.

CHAIR—And how many ratifications?

Ms Guenther—It is a tacit acceptance process.

CHAIR—Okay.

Mr Tongue—Because of the global maritime community's expectation that the US in particular is very serious about this issue, the commercial drivers are such that the sector in Australia is basically acknowledging that it needs to implement the changes to the code. So our involvement with industry, with the port sector, with the Australian flagged shipping sector, and with the representatives of people using international vessels has been fairly positive. Their concerns have been that we would adopt an aggressive, blanket approach that would treat, say, a

dry bulk port facility the same way we would treat a cruise ship facility. The model we are developing is based on a risk assessment process, and we are trying to differentiate, in our application of the code, between those parts of ports that we consider to be higher risk than low-risk areas. Therefore, as we have taken that out and discussed it with industry, we feel we have dealt effectively with that concern that they have raised.

CHAIR—You said the US is indicating it is going to adopt zero tolerance. Have other nations given a similar indication?

Mr Tongue—Post the incident with the *Limburg*, the French position seemed to harden in connection with the adoption of the code. My colleague Mr Wolfe has just returned from London, where the IMO has been meeting and considering, amongst other things, international progress in the code—I do not know whether he would like to add anything—

CHAIR—Perhaps you could give us an update, Mr Wolfe, on your trip to London.

Mr Wolfe—Certainly. The main feature is now that there is a strong acceptance, by all major countries around the world, that 1 July 2004 is a deadline that should be met—by both ship and port operators. Of course, in the process of getting there, I think we recognise that there needs to be a focus on outcomes based requirements rather than overly prescriptive requirements which, from various parts, may not get us the results we want. But certainly the commitment remains as strong as ever.

CHAIR—Where are the majority of the world's ships flagged?

Mr Baird—Various places. Perhaps the greatest majority of the ships are flagged with what one would term as the 'open registers'—such as Monrovia, Panama, Bahamas and so forth.

CHAIR—Is this very much a United States-driven mechanism? Obviously there is a great deal of comment in the NIA about the US position and what it would mean to Australian trade—or, indeed, to any other country that trades with the world's mightiest economy. It seems to be widely accepted that it is a US promotion, but how was this drafted, lodged, accepted, negotiated?

Mr Tongue—It was developed in what we consider to be record time for the IMO. It was heavily driven by the US Coast Guard. In large part the code has been informed by a coast guard style model, which in its implementation poses a few issues for us because our port sector is basically the responsibility of state government. So, in implementing the code, we have been working very closely with state government. But certainly in the development the US Coast Guard heavily influenced the negotiation, and there was a large team from the US involved.

CHAIR—Would it be fair to say that it was non-negotiable?

Mr Tongue—I think it is fair to say that the government considers that it is very important that we comply with the code.

Mr WILKIE—I understand that there a lot of changes will be happening at our ports and that that would obviously affect a lot of the people who work in them. From the consultation I have seen, it would appear that there has been no consultation with unions. Is that the case?

Mr Tongue—Early on in the process there was some discussion with the unions. We are currently running workshops around the country where the MUA have asked to participate and we have invited them to participate in the process. I have no doubt, as we develop the draft legislation and the regulations, that we will get to the meat of this and that we will be having further conversation with the unions.

Mr ADAMS—I turn to ships that have flags on the open register and to countries that have all these flagged vessels but do not have any ownership at all. Do you think that this treaty will apply any pressure to change that structure?

Mr Tongue—My assessment is that, as the global community deals with how it is going to get all of these ships surveyed, security plans done, appropriate arrangements in place and the system built, it will highlight that issue quite starkly.

Mr ADAMS—So the flags of convenience and the 'ships of shame' may finally get some focus?

