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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Monday, 9 August 2004

Members: Dr Southcott *(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 Bartlett, Marshall and Tchen and Mr Adams, Mr Martyn Evans, Dr Southcott and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 22 June 2004

WITNESSES

ALDER, Mr Michael, Manager, Wine Policy, Crops, Wine and Horticulture, Food and Agriculture, Department of Agriculture, Fisheries and Forestry............ 2

CRESWELL, Mr Christopher Colin, Copyright Law Consultant to the Copyright Law Branch, Attorney-General's Department............ 14

DANIELS, Ms Helen Elizabeth, Assistant Secretary, Copyright Law Branch, Attorney-General's Department............ 14

GRUBER, Mr James, Principal Food Technologist, Food Standards Australia New Zealand............ 2

HAIPOLA, Ms Kirsti Kaarina, Senior Legal Officer, Copyright Law Branch, Attorney-General's Department............ 14

HODGES, Mr Christopher Robert, Principal Legal Officer, Criminal Justice Division, Attorney-General's Department............ 7

HUNTER, Mr Peter, Executive Officer, Pacific Islands Branch, Department of Foreign Affairs and Trade............ 7

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department............ 2

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department............ 14

LENEHAN, Mr Craig, Acting Director, Legal Section, Human Rights and Equal Opportunity Commission............ 28

PANAYI, Mr Paul, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade............ 2

SADLEIR, Mr Richard, Assistant Secretary, International Organisations Branch, Department of Foreign Affairs and Trade............ 23

SEWELL, Mr Mark Francis, Senior Adviser, Pacific and Assistance Division, Department of the Treasury............ 7

SKILLEN, Mr Geoff, Principal Legal Officer, Public International Law Branch, Office of International Law, Attorney-General's Department............ 23

TAYLOR, Mr John, Senior Legal Adviser, Food Standards Australia New Zealand............ 2

THOM, Mr Steve, Executive Officer, International Organisations Branch, Department of Foreign Affairs and Trade............ 23

WHITE, Mr Damian Craig, Executive Officer, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade............ 7

WHITE, Mr Damian Craig, Executive Officer, Legal Branch, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade............ 23

Committee met at 10.02 a.m.

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties.

Resolved (on motion by **Senator Marshall**, seconded by **Mr Martyn Evans**):

That submissions Nos 1 and 2 for treaties, tabled 22 June, be treated as evidence and authorised for publication.

CHAIR—Copies of those submissions are available from the secretariat. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will review five treaties tabled in parliament on 22 June 2004. This is the first opportunity for the committee to take evidence for this inquiry. Witnesses from the Department of Foreign Affairs and Trade and from the Attorney-General's Department will be with us for today's proceedings, with witnesses from other departments joining us for discussion of the specific treaties for which they are responsible. I also understand that a representative from the Human Rights and Equal Opportunities Commission will present evidence on the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict. Today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present problems for any witnesses, it would be helpful if they would raise this issue now. A security exercise will interrupt our hearings for a short time, but witnesses will not be required to evacuate the room and new witnesses should still be able to gain access.

[10.04 a.m.]

Agreement on Mutual Acceptance of Oenological Practices

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department

ALDER, Mr Michael, Manager, Wine Policy, Crops, Wine and Horticulture, Food and Agriculture, Department of Agriculture, Fisheries and Forestry

GRUBER, Mr James, Principal Food Technologist, Food Standards Australia New Zealand

TAYLOR, Mr John, Senior Legal Adviser, Food Standards Australia New Zealand

PANAYI, Mr Paul, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

CHAIR—To begin our hearing, we will take evidence on the Agreement on Mutual Acceptance of Oenological Practices, done at Toronto, Canada on 18 December 2001. I welcome representatives from the Attorney-General's Department and the Department of Foreign Affairs and Trade and from Food Standards Australia New Zealand and the Department of Agriculture, Fisheries and Forestry. Although the committee does not require you to give evidence under oath, I should 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. Do you wish to make some introductory remarks before we proceed to questions?

Mr Alder—I would like to make a few brief remarks on the Agreement on Mutual Acceptance of Oenological Practices. Basically, the points I want to make are already outlined in our national interest analysis, which we submitted to the committee on 22 June. The mutual acceptance agreement is the first legal or major output of the World Wine Trade Group. The World Wine Trade Group is a group of countries that was formed in 1998, comprising Australia, New Zealand, Canada, the US, South Africa, Chile and Argentina, which has a few other observer countries from time to time. In short, the World Wine Trade Group is a group of countries that is committed to examining initiatives and proposals for facilitating the international trade in wine. The group meets about twice a year and has done since 1998.

The MAA itself was signed by Australia, New Zealand, Canada, Chile and the US—and later by Argentina—in December 2001. It was ratified by the US and Canada in December 2002—which brought it into force—and by Chile later, in 2003. The key objective of this particular treaty is set out in article 1 of the document. Its objective is to facilitate the trade in wine, and in particular its aim is to avoid obstacles being put in the way of such trade through mutually accepting the oenological practices of each party. The basic principle that is enshrined in the agreement is that an importing country will accept an exporting country's laws in relation to the regulation of oenological practices, regardless of whether such practices are legal in the importing country. However, this arrangement or this principle is also subject to article 3(2) of

the treaty, which means that acceptance of other countries' oenological practices is subject to health and safety considerations, which remain totally with the importing country.

In Australia's case, our Australia New Zealand Food Standards Code is essentially based on the WTO agreements and is therefore health and safety based, particularly in relation to oenological practices per se. In the case of the mutual acceptance agreement, therefore, our system of regulating oenological winemaking practices is already consistent with the broad objective of the treaty itself, and we did not need to make any legislative changes to the governing legislation. However, because of the way our code works, which is a positive listing approach, we did need to, in accordance with the treaty procedures themselves, assess the oenological practices of the other countries that are members of the treaty. So we had those practices—particularly those of Chile, Argentina, Canada and the US—assessed by Food Standards Australia and they undertook this assessment procedure in accordance with their normal public consultation arrangements. A limited number of practices were identified—11, I believe—that were inconsistent with the joint food standards code and, following the normal public consultation processes, the code was amended. The changes came into force in April this year, which now enables Australia to proceed to formally ratify the treaty.

The major thing to point out with this treaty in terms of the benefits for Australia is that it provides greater security of access for our exports, particularly into important North American markets. You are probably all aware of Australia's strong export success in the wine area over the last decade or so. In the case of North America, the US is now our largest export market by value—the UK remains our largest by volume—and Canada is now our No. 3 market by value. North America itself is an export market worth about $1.16 billion per annum. In terms of security, limiting a potential area that could pose a threat or technical barrier to our market access means that this particular treaty is important.

The treaty itself also provides the enshrining of an important international alternative principle to the multilaterals pursued by the European Community, which takes a positive listing approach to oenological practices, but they also take into account non health and safety related aspects. We believe this is an important step forward in terms of the way in which we wish to regulate that trade.

Finally, it encourages new technologies. When you have greater certainty in relation to practices, it encourages technological innovation, which the Australian wine industry is very adept at. The MAA itself, it is noted in the NIA document, is strongly supported by the Australian wine industry, who are also participants in the World Wine Trade Group. In summary, we believe that, now we have completed the amendments to the Food Standards Code, Australia should proceed to ratify this agreement.

CHAIR—Has Food Standards Australia New Zealand done an assessment of the oenological practices of the other members of the worldwide trading group?

Mr Gruber—Yes. Staff went through the practices and identified those things that Michael has talked about. We have assessed those in terms of public health and safety, and they have now been legislated. We fast-tracked those through an arrangement within our act, and the board actually met out of session to facilitate that.

CHAIR—What changes needed to be made?

Mr Gruber—There were a number of additives and processing aids such as gum acacia—gum arabic. I am not sure that I can remember all of them. There were a couple of flavours that were permitted in specific wine types. Some of the processing aids were ammonium sulfite—urease? I am sorry; I might need help—

CHAIR—So these were Australian oenological practices?

Mr Gruber—No, these were practices that were permitted in other countries that we had not approved in wine. In most cases, these things were approved in other foods; it was just about working out what worked for our practices in wine. Some of those were new to the Food Standards Code.