Mr Tongue—That would be my expectation. I think it is going to take time. I would expect that all countries will, first off, be doing what we are doing—doing a bit of a risk assessment about where we need to put our energy early on. The key thing about this is that, once we have put our toe in the water, we have basically adopted a new mechanism that is going to last into the future. We will have to work through a lot of these issues. So, for example, in building the Australian model we will have the capacity to look back at the 10 previous port calls of any ship. If a ship does not comply to our satisfaction with the code or any of its previous 10 port calls have been at a port that does not comply, there is an expectation that we have the capacity to do something about that—put control measures on the ship. My expectation is that the developed economies of the world are taking this seriously, and we will start to see some shift in how shipping is organised.

Mr ADAMS—I heard you use the term 'zero tolerance' in relation to the United States. I have read that one of their concerns is that shipping could be a major terrorist approach into the US, breaching their security. Do you think that the indications from the negotiations are that the Americans are very serious about this? Do you think that, if people do not comply, it will affect the trading of nations with the USA?

Mr Tongue—I think our best guide is the US approach to the 24-hour advance manifest rule on the customs side that was recently introduced. They made it clear that, unless US customs was provided with details of containers 24 hours before they were loaded, they would reject both the container and the ship carrying it. They were serious about that, and the implementation date happened. They received advice that Hong Kong may not be able to meet the deadline. The advice back to Hong Kong was 'Don't bother packing the containers unless you meet it', and Hong Kong met the deadline. So my sense is that they are very serious.

Mr Wolfe—I would like to add to that that we should not just focus on the US. It is quite clear that the European Union and our major trading partners, Singapore and Japan, are deadly serious about complying with the code.

Mr ADAMS—In relation to being able to use technology in this situation, how are we placed as a country in terms of the companies here? Have they got opportunities to get involved in some new technology and new approaches to looking at this?

Mr Tongue—We have certainly received a lot of approaches from Australian and other companies about how enhanced security systems can be built into ports. Early on, we want to focus on good basic security but, down the track, there are clearly going to be opportunities across the transport sector—beyond the port sector—for everything from X-ray technology to access control systems and the like. It is an emerging area of activity.

Mr CIOBO—I am interested in the objection process. Can you advise us of what some of the possible or likely objections may be and what their impact could be should they become material objections?

Mr Tongue—Within Australia?

Mr CIOBO—Internally or externally.

Mr Tongue—It is hard to anticipate. For example, in regional ports such as some of the smaller ports that might receive only a few SOLAS vessels each year, I would expect—and there has been a little bit of press about this—fears that we would be basically mandating that the whole waterfront be shut off so that nobody could fish off the wharf and those sorts of things. Again, we want to focus on the outcome of protecting the ship when it is there. We do not necessarily have to mandate that you can no longer walk on the wharf. We will have to go through a process of explaining to communities that we are serious about this but that we are not going to be silly about it.

As we get to some of the bigger metropolitan ports like Sydney, Melbourne, Brisbane and Fremantle, where the port is embedded in the operation of the city, we will have to negotiate with facility operators and owners about the level and nature of the security treatments we would like to see in place around some particular facilities because some of them will be costly. That will be a negotiation process as we as a regulator learn how to run this new system and as the maritime community begins to appreciate a whole new facet of its operation. So it is going to take us a while to change the culture in the sector from where it is to where it needs to be.

Mr CIOBO—It is projected that the maritime industry will need to invest up to $313 million initially and up to a further $96 million in subsequent years. Are those estimates off the back of consultation? Have you started that consultation process?

Mr Tongue—They were our initial estimates early in the process. We have subsequently found through our consultation processes that in some parts of the sector there is more security in place than we had anticipated and that some of it is quite good quality. There are other areas, where we have worked with state governments under the national counterterrorism arrangements around critical infrastructure protection, where we think there is a fair bit more work to do. So at

this stage that is our best estimate on the table. So far, Port Kembla is the one port that has costed this. Their estimate was in the order of $2 million or so to comply and about $500,000 additional annually. It is possibly not a bad medium-level port as a guide, and if you extrapolate that then our estimate is possibly a little bit high.

Mr CIOBO—I would have thought that to a very significant extent a lot of this would overlap with basic quarantine and Customs measures.

Mr Tongue—Within a port there are certainly customs zones—particularly, say, associated with containers. Having said that, in the last two decades the focus in the maritime sector has been very much on facilitation. Ports have opened up and become more accessible. The emphasis has been on speed and volume. What this does, if I could use the airport analogy, is effectively try to put a decent sized fence around the port. Practically, of course, we are not going to do that, but it tries to improve perimeter control and access. A key issue for us is who is getting on and off ships. On the waterside we are working with state police, Customs, the Navy and others on how we can protect ships moored at ports. There is some control there. Its focus is principally Customs control, with AQIS also. However, we need to significantly enhance that to ensure we have security control over the port environment.

Mr CIOBO—Not in terms of primary considerations, because they possibly are economic, but in terms of labour force considerations, the deputy chair raised the notion of consultation with the union movement. With regard to the union movement, is there a willingness to recognise the importance of undertaking this type of reform? How has the approach been with regard to the labour force making changes to their working practices to accommodate these types of increased security measures?

Mr Tongue—My sense to date is that all our interactions across the sector have been very positive, with the proviso that people do not want us to get carried away and put in place, if you like, a Rolls Royce system across the board. As long as the system addresses the risks, to date we have been received reasonably positively. Certainly issues of personnel and identity, particularly around key port facilities, are something that we are going to have to negotiate, but, given that we have been able to do that in aviation, I am pretty hopeful that, as long as we take a sensible approach, people will accept the need to do this.

Mr Wolfe—Some of the benefits that you will get from improved maritime security will, I suspect, be improved personal security and security of items that one is storing at one's locations. Those are benefits we found in aviation security.

Mr CIOBO—Do we have the ability—and I might be digressing a little bit here; I am not sure—in terms of the waterfront, of tracking items, especially containers, for example, off the ships and through the customs process until they are released?

Mr Tongue—That is principally the responsibility of the people handling the shipment and its agents. An area that we are looking at, again on this risk based process, is dangerous goods coming in by container—how they move. That is an early priority for us so that we have a sense about who is bringing it in, where it is coming from and whether it is moving correctly. That will be one of our early priorities.

Mr Wolfe—Our colleagues in Customs could probably provide you with a more fulsome answer than we can.

Mr CIOBO—I take it, though, that your consultation with Customs would have been very significant with regard to all of this.

Mr Tongue—Yes, and it continues to be.

Mr CIOBO—The focus of our discussions has been domestic in nature. Internationally, would the same basis probably be the primary driver of any likely objections?

Mr Tongue—It varies across the globe. It varies because of domestic arrangements and the position of governments. For example, in the US the estimated cost of complying is in the order of $6½ billion, and government has poured about $500 million in grants on the table to get the sector across the line to address the cost concern. I think, broadly, there will be those community access concerns in most places, particularly at the ports which are not big entrepot type ports. Other than that I would be speculating.

Mr Wolfe—What industry is looking for is, as far as possible, international consistency in approach—that is really a common theme—and, in a broader sense, making sure this does not become some sort of trade barrier.

Mr CIOBO—Sure. You raised Port Kembla as an example. Would there be provision to roll that out as a benchmark in best practice so that it might be easier for other industry participants and other ports?

Mr Tongue—As we move around the ports establishing port security committees, identifying the governance arrangements and so on, we are pointing to the industry leaders. Port Kembla is a good one in the bulk area. Other examples are the ports of Fremantle, Brisbane and Sydney. Many of them have anticipated this and are putting the infrastructure in place, and we are able to draw those people into our work so that it is not something dreamt up in Canberra; it is based on industry practice.

Mr CIOBO—So might there be provision to export that knowledge internationally?

Mr Tongue—The government is committed to the STAR initiative—the secure trade in the Asian region initiative—and one of the commitments under the STAR arrangements is that countries in the region meet the IMO deadline. We are working with the Department of Foreign Affairs and Trade, AusAID and the Customs Service to look at providing some support to our near neighbours to assist them in getting over this hurdle, and certainly we will be looking at opportunities to export Australian skills, knowledge and so on into the region.