CHAIR—I follow that. Have equivalent organisations like the FDA in the United States done a similar analysis of oenological practices in those groups?

Mr Alder—It is up to each country to decide how they wish to carry out their own assessments. They might have a different process. The treaty itself requires each country to have concluded such assessments. Once they ratify it, we assume we have done that and they are happy with our particular case. But we have notified the depository, the US, of all the regulations and so on that apply to Australian practices so that they are fully aware of them.

CHAIR—To go back to Food Standards Australia New Zealand: you are saying that there were additives that other countries, as part of their practices, were putting in their wine that we had not permitted in Australia for wine. We are going to allow that. But you are also satisfied that they are safe additives.

Mr Gruber—We have done the assessment and it has been through the ministerial council process. So it is not just FSANZ; it has now been done in the law.

Senator MARSHALL—So there is no good reason why those food additives were not allowed in Australia before now?

Mr Gruber—No. As I said, things like gum arabic were allowed in a whole range of foods; they just were not allowed in wine. The change was to allow that in wine.

Senator MARSHALL—Why wasn’t it allowed in wine?

Mr Gruber—Mainly because the wine industry had not asked for it.

Senator MARSHALL—There was no valid reason why any of those food additives were not previously allowed; is that what you are saying?

Mr Gruber—Not on public health and safety grounds. We were just assessing the public health and safety, and that was fine.

Mr Alder—I think the practices that are used in some other countries are by tradition; they just have not been used here traditionally. It is not a health or safety issue, as Jim has said. It is because we have a positive listing approach and they were not listed and we just had not used them. You can take sugar as a very simple example. Sugar is banned in Australia. We do not use it; we do not need it. But in Europe sugar is required for making wine, simply because of the colder weather. It is just a practice. If we were going to allow it, we had to add it here to enable them to bring in that wine.

CHAIR—This is an agreement on oenological practices. The committee has recently concluded an inquiry into the Australia-United States free trade agreement. We looked at wine, including the issues of blending and geographical indicators and so on. Does the World Wine Trade Group look at issues other than oenological practices?

Mr Alder—Yes. In fact, this treaty requires the parties to enter into negotiations on a multilateral wine labelling agreement. That is what we are working on right now and have been working on for the last two years or so. We talk about a whole range of trade issues generally. It is used as an exchange forum as well for what is going on in the world of wine. This was the first output; the multilateral labelling treaty is the second output.

CHAIR—Given that in the Australia-United States free trade agreement they were unable to get resolutions on geographical indicators, blending issues and so on, how confident are you that the seven- or eight-member group can do this?

Mr Alder—I do not know whether I would put a tick on a level of confidence per se but the issues of blending and geographical indications are certainly ones that we will be taking up at a future date in the World Wine Trade Group. We tend to focus on one major issue at a time, but those issues are on the longer term agenda for discussion.

Senator MARSHALL—Can Australia now change its practices or regulations in respect of this area without agreement from the other treaty partners?

Mr Alder—We are obliged to notify any changes of practices to the other parties. They then have the right to decide whether they accept them or not. The only ground on which they can reject them is health and safety; so to reject them they would have to show there was a health and safety issue.

Senator MARSHALL—Vice versa, if we decided that some of the existing practices had health and safety implications, would we have to get the agreement of the other treaty partners before we changed our practice?

Mr Alder—No. Article 3(2) says that we maintain complete control of health and safety. If a health and safety issue comes to the attention of Australian authorities in relation to a particular additive, we have the right to prevent it. The other party could challenge that but, if we simply cannot reach agreement and continue to differ and it is a health and safety issue from our side and not theirs, it is ultimately a WTO dispute matter.

CHAIR—The agreement was signed in December 2001 and entered into force in December 2002. Can you comment on the reasons for the delay in tabling until June 2004?

Mr Alder—We lodged the treaty only after we had finished our internal processes. The normal procedure is to correct any domestic legislation and check that it is consistent. Once we had done that, part of the process was through the Food Standards Code amendments. As soon as the process had finished there, which was at the end of April, we took action to table it.

Mr MARTYN EVANS—I notice that Argentina, New Zealand and South Africa are yet to ratify. When do we expect them to ratify? We are hardly upfront about it either so I am not being critical of those countries, but do we have an expectation that they will be on a similar time track to ours?

Mr Alder—New Zealand should be because they have the same regime, so we would expect them to be fairly much in line with us. I could not tell you what Argentina's time frame is; it obviously depends on their parliamentary process and other processes. I think South Africa is going to be considerably slower. They have yet to even sign the agreement. They have had a whole lot of internal issues in relation to wine that they have tended to focus on. They have yet to really come back to this agreement. I know from talking to their industry people that they are very keen to become members, but it is a matter of when their government gets around to doing those things.

Mr ADAMS—This does not touch blending? We are not going to get a five-country blend?

Mr Alder—No, this has nothing to do with blending.

Mr ADAMS—Can we have the list of changes made to the food standards?

Mr Alder—There was a report done by FSANZ which I am sure is available, and we can make it available on the public record.

Mr ADAMS—Perhaps we could we get that.

Mr Gruber—We have one here that we can make available.

CHAIR—Thank you for your evidence.

[10.20 a.m.]

Agreement between Australia and Nauru concerning additional police and other assistance to Nauru

HODGES, Mr Christopher Robert, Principal Legal Officer, Criminal Justice Division, Attorney-General's Department

HUNTER, Mr Peter, Executive Officer, Pacific Islands Branch, Department of Foreign Affairs and Trade

WHITE, Mr Damian Craig, Executive Officer, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

SEWELL, Mr Mark Francis, Senior Adviser, Pacific and Assistance Division, Department of the Treasury

CHAIR—Welcome. We will now hear evidence on the agreement between Australia and Nauru, done at Melbourne on 10 May. 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. Do you wish to make some introductory remarks before we proceed to questions?

Mr White—I will make some introductory remarks. Australia and Nauru signed the third of a series of memoranda of understanding on 25 February 2004. This MOU outlined additional assistance which Australia would provide to Nauru to help Nauru address the serious and systemic governance issues which it was facing. Nauru's governance problems are so serious that Nauru could have been said to be on the verge of state failure. Without outside assistance, the Nauru government's inability to manage its own resources could have resulted in its economic collapse. In this context, Australia agreed to provide Nauru with a secretary of finance and a director of police to assist it to meet its governance challenges. The MOU envisaged that each of those positions would be assisted by two Australian advisers respectively.

In order to ensure that Australian officials deployed to Nauru have appropriate legal protections and appropriate legal powers, Australia and Nauru agreed to enter into a treaty which would set out the obligations, rights and duties of each country with respect to the officials deployed. The treaty is of a similar nature to the multilateral agreement which has now been signed by all Pacific island countries in relation to the Regional Assistance Mission to the Solomon Islands—RAMSI. In some ways it is similar to the recently signed agreement between Australia and Papua New Guinea on enhanced cooperation.

The agreement helps to ensure that Australian officials working in Nauru will have the necessary powers to perform their duties. The secretary of finance position is an in-line position within the Nauru bureaucracy. As a result of the treaty and its implementing legislation within Nauru, the secretary can exercise all of the powers that a Nauruan secretary of finance could

exercise. The treaty also contains provisions on jurisdiction which are designed to protect Australian officials serving in Nauru. Under the treaty, Australians serving in Nauru are obliged to observe and respect the laws of Nauru but are subject to the exclusive jurisdiction of Australia with respect to criminal matters. Australia can enforce its criminal jurisdiction over deployees to Nauru under the Crimes (Overseas) Act. In a similar way, Australian officials deployed to Nauru cannot be subject to the civil jurisdiction of courts in Nauru.

It is important to note that these immunities for Australian officials are designed to prevent those officials from being exposed to vexatious litigation in Nauru which could prevent them from carrying out their duties. Australians working in Nauru, in both the policing and finance sectors, could potentially be engaged in sensitive work. In order for them to work free from interference, it was desirable to agree to these immunity provisions. Australia can waive these immunities if it considers it appropriate in a particular case.