Mr WILKIE—I am interested in a couple of areas. Firstly, we are talking about an enormous amount of money to put this in place and keep it operating in Australia. Is 12 months enough time to get that sort of infrastructure up and running?

Mr Tongue—Twelve months is tight. Our problem is an unusual one. As I said in my introduction, our focus has to be on the ports because of the relatively small number of

Australian flagged ships. We think we can knock the Australian flagged ships off in relatively quick time. In the port sector, it is going to be tight. Some investments will not be in place, simply because of the planning and other lead times required. However, if we identify that there is a particular risk working in a port that they need to cover off with a treatment that cannot be in place, then it is certainly open for us to work with them to put in place some other mitigating measure. If they need to put in new security cameras and they cannot get them in time—those sorts of things—there are ways we can treat the risks in the interim to meet the deadline. So we think at this stage that we can meet the deadline, but there will not be lots of free time.

Mr WILKIE—You have already touched on my second point, which relates to ports where there is a high level of public involvement. I am from Western Australia, so obviously I am particularly interested in Fremantle. I can imagine it might be realistic to separate the berthing facilities and some of the terminal facilities from the public, but in Western Australia the river is the main source of recreation for people with boats trying to get out onto the ocean. How will security operate in that environment?

Mr Tongue—The waterside is our toughest area. It is tough because of the legislative issues involved and it is tough because there are some vulnerabilities there. The way we are approaching the task is to look at areas where we would not want people either associated with a particular facility—a cruise terminal, possibly oil and gas facilities, or something like that—or close to particular vessels. For example, we might maintain an exclusion zone around a big tanker, with penalties attached to going inside that zone as the tanker comes in to berth, but for the rest of the time we will enable people to quite rightly enjoy the waterfront. It is a significant issue for us. We are talking to state police and water police about it. It is silly to do it if we cannot police it, but at the same time we need to demonstrate to the community that we are serious and that there are certain sorts of vessels that we think it is prudent for people not to be near. So it is going to be a tough one for us to work through.

Mr WILKIE—Would it include reviewing whether it is appropriate for certain types of vessels to visit those ports? I will give you an example and perspective. We do a lot of crew swaps in Western Australia for the US fleet, and often those vessels will go to Fremantle. It has been suggested that it may be more appropriate for those vessels to go to Garden Island naval base at Rockingham and do the swaps down there. Would the procedures in implementing this involve reassessing those sorts of activities?

Mr Tongue—This does not cover naval vessels. Having said that, in working with the sector, they see that a lot of the structures, processes and so on that we put in place here will provide them with some valuable learning about how they handle those vessels. I would be principally interested in the interaction between naval vessels and SOLAS vessels—for example, a naval vessel moored alongside a cruise ship introduces a different set of risk parameters that has to be addressed. I expect that we will have to work with the sector around those particular sorts of issues: what is the nature of the naval vessel, what is the nature of the cruise ship and can we risk treat both working through those issues? In discovering and working with the sector, we have found that it is an incredibly complex interplay of forces and systems.

CHAIR—Can you comment as to why the code being introduced as an amendment to the SOLAS convention? Was there another means by which these security measures could have been introduced? Technically, how and why has it been done this way?

Mr Tongue—In the post September 11 environment the US has principally worked through many international fora to advance international security type obligations—world customs organisations, international civil aviation organisations and international maritime organisations. I think the IMO was the only appropriate vehicle that had the reach and structured process in place. It is unusual to see security provisions in a safety related document, but—

CHAIR—It was deemed to be the most convenient vehicle to do this?

Mr Tongue—Yes.

CHAIR—Time is running away from us and we should adjourn this now. We may well have some supplementary questions or other issues we would like to raise with you, but thank you very much for your submissions and your presence here this morning. It is very much appreciated.

Committee adjourned at 12.12 p.m.