The treaty was signed by both countries on 10 May 2003 in Melbourne. Due to the urgent need to deploy Australian officials to Nauru—particularly the finance team—it was necessary to bring the treaty into force before it was tabled in parliament. The Minister for Foreign Affairs, Mr Downer, wrote to the Chair of the JSCOT on 27 April 2004 advising of the need for this treaty to be subject to the national interest exemption. The treaty entered into force on 29 July 2004. That was the date that Nauru sent Australia a third person note stating that the constitutional formalities in Nauru for entry into force had been completed. The Australian finance team have now been deployed to work in Nauru, and they have begun their work.

Senator BARTLETT—Thank you for that. To affirm that point you have made, when you tabled the national interest analysis, it was waiting on the parliament of Nauru to pass the necessary legislation. Has that now happened?

Mr White—Yes, that has occurred.

Senator BARTLETT—They have a new government?

Mr White—Yes, that is right.

Senator BARTLETT—There are no modifications required to this? Are the new government as happy with it as the old government were?

Mr Hunter—In fact, the new government were much more active in pushing this through. One of the first things they did when they were in place was to pass the legislation immediately with no amendment to the existing legislation.

Senator BARTLETT—It sort of had its genesis under the new government when it was the government before the old government, as I understand it.

Mr Hunter—That is one way to look at it in the sense that, yes, President Scotty when he was previously president had sought Australian assistance and had given a strong indication of a possible commitment to the sort of reforms that we are aiming to achieve under this agreement.

Senator BARTLETT—You state that, in practice, it is likely that an Australian will be appointed to be the director of the Nauru police. Has that happened?

Mr Hunter—It has yet to happen. We are still in the process of discussing this with Nauru. There has been a slight change from the previous government to the existing government in that the previous government was concerned to have the police deployment occur more or less simultaneously with the deployment of its finance officials. The new government sees a higher priority being placed on the need for economic reforms and economic measures to get Nauru back on track and it is interested in discussing further with us the possibility of delaying the policing deployment slightly to give a slightly higher priority to the economic measures. That said, it is still pushing ahead with the policing deployment.

Senator BARTLETT—Does the position of director of the Nauru police—if it is filled by an Australian—then come under the auspice of this agreement?

Mr Hunter—Yes.

Senator BARTLETT—I presume that 'director of police' is a Nauruan position under their law, rather than being newly created here. But, if an Australian is to hold that position, they would then get the protections of this treaty.

Mr Hunter—That is correct.

Senator BARTLETT—Is law enforcement the main focus of the police deployment, or is it training and skilling?

Mr Hunter—I would say it is more the latter. It is our assessment, from a foreign affairs perspective, that there is not the same sort of challenge to law and order stability that we are seeing elsewhere in the pacific—for example, in Papua New Guinea and the Solomon Islands. Nauru is not on the verge of a kind of social breakdown like that. That said, its police force is in need of reform; it is oversized and needs significant retraining and re-evaluation. So the emphasis of the police deployment will certainly be on the latter aspect of your question—that is, the training and reform side more than law enforcement holding and that kind of typical operational policing.

Senator BARTLETT—Given what you have said before about the priority of economic reform from the point of view of the new government in Nauru—which to me would seem rational because, if they do not get that right, all the other law and order and social problems will flow on—this agreement seems to focus predominantly on the police side of things, although it is about other assistance. How necessary is this type of agreement for the other side of it—that is, the financial treasury side?

Mr Hunter—I think the key aspect, as Mr White indicated in the introductory comments, is to provide immunities and protections for all officials deploying to Nauru. The focus on policing in this treaty perhaps in part reflects the higher priority that the previous Nauru government placed on it. We need to reassure them, through the drafting of this treaty, that the Australian police deployment would be conducted in a manner that would protect both Australians and Nauruans, so there was an emphasis there. Nevertheless, I think this treaty—and I am sure my colleagues

will be able to comment more directly on this—provides ample protection for the Australian finance team also.

Senator BARTLETT—There is a list here of some similar agreements—multilateral ones. Are you able to indicate whether there is any significant difference between this one and those other multilateral agreements? You say they are similar, but is there any difference with this one and, if so, what is it?

Mr White—All the listed treaties have been listed because they involve the deployment of the Australian Defence Force, Australian police or Australian public servants to countries in the Pacific. All of them contain provisions on jurisdiction but, from looking at the list, I think they all vary slightly in terms of the scope of protections that are offered to Australians. I think that, in all these situations—in all the deployments—the protections that have been offered to Australians have been assessed as adequate by the agencies deploying people. You could probably say that this treaty represents the high-water mark in terms of protections. With respect to criminal matters, Australia has exclusive jurisdiction over all Australians deployed and they are not subject to the civil jurisdiction of Nauruan courts at any time. This would represent the maximum immunities you could expect in a treaty of this type. There are some variations with the others. Some of the other treaties also mention defence forces. The deployments to Bougainville and the Solomon Islands agreement have provisions relevant to Defence.

Senator BARTLETT—Is this going to represent a benchmark that we are going to try and match elsewhere, or is it case by case?

Mr White—It is very much on a case-by-case basis; each deployment is different. One of the features of this treaty—and, I guess, with the agreement signed with Papua New Guinea—is that the officials are being deployed to in-line positions. They are not being deployed to act as advisers; they are actually acting in jobs within the bureaucracy of Nauru. It was therefore felt that they are somewhat more exposed than an adviser would be to vexatious litigation or attempts to prevent them from carrying out their work.

Senator BARTLETT—Does this agreement have any linkage at all to the agreements that have been reached with Nauru in relation to holding asylum seekers there?

Mr Hunter—Yes. The treaty is directly connected to the memorandum of understanding governing cooperation between Australia and Nauru on the management of the offshore processing centres.

Senator BARTLETT—What is the status of that agreement?

Mr Hunter—Do you mean: how is it enforced at present?

Senator BARTLETT—I mean: what is its time frame? Does it have a time frame?

Mr Hunter—Yes. It will be in place until the end of June 2005.

Senator BARTLETT—That has, in effect, been renewed two or three times.

Mr Hunter—That is correct—as of February this year.

Senator BARTLETT—In the national interest analysis there is a phrase about Nauru being among the most egregious examples of corruption, profligacy and mismanagement in the South Pacific—a reasonably strong statement, although I do not dispute it. Given that you are talking about good governance, and I think that is also talked about elsewhere, or just straight after that—the policy of good governance for Pacific Island countries—has there been any discussion between our government and theirs at the foreign affairs level about the practice of Nauru preventing so many people from being able to enter that country, particularly lawyers and others trying to assist people in the detention camps?

Mr Hunter—I am sorry if I have not entirely drawn a correct linkage between the first part of your question and the second but, in any case, in direct response to the second part—whether Australia has corresponded with the Nauru government on the matter of who Nauru does and does not issue visas to—we have not in any way maintained, at an official level or at any other level, correspondence with them over who they choose to issue their visas to.

Senator BARTLETT—So it is not a matter of concern to Australia, given that we are trying to promote good governance, that a nation can prevent from entering people who can assist in ensuring that people in that territory have proper access to due legal process in that country? Is that something that has not bothered us?

Mr Hunter—I see. Now I understand you better. I am sorry about that; I had not quite picked up on what you meant. Firstly, when we refer to good governance in the case of that specific part of the treaty and indeed the MOU, we are referring to the economic management of Nauru, and it refers to being transparent and practising the sorts of economic procedures that we follow in Australia. It is also a reference to following economic practices and government procedures to control and overcome corruption. That is what we are referring to when we use that expression. In answer to the second part of your question about whether—in, for example, cases of representation in court cases such as the one you mentioned—the matter of who Nauru does and does not grant visas to is a concern to the Australia government, I think that would probably be more a matter for the department of immigration to answer. From DFAT's perspective, in our bilateral relations with all countries, we do not intervene in another government's perspective on who they do and do not issue visas to.

Senator BARTLETT—But we are intervening in the management of their economy?

Mr Hunter—That is so.

Mr ADAMS—What number of people are we deploying there—with the police and in the financial team?

Mr Hunter—We presently have three members of the financial team in place and, subject to further discussions with the Nauru government, we expect three Australian Federal Police to deploy—so it will be six in total.

Mr ADAMS—What danger to Australia do we perceive in relation to this government's issuing of visas and passports? Have we any concerns in relation to that, seeing that this government is in some disarray?

Mr Hunter—I will have to make sure I have understood you properly. Are you asking whether the Australian government is concerned about the existing Nauru government issuing fraudulent passports?

Mr ADAMS—Yes—for entry into Australia, with the present heightened tensions we have in the world, with people using passports illegitimately.

Mr Hunter—Okay. Firstly, the Department of Immigration and Multicultural and Indigenous Affairs has a representative officer in Nauru who is responsible for issuing visas to all people who want to travel to Australia from Nauru. I can fairly confidently say that that officer is doing a quite rigorous job to make sure that standards are kept at the highest levels. In terms of the first part of your question about issuing fraudulent passports, that is a problem we have seen throughout the Pacific, and indeed during the terms of previous Nauru governments we have had concerns about that. That was one of the reasons for having the immigration officer deploy there—to make sure that issue was more thoroughly monitored. We have not seen any evidence recently to make us more concerned that that issue is continuing to be a problem. I would, however, have to defer to expertise from DIMIA to get a very accurate picture for you there, but my understanding is that that is no longer a problem.

Mr ADAMS—If somebody wants to go to Nauru from Australia, do they apply through due process? Is there a consulate or an embassy?

Mr Hunter—There is the Consulate-General in Melbourne and, yes, you have to apply through their office to get a visa to travel to Nauru.

Mr ADAMS—Do they normally knock back Australians or do they welcome Australians? Do they welcome people going there for holidays?

Mr Hunter—I do not have a track record that I could sketch out for you on the odds of being knocked back or not if you are an Australian citizen or a citizen of any other country. I am afraid I cannot give you a picture.

Mr ADAMS—I understand that the economy is very limited.

Mr Hunter—That is so. I am sorry; I do not have an accurate picture for you about the rate at which they issue or reject visas.

Mr ADAMS—What sort of process is being structured by our financial people? How do we have an audit? How do we see that what we do is monitored into the future? Is there a process for that or do we just do a job and pass it over at some time in the future?

Mr Sewell—It is contemplated at this stage that the deployed officers would be working through to the middle of next year. The problem in Nauru is that there has not been much

information available. We are hopeful that the deployment of the officers will give us and the Nauruan people a much better idea of what their actual financial situation is.

Mr ADAMS—So there will be a transparent process and some auditing put in place.

Mr Sewell—Yes. They have tended to lack the processes that Australia and other countries have.

CHAIR—As there are no further questions on this treaty, we thank you very much for your evidence.

Proceedings suspended from 10.42 a.m. to 11.09 a.m.

World Intellectual Property Organisation Copyright Treaty

World Intellectual Property Organisation Performances and Phonograms Treaty

CRESWELL, Mr Christopher Colin, Copyright Law Consultant to the Copyright Law Branch, Attorney-General's Department

DANIELS, Ms Helen Elizabeth, Assistant Secretary, Copyright Law Branch, Attorney-General's Department

HAIPOLA, Ms Kirsti Kaarina, Senior Legal Officer, Copyright Law Branch, Attorney-General's Department

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department

CHAIR—Welcome. We will now hear evidence on the WIPO Copyright Treaty of Geneva, 20 December 1996 and the WIPO Performances and Phonograms Treaty of Geneva, 20 December 1996. I welcome representatives of the Attorney-General's Department. 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. Do you wish to make some introductory remarks before we proceed to questions?

Ms Daniels—Yes, I do. The conclusion of the World Intellectual Property Organisation Copyright Treaty and the World Intellectual Property Organisation Performances and Phonograms Treaty marks an important advance in improving international copyright standards to meet the challenges posed by digital technology. The treaties were designed to supplement the provisions of the Berne Convention for the Protection of Literary and Artistic Works and update protection under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, known as the Rome convention. They expand the rights of owners of copyright in works, films and sound recordings and of performers and provide protection in the online environment. The treaties also standardise the general criteria for permissible exceptions to copyright under the Berne convention, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. It was agreed that Berne convention exceptions fully apply in the digital environment.

Australia was an active participant in the treaty-making process, and the government has been working towards accession to these treaties since their conclusion in 1996. Australia gained considerable standing in the international copyright community in being one of the first countries to implement the main obligations of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty regarding sound recordings, by the enactment of the Copyright Amendment (Digital Agenda) Act 2000, known as the digital agenda act.

The WIPO Copyright Treaty adds to protection under the Berne convention in the following ways. It provides for expanded rights for owners of copyright in works and films; protection of new categories of works; and specific obligations concerning the protection of technological protection measures and concerning rights management information. In addition, contracting parties must comply with substantive provisions of the Berne convention. This last requirement was included because non Berne convention members are eligible to accede to the WIPO Copyright Treaty without also acceding to the Berne convention.

The WIPO Performances and Phonograms Treaty provides for increased protection, compared to the Rome convention, in the following ways. It introduces moral rights for performers and protection for their rights in sound recordings. It provides for expanded rights for producers of sound recordings. Specific obligations are also placed on contracting parties concerning the protection of technological protection measures and concerning rights management information, obligations which parallel the provisions in the WIPO Copyright Treaty.

Australia implemented the main obligations of both treaties following the enactment of the digital agenda act. Further obligations will be implemented if the US Free Trade Agreement Implementation Bill 2004 is passed by the parliament. Parts 1 to 5 of schedule 9 of the free trade bill provide performers with rights over the exploitation of authorised sound recordings of their performances; protection against unauthorised communication of their performances; and comprehensive moral rights over their live and recorded performances. Schedule 9 of the bill will also align the term of protection for photographs with the term of protection for other artistic works.

Amendments to the Copyright (International Protection) Regulations will be required to ensure that protection granted under the Copyright Act is extended to rights-holders of other treaty-member countries, in compliance with the principle of national treatment required by the two treaties. These amendments are currently being drafted.

No reservations to the WIPO Copyright Treaty are permitted. As allowed by article 3(3) of the WIPO Performances and Phonograms Treaty, Australia is likely to take advantage of limitations on the criteria for extending the protection of sound recordings to the nationals of other contracting parties. As it has done under the Rome convention, Australia is likely to make a notification to the Director-General of WIPO that it will not apply the criteria of publication. In addition, as allowed by article 15(3) of the WIPO Performances and Phonograms Treaty, Australia will need to make a notification to the Director-General of WIPO that it will limit the application of paragraph 1 of article 15.

We wish to clarify to the committee a statement in the national interest analysis for the WIPO Performances and Phonograms Treaty. Paragraph 37 of the NIA discusses an exception to national treatment under the Australia-US free trade agreement and states:

> To ensure this AUSFTA exception to national treatment remained available to Australia, a reservation to Article 15(1) of the WPPT would be required.

In fact, Australia is able to take advantage of the exception in article 17.1.6 of the AUSFTA by virtue of a reservation to article 15(1) of the WIPO Performances and Phonograms Treaty made by the United States. However, Australia will need to make a reservation under article 15(3)

because of the limitation in section 152 of the Copyright Act on the quantum of remuneration payable for broadcasting sound recordings.

With regard to paragraph 28 of the WIPO Performances and Phonograms Treaty national interest analysis, we wish to add that, as well as the rights referred to there, moral rights will have to be granted to performers as required by the WIPO Performances and Phonograms Treaty. As mentioned earlier, the free trade bill includes comprehensive provisions for performers' moral rights.

Also, we wish to clarify to the committee the statement in paragraph 24 of the WIPO Copyright Treaty national interest analysis and paragraph 30 of the WIPO Performances and Phonograms Treaty national interest analysis regarding Australian law being fully compliant with all of the other obligations of the two treaties. We are in the process of obtaining advice from the Office of International Law to ensure that aspects of Australia's copyright law are in full compliance with the requirements of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

In conclusion, Australian accession to the two treaties will help to secure better protection abroad for Australian works, films, sound recordings and performers. This is a clear benefit to the important cultural sector of our community. The treaty standards with which Australian law has to comply were painstakingly negotiated with active Australian participation and enjoy wide and growing acceptance by countries around the world. Accession will also strengthen Australia's support for the work and role of WIPO in promoting international cooperation in the protection and use of intellectual property. Australia continues to be an active participant in WIPO consideration of the adequacy of international copyright standards and the negotiation of possible new standards.

CHAIR—Thank you. There is an annex giving 64 stakeholders. On 10 June there had been three submissions received. How many submissions have now been received from the stakeholders?

Ms Daniels—There were three submissions and then one further submission saying, 'No comment,' so there is nothing further.

CHAIR—So we have three submissions from 64 stakeholders?

Ms Daniels—I guess one point I could make is that the subject-matters of the two treaties have been subject to extensive consultation over a period of years, whether it is performers' protection we are talking about or moral rights for performers. Following the 1996 diplomatic conference, work commenced in the department on moving towards introducing new rights under our law. That has involved extensive consultation all the way. So the stakeholders, I guess, were not surprised or they had expressed their views in the consultation phase in an earlier period.

CHAIR—The ABC has raised concerns about being adversely affected by new laws pertaining to performers' rights due to the breadth of material that it administers. Would you care to elaborate on that?

Mr Creswell—In those earlier consultations preceding the letter in the context of tabling the NIA, the department and also the Department of Communications, Information Technology and the Arts had extensive consultations, and received comments from, the ABC, relating to the proposed performers' rights that are now in the US Free Trade Agreement Implementation Bill.

What the ABC are conveying in that comment summarised in the NIA is that, through the diversity of activities, they are both a producer and a broadcaster of sound recordings and also employ performers so they have to consider these various capacities in which they operate in considering the impact of the proposed new performers' rights. I think it is fair to say that, after these extensive consultations in which we have carefully responded to their comments of substance, they are reasonably satisfied that they can manage the impact of the new rights.

CHAIR—Would you care to comment on the other submissions as well? You have got one from Commercial Radio Australia and one from the Australian Library and Information Association. There was a fourth one—what was it?

Ms Daniels—The fourth one was from the Australian War Memorial, basically saying that they had no comment.

CHAIR—Is it true that CRA's concerns will be dealt with in the exception in the Australia-US free trade agreement?

Mr Creswell—Yes. As Ms Daniels indicated in her speech, their concern is actually addressed by the fact that the US has taken a reservation in its ratification of the WPPT. In the USA the traditional free-to-air broadcasters do not pay any remuneration to the owners of copyright in sound recordings for broadcasting those sound recordings, so if an Australian recording is played on that form of radio in the US they would get nothing. To the extent that the US has taken that reservation under the WPPT article 15, that constitutes an exception or a qualification on the national treatment obligation in the WPPT. So, by virtue of that action by the US—and this is the concern of CRA—Australian radio stations should not have to pay remuneration for the playing of US recordings when US recordings do not get any payment for their being broadcast in the US.

Mr ADAMS—What are we talking about: Australian records or the whole—

Mr Creswell—CRA's concern is about Australian radio stations having to pay remuneration to the owners of copyright in US sound recordings.

Mr ADAMS—Without the Americans paying for ours?

Mr Creswell—Yes, that was their concern. The present situation will continue under which the payments made by commercial radio—indeed, all radio—for playing sound recordings will not extend to US sound recordings.

Mr MARTYN EVANS—This is a very comprehensive treaty dealing with the digital rights agenda and with the extension of the copyright term. I take it Australia was proceeding with this treaty generally regardless of the US free trade agreement. We had been negotiating this in

parallel, I take it, and we were proceeding with this irrespective of the US free trade agenda. Is that right?

Ms Daniels—Yes, that is correct. Most of the obligations were made in the digital agenda act in 2000. The remaining obligations, such as extending the term of protection for photographs, we were working towards doing. We were also working on extending rights for performers.

Mr MARTYN EVANS—There is also the protection of the digital agenda, in terms of the protection that people have for copyright infringement devices and also the control over where items are released, which almost seems to me to reflect the region coding of DVDs. Some of the clauses seem to refer to control over the distribution of material, so that seems to reflect the region coding. If you are a producer or holder of copyright material and you have control over its distribution, then that right implies control over region coding, doesn't it?

Ms Daniels—Mr Creswell might want to add to my answer. With respect to the issue of rights management information and technological protection measures, the requirements for these treaties were covered in our digital agenda act 2000. With respect to the free trade bill, there are no further requirements or obligations under these two treaties. We consider that we fully comply with our rights management information obligations and our technological protection measures obligations under these two treaties in the amendments to the law that were made in 2000.

Mr Creswell—To supplement what Ms Daniels has said, the provisions in the two treaties concerning technological measures are actually written in quite general terms. For instance, article 11 of the copyright treaty states:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights ...

So it is written in quite general terms. As Ms Daniels said, we understood and took the view that the provisions in support of technological protection used by copyright owners in the digital agenda act 2000 complied with this fairly general obligation. As the committee would be well aware, in the context of the US free trade agreement, there are much more prescriptive provisions there, but they are provisions of the US free trade agreement, not these treaties. With respect to rights over distribution, I do not know whether you were referring, Mr Evans, to the distribution right in these two treaties, but that is understood, and expressed to be understood, to apply to physical items. It is not an electronic distribution right.

Mr MARTYN EVANS—But with respect to the distribution of DVDs, DVDs are a physical item.

Mr Creswell—Yes. The distribution right in both treaties is able to be limited by what is called exhaustion—that is, as soon as there has been an authorised sale anywhere in the world, that can be marked out as the limit of the distribution right. That is certainly Australia's view regarding its compliance with these treaties. So as soon as there is one authorised sale by or with the authority of the copyright owner, the distribution right ceases to apply. For instance, if a DVD which has regional coding that has been applied by the copyright owner is the subject of

an authorised sale in the US or in a European country, under Australian law the distribution right, as implemented by our law, has no further application.

Mr MARTYN EVANS—It is exhausted?

Mr Creswell—Yes. So it is a function of the extent to which the law can be invoked in aid of stopping people bypassing that regional code. It becomes a technological protection issue rather than a distribution right issue.

Mr MARTYN EVANS—So you are saying the distribution rights question expires once the first authorised sale occurs in the United States, for example?

Mr Creswell—Yes. That is what the treaty says.

Mr MARTYN EVANS—So the regional coding issue does not become a question for us because we choose to interpret it in that way. For example, I might choose to buy 1,000 region 1 coded DVDs in the United States, which I propose to import into Australia for lawful sale. I buy them lawfully in California from a distributor of those DVDs. That is a lawful sale; that exhausts the lawful rights of the copyright holder. I put them in a container and ship them to Australia. They get here; that is lawful; therefore the distribution rights have expired and I can legally import them under Australian law.

Mr Creswell—In the particular case of DVDs, we do have an importation right. The distribution right fastens on that to the extent that that would be parallel importation, which, in the case of audiovisual items, and we are talking about films—never having owned a DVD I am not completely sure what I am talking about—

Mr MARTYN EVANS—But the issue is that it is not prohibited by this treaty.

Mr Creswell—No, not necessarily—that is right.

Mr MARTYN EVANS—And we are choosing to interpret it in that way.

Mr Creswell—Yes. We are choosing to apply it in that way.

Mr MARTYN EVANS—But the interesting thing is that these provisions in many ways run parallel with those of the US FTA because they contain quite similar, although not quite as comprehensive, provisions to those of the US FTA. They both relate back to digital rights, management and avoidance measures, and distribution provisions.

Mr Creswell—You are quite right that a number of provisions in the US FTA parallel provisions in these treaties. I agree with you that the US FTA sometimes is much more prescriptive or more precise.

Mr MARTYN EVANS—We consider that our obligations under this treaty have been complied with already by the existing law in those two areas.

Mr Creswell—Yes.

Mr MARTYN EVANS—Finally, if I turn to the list of countries which have already ratified these two treaties, I notice the United States and Japan. I do not notice any EEC countries, particularly, and I do not see Canada. I wonder why there are so few other major countries with OECD type status. What is the situation with that?

Mr Creswell—The EC and the EU countries have all signed these two treaties. Under the EU constitutional processes, which are extremely complex, they all have to implement the obligations of the treaties, just as we claim we either have done or are in the process of doing. The EU countries all have to implement the obligations of the treaties in their domestic law. They all propose to ratify at the same time, and the EC as a separate legal entity will ratify at the same time. So the EU countries are being held back in terms of ratifying until the last EU country implements the law.

Mr MARTYN EVANS—But there is no doubt that they will all jump on board in some single, blinding big bang?

Mr Creswell—That is right. There is an EU directive with a very long title which includes the words 'harmonisation of copyright in the information society'. That was a sort of regional treaty within the EU telling countries how to implement the treaty obligations, and the countries are in the process of doing that. It has been complicated further by the fact that some of the newer EU countries as of May—I think it was—this year are already in there, such as Hungary—

Mr MARTYN EVANS—Poland.

Mr Creswell—Slovenia, Slovakia, the Czech Republic and, I think, Latvia. So several of those very new EU countries are already in there.

Mr MARTYN EVANS—And China?

Mr Creswell—I cannot tell the committee how advanced China is. We know that the Chinese are very focused on upgrading—

Mr MARTYN EVANS—Copyright?

Mr Creswell—Yes, their copyright law. We have read about it at the political level. The National Copyright Administration of China has visited Australia twice in the last four years and invited an Australian delegation to make a visit to China, which it did in about April this year, and we know they are doing the same with other countries; they have been to New Zealand and I believe they have been to Europe. So they are putting in a lot of effort to work out the best way for the Chinese to upgrade their copyright protection.

Mr ADAMS—Has there been any action in the WTO? Has that American corporation asked the government to lodge something—is there an action on copyright against China?

Mr Creswell—I do not know. I am sorry; I cannot inform the committee about that.

Mr Jennings—Certainly, there has been material in the press about possible actions that may be brought against China, but without consulting the WTO web site I do not think we are in a

position to provide an answer to that. If there were any actions or requests for consultations, being the first step in taking dispute action in the WTO, then that would be recorded on the WTO web site—quite publicly available.

Mr WILKIE—I have some questions about our Copyright Act itself. Is the legislation up to date; does it cover new forms of media? Let me put it into context. I was on a plane on Friday with a senior executive from one of the TV networks, and he was saying that they have a real problem with copyright. For example, let us say they are taping a football match and they send it to their network via satellite, but the network decide they are going to run it later in the day. A hotel with a satellite dish on the roof could download directly from the satellite and broadcast it live. They are saying that, under the Copyright Act, they cannot actually prevent the hotel from doing that, even though they own the transmission. The law covers film, and they are saying, 'Well, the satellite downlink is not film.' It is not in that medium, so they cannot actually take copyright action to prevent that occurring. Is there anything being done to cover those sorts of things in the future?

Mr Creswell—We are aware that some broadcasting organisations are concerned about the unauthorised use of signals—the interception of signals, as it were, and their showing in public places. I am sorry I cannot be more specific about this, but there are certainly some provisions in the act which give a right of action in respect of the commercial use of encoded broadcasts. Was this a free-to-air broadcast or a pay television broadcast?

Mr WILKIE—It would be free to air.

Mr Creswell—I think we would have to take that one on notice and see if we can provide a subsequent response.

Mr WILKIE—I would be interested in that, particularly given that we are talking about phonographs, with 'sound recordings' in brackets. If the act is the old act and still refers to phonographs—that is, carvings of an image onto a disk—how then does that go on to tapes and then on to digital recordings on CDs? Are we using the same act to cover those things and could that be challenged in a court?

Mr Creswell—Thanks for raising that. The term is actually 'phonogram', as it appears in the title of one of the two treaties. It is admittedly a rather arcane term and it is quite difficult to find a definition in a fairly substantial English dictionary. For better or for worse, it is a term that has been adopted, at least by the World Intellectual Property Organisation or WIPO arena, for referring to sound recordings. We do not use the term 'phonogram' in the Australian Copyright Act; we use the term 'sound recordings' and so do most common-law countries. I do not know what the situation is in non-common-law countries. As I say, it is an arcane term that is used in WIPO. The term 'sound recording' in our act is certainly regarded as covering something on disk or on tape and is capable of being applied to the latest form of technology for fixing sounds in a permanent form.

CHAIR—As there are no further questions, I thank you for your evidence before the committee today. This committee did make a number of recommendations on the free trade agreement in the area of copyright law, and so we ask you to look very closely at those

recommendations. We believe they are within the spirit of the free trade agreement and you, with your expertise in copyright law, are in a good position to consider them.

[11.41 a.m.]

Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict

SKILLEN, Mr Geoff, Principal Legal Officer, Public International Law Branch, Office of International Law, Attorney-General's Department

SADLEIR, Mr Richard, Assistant Secretary, International Organisations Branch, Department of Foreign Affairs and Trade

THOM, Mr Steve, Executive Officer, International Organisations Branch, Department of Foreign Affairs and Trade

WHITE, Mr Damian Craig, Executive Officer, Legal Branch, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

CHAIR—Welcome. We will now hear evidence on the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict done at New York on 25 May 2000. 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. Do you wish to make some introductory remarks before we proceed to questions?

Mr Sadleir—I will make a brief statement. As a prosperous and vigorous democracy Australia is recognised for the protections we afford our children through our laws and institutions. We have also been active in ratifying international instruments that seek to enshrine in law and practice the rights of the child. Australia was among the first countries to sign and ratify the Convention on the Rights of the Child in 1990 and we have been active in progressing ratification of the optional protocol to the convention on the involvement of children in armed conflict.

Ratification of the optional protocol is in Australia's interests. The recruitment and use of persons under 18 as soldiers remains a serious problem, both regionally and for the international community. UNICEF estimates that 300,000 child soldiers are involved in more than 30 conflicts worldwide. The use of child soldiers in conflicts in the Asia-Pacific region demonstrates that this is a problem which directly affects Australia. It affects us by negatively impacting on the social cohesion, economic prospects and stability of our region. It is in our interests to see a prosperous, stable and peaceful Asia-Pacific region, and we believe that ratification of this optional protocol would positively contribute to this aim.

Our ratification of the optional protocol would enhance our ability to encourage states in our region which have not yet done so to accede to this important instrument. Ratification of the optional protocol would also align our international obligations with the active approach of our development and cooperation program to assist countries in the Asia-Pacific deal with the effects

of the recruitment and use of child soldiers. Ratification would accord with the expectations of the public following Australia's signature to the protocol in 2002. Non-governmental organisations have indicated to us their strong support for ratification. Another indication of broad community support is the number of letters the government continues to receive from interested members of the public urging this course of action.

In accordance with government policy, ratification of the optional protocol should not occur until compliance with its provisions is ensured. The Australian Defence Force is already in compliance with the optional protocol. In relation to non-state actors one minor amendment to the Commonwealth Criminal Code is required, and the government is working on this.

CHAIR—Who is responsible for the coordination of witnesses?

Mr Sadleir—The Department of Foreign Affairs and Trade is responsible for the coordination of witnesses.

CHAIR—We were advised that David Mason from the Department of Defence was to attend this hearing.

Mr Sadleir—That is correct. We were under the impression that that would be the case. We were advised late on Friday that Defence would not be providing a witness for a range of reasons. As early as this morning we continued to pursue that issue but we were told that Defence would be unable to present a witness.

CHAIR—And those reasons were?

Mr Sadleir—It is difficult to provide an explanation which we find satisfactory but, at the end of the day, the explanation was that they needed to seek the permission of their minister to attend and they had not been able to do that. Secondly, their sense was that because they were in compliance with the requirements and had received legal advice to that effect, it was not necessary for them to attend.

CHAIR—I find this very unsatisfactory. In the past, the committee has told DFAT that we do expect witnesses who can answer questions to be here. Given that we have had submissions from the Human Rights and Equal Opportunity Commission and from the Uniting Church which relate to the Australian Defence Force, and given that we were advised that we were going to have someone here from the Department of Defence, to be told that is not the case this morning is just not acceptable. A lot of our questions relate to the issues that have been raised in the submissions that we have received from the Uniting Church and from the Human Rights and Equal Opportunity Commission. Could the department provide comment about Australia's policy of recruiting ADF personnel below the age of 18?

Mr Sadleir—We could certainly provide comment. I might ask Mr Thom to do that.

Mr Thom—I will relate briefly the information that we have. The minimum age for service in the ADF is 16 years of age. However, candidates under the age of 17 must have approval from the Soldier Career Management Agency and must reach 17 years of age prior to completion of training in a designated military school. Defence interviewers endeavour to ensure that these

candidates have the maturity to cope with separation from family and the psychological rigours of military training.

CHAIR—At what age are ADF personnel allowed to serve as overseas peacekeepers or in an overseas operation?

Mr Sadleir—We will have to take that question on notice.

CHAIR—Do you see the problem?

Mr Sadleir—I certainly do.

CHAIR—Can the department provide some information on the current age of recruits to the ADF and what proportion is currently under the age of 18?

Mr Sadleir—No, unfortunately we cannot.

CHAIR—What departments do we have here—the Department of Foreign Affairs and Trade and the Attorney-General's Department?

Mr Sadleir—Yes.

CHAIR—Is the department aware of attitudes to the optional protocol in other countries in the region?

Mr Thom—I note that, as of June 2004, 115 states had signed the optional protocol, with 72 states having deposited instruments of ratification or accession. In the annex to the national interest analysis that was sent up for this optional protocol there is a list of those countries. You will note from that list that quite a few of those countries are from our region.

Mr MARTYN EVANS—Indonesia is not there.

CHAIR—Indonesia is a signatory.

Mr MARTYN EVANS—It is a signatory but it has not yet ratified.

CHAIR—There are countries in the South Pacific that have defence forces, like Papua New Guinea and Fiji. They are not signatories. What is their attitude to the optional protocol?

Mr Sadleir—We do not have information on that at this point but we can take it on notice and provide that information to you.

CHAIR—Okay. There are countries that we have bilateral defence relationships with, including Thailand, which are not signatories either. Singapore is. Don't we have any advice on what the attitudes to the optional protocol are in the region?

Mr Thom—The only thing that can be said would be general, and that is that—as can be seen from the number of states which have signed this—there is broad support within the international community, including in the region, for this particular instrument. I guess we would expect over time that the number of signatories and the number of those who have ratified would steadily increase.

CHAIR—In relation to the possible need for Australia to amend the Commonwealth Criminal Code Act 1995, HREOC has noted DFAT's view that section 268.88 needs to be amended in order to meet the optional protocol's standard. HREOC also considers that section 268.68 needs amending in order to apply the same provisions to international as well as domestic conflict situations. Can the department—and this would be, I guess, a question for the Attorney-General's Department—provide a comment on the possible need to amend both section 268.88 and section 268.68 of the Criminal Code Act 1995? Is this an advisable and feasible action?

Mr Skillen—I can say that the government does in fact intend to introduce legislation which would amend both the sections of the Criminal Code to which you have referred.

CHAIR—Both sections. On page 10, the HREOC submission suggests that the committee:

... seek the views of children who may be affected by the Optional Protocol (including those minors currently in the armed services and children who have come to Australia from areas of armed conflict).

Can the department advise whether consultation of that kind—for example, with minors currently in the armed services—has taken place as part of the preparation for Australian ratification of the protocol?

Mr Sadleir—Unfortunately we cannot. That is an issue that may have been addressed by Defence, but I cannot speak on it.

CHAIR—I am just looking at the NIA. What consultation has been done? I am looking at section 23 of the NIA. It has been on the agenda of both the Standing Committee of Attorneys-General and the Joint Standing Committee on Treaties. That is the consultation, then, of states and territories?

Mr Sadleir—That is correct. The issue was also discussed at our NGO consultations on a regular basis.

Mr WILKIE—I have questions, but I would really like to ask them of Defence. I understand Defence have refused to send in an official.

Mr Sadleir—The explanation was that they were unable to send a representative to the hearing.

CHAIR—We were advised that Mr David Mason would be here from the Department of Defence, but we have been advised this morning that he will not be coming.

Mr WILKIE—I do not think we can consider the treaty until Defence sends someone along to answer some questions, because it is a key area of the treaty and it is obviously to do with Defence. I think it is unacceptable that they are not here to answer questions.

Mr Sadleir—I should make the point that it was our recommendation that someone attend and that we did pursue the issue.

Mr WILKIE—I am not critical of your department, but I am critical of Defence for not sending someone, because it is a key part of the operation of this treaty. I do not think we can consider it until we get someone from Defence.

CHAIR—We will ask any questions today which relate to the legal or foreign affairs parts of the treaty, and we will ask someone from Defence to come to a later meeting.

Mr ADAMS—Does anyone know at what age someone goes into the Defence academy?

Mr Thom—As I understand it, 16 years is the minimum age for service in the ADF. I also understand that that is the age at which they can enter certain training academies.

CHAIR—Thank you very much for your attendance before the committee today. It is regrettable that the Department of Defence are not here, because we have a number of questions relating to the submissions that we have received that we would like to put to them. We will be putting in a request for them to come to a public hearing tomorrow evening at 8 o'clock. Thank you very much for your evidence today.

[12.00 p.m.]

LENEHAN, Mr Craig, Acting Director, Legal Section, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. I should remind you that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for you, it would be helpful if you could raise this issue now. Although the committee does not require you to give evidence under oath, I should 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. Do you wish to make some introductory remarks before we proceed to questions?

Mr Lenehan—The commission has authorised me to read an opening statement, which I propose simply to do. The commission supports ratification and implementation of the optional protocol. The commission submits that ratifying and implementing the optional protocol would allow Australia to show leadership on this important global issue. As the current chair of the United Nations Commission on Human Rights, Australia has a unique opportunity to lead the international community on human rights issues. For the most part, Australian law already complies with the minimum requirements contained in the optional protocol. The commission submits that it would be appropriate to make some relatively minor amendments to Australian law to ensure that Australian law fully complies with the minimum requirements of the optional protocol. In respect of some fundamental protections contained in the optional protocol, the commission submits that Australia should consider giving greater protection than the minimum standards contained in the international instrument.

The commission notes that the Secretary of Defence and the Chief of Defence Force have issued the Defence Instruction General which is referred to as PERS 33-4. That instruction was issued on 28 June 2002 with the aim of complying with the optional protocol. The commission welcomes the measures taken in the Defence Instruction to provide protection to children in armed conflict. The commission is of the view that it would be preferable if the protections contained in the Defence Instruction were incorporated into the Defence Act itself. Amending the Defence Act would place responsibility for these important protections with parliament rather than the Secretary of Defence and Chief of Defence Force and, as such, would better entrench those protections.

Including those protections in the Defence Act would also assist Australia to meet the obligation in article 6(2) of the optional protocol, which requires that Australia make the principles and provisions of the optional protocol widely known. Incorporating those provisions in the Defence Act would, in the commission's view, raise the profile of those protections and ensure that they are easily accessible to members of the public. In that regard, the commission understands that the Defence Instruction is only available on written request to the Department of Defence.

In addition, the commission is of the view that the protections contained in the Defence Instruction should be strengthened to better match the wording of the optional protocol. In that

regard, in relation to voluntary recruitment, the commission recommends that paragraph 6, 7 and 8 of the Defence Instruction be amended in accordance with article 3 to ensure that such recruitment is generally voluntary, that minors are fully informed about their duties and that their parents or legal guardians give informed consent. In addition, the commission submits that Australia should consider going beyond the minimum requirements of the optional protocol. During the negotiation of the optional protocol many delegations and NGOs as well as the International Committee of the Red Cross, the UN High Commissioner for Human Rights and the Special Representative of the Secretary General for Children and Armed Conflict advocated a minimum age of 18 for voluntary recruitment. In addition, the Committee on the Rights of the Child has repeatedly recommended that states do not voluntarily recruit persons below the age of 18 years.

The commission submits that it may also be appropriate to amend the Criminal Code to implement article 4(2) of the optional protocol, which requires that states' parties take all feasible measures to prevent recruitment and use of child soldiers in hostilities by armed groups distinct from the armed forces of a state. That article requires that states include such legal measures as necessary to prohibit and criminalise that behaviour. The Department of Foreign Affairs and Trade's national interest analysis suggests meeting this obligation by amending section 268.88 of the Criminal Code.

That section criminalises using, conscripting or enlisting persons under the age of 15 years in an internal armed conflict. As I have noted, the optional protocol uses the term 'hostilities' in article 4(2). The commission understands this to be a broad term which is not dependent upon the characterisation of a particular conflict as an international conflict or a non-international conflict. The commission has therefore suggested that an amendment to 268.68 might also be considered. That provision creates similar offences to 268.88 in international conflicts. An alternative and possibly preferable approach would be to create a new provision which more closely reflects the wording of article 4 of the optional protocol. In particular, such a provision might make use of the term 'hostilities' and pick up the notion of armed groups distinct from the armed forces of a state.

Finally, the commission submits that, in order to meet its obligations in article 6(3) to accord to persons within their jurisdiction recruited or used in hostilities contrary to the optional protocol all appropriate assistance for their physical and psychological recovery and their social reintegration, Australia must ensure that asylum seekers under the age of 18 years who have been involved in armed conflict are given all appropriate assistance for their physical and psychological recovery and their social reintegration. That might include creating a special category of visa for such children. This would also give effect to the pre-existing obligations in articles 22 and 39 of the Convention on the Rights of the Child to which Australia is already a party.

CHAIR—Can HREOC provide a comment on Australia's current policy of recruiting from age 16 but not participating in armed conflict until aged over 18.

Mr Lenehan—We had understood that the minimum age for recruitment in accordance with the existing Defence Instruction was 17, and then we further understood from that direction that all feasible measures were to be taken to avoid putting people between 17 and 18 in a position where they would be engaged in direct hostilities.

CHAIR—We have been advised that the minimum age for service in the ADF is 16; however, candidates who are under 17 must have approval from the single-service career management agency and must reach 17 years of age prior to the completion of training in a designated military school.

Mr Lenehan—I too noticed that. What I have in mind is paragraph 4 of the Defence Instruction to which I have referred. It says that the ADF will continue to observe a minimum voluntary recruitment age of 17 years. There seems to be some confusion as to that.

CHAIR—Did you hear the evidence of the departmental representatives?

Mr Lenehan—I did.

CHAIR—There seemed to be agreement with your submission that there should be changes to both 268.88 and 268.68 of the Criminal Code. Do you have any comments on that?

Mr Lenehan—We welcome that approach. We will be interested to see the amendments. I might just add that the actual wording of the relevant provision of the optional protocol, as I have said, refers to the term 'hostilities' rather than a particular conflict, however it is characterised. It may be worth considering whether an easier approach, rather than amending those two provisions, would simply be to insert a new provision.

Mr ADAMS—How do we deal with issues like fighting apartheid in South Africa where schoolchildren became the front line? The world is not a simplistic place where one struggle is so simple. Has your organisation thought about that?

Mr Lenehan—That is certainly true. Fortunately, HREOC has not been in a position of having to directly consider how those situations might play out, because obviously our focus is domestic and in Australia we have not had such situations arise. However, the Committee on the Rights of the Child has had to consider those sorts of situations. Its consistent urging of armed groups and groups who, arguably for very good reasons, take arms against a state has been to protect the rights of children by not directly involving them in hostilities.

Mr ADAMS—Coming back to our own domestic circumstances, the last Anzac, Mr Alec Campbell, was 15 when he went to Gallipoli, so we have that in our history. Your position is that it should be from 17 up, but apprentices have traditionally gone into service at the age of 16 and, I understand, earlier than that. I guess that you are opposing the Defence Force taking people before 17. Can you tell me why that is—even though they are excluded from hostilities, from being put in that position? The training process that we have traditionally had, even in the private sector, is one where people got into apprenticeships when they were less than 17 years old. Can you tell me what your thinking is on that?

Mr Lenehan—We have actually gone a little further than that and suggested that consideration might be given to recommendations made by various bodies, including the International Committee of the Red Cross, which have suggested that the voluntary age should in fact be 18. The thinking behind those sorts of recommendations—and I accept that they do differ from what may have been accepted in the past—is that, as you would have seen, the obligation in the protocol is simply, reading from the protocol, to 'take all feasible measures'.

You will recognise that in that there is an acceptance that it may not always be feasible to prevent people under the age of 18 who have volunteered from being engaged in direct hostilities. One way to avoid that unfortunate situation is to prevent them from getting into the Defence Force in the first place. That is the thinking behind the idea that perhaps the voluntary age of recruitment should be raised.

Mr ADAMS—It will be interesting to hear what Defence says, because of this traditional issue of training and process. Your position seems to be totally counter to that historical position that we have had even in the private sector and for people going into the defence forces to do a trade.

Mr Lenehan—If it were strictly limited to training—and there is in fact a carve-out in the protocol for schools operated by or under the control of an armed force—then I think that would be in a different category. But, if there is ongoing acceptance of the notion that children, who are defined in the Convention on the Rights of the Child as people under the age of 18, will in some extreme circumstances still be put in a position where they are directly involved in hostilities, then that seems to the commission to be an unfortunate position, which is why we have recommended that perhaps the government consider over time raising that voluntary age. And, as you have alluded to, there may be other ways of protecting children from those situations.

Mr ADAMS—I understand the reason why the world has got to this stage and why we have got to this stage, but I think we are taking it into another area which has an impact and can have an impact on our traditional ways of doing things, and the sorts of problems that that may cause should have been given more consideration.

Mr Lenehan—We would certainly advocate all due consideration being given to these sorts of proposals. I suppose one thing to add, however, is that the process that is developing both international humanitarian law and international human rights law has been one of change: recognising that certain things that have happened in the past are undesirable and working to change those through the general acceptance of those sorts of norms.

Mr ADAMS—I just think in the West we always have a different opinion from those in some other places.

Mr WILKIE—Mr Adams is talking about apprenticeships in mechanical, electrical or other trades in Defence, where they would take people at a younger age. How does the commission feel about organisations employed by Defence to provide services that may have underage people working for them who could then be involved in conflict indirectly or even directly—for example, if you had a contractor on board a ship who got involved in the conflict, and that person employed an apprentice who was under 18?

Mr Lenehan—I do not have the commission's views on that matter. I am happy to take that on notice. I imagine that some concern would be expressed about any set of circumstances which continued to permit children to be directly engaged in hostilities. The commission is similarly concerned, as you would have gathered from the tenor of its submission, about indirect involvement in hostilities.

CHAIR—The Uniting Church, in their submission, talked about the Norwegian alternative. Are you familiar with that? Norway introduced legislation allowing it to offer 17-year-olds a military career without them formally becoming members of the defence force. Do you wish to make any comments on that?

Mr Lenehan—I am not aware of the Norwegian alternative, and I do not have the commission's views on that possible alternative. I am happy to take that on notice and to seek those views if the committee wishes.

Mr ADAMS—What about the protocol for the super, given you start at 16 but do not actually become a member of the defence force until you are 18? When does the long-service leave start? There are a number of complexities.

CHAIR—In your submission, you also suggested that the committee seek the views of children who may be affected by the optional protocol, including minors in the armed services and children who have come into Australia. Do you have any suggestions on how to conduct the consultations?

Mr Lenehan—We have not given thought to that. That is really a matter for government. We have raised that possibility because it is in fact an obligation under the Convention on the Rights of the Child. We have pointed to the relevant provisions of that international instrument in our submission, and we think this might be an appropriate circumstance in which to do so.

CHAIR—Thank you very much for appearing before the committee. The secretariat will forward a copy of the proof transcript of evidence for your review as soon as it becomes available.

Mr WILKIE—I suggest we write to Defence and point out that we have been unable to consider the treaty because of their nonattendance today and that we find it unacceptable and urge them to attend a future meeting.

CHAIR—We will ask them to attend the committee's meeting tomorrow night.

Mr WILKIE—I think we need to express our disappointment at the fact that they did not turn up today and the inconvenience it has caused the committee.

CHAIR—I am happy to do that.

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

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

Committee adjourned at 12.18 p.m.