

Report 91

Treaties tabled on 12 March 2008

Treaty on Extradition between Australia and the State of the United Arab Emirates (Hobart, 26 July 2007)

Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters (Hobart, 26 July 2007)

Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income, and Protocol (Tokyo, 31 January 2008)

Film Co-Production Agreement between the Government of Australia and the Government of the People's Republic of China (Beijing, 27 August 2007)

Agreement between the Government of Australia and the Government of the Republic of Singapore concerning the co-production of films (Sydney, 7 September 2007)

Fourth Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training related to Nuclear Science and Technology (Vienna, 22 June 2006)

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Membership of the Committee

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

ANSTO	Australian Nuclear Science and Technology Organisation
CLA	Civil Liberties Australia
IAEA	International Atomic Energy Agency
JSCOT	Joint Standing Committee on Treaties
MA	Mutual Assistance
NIA	National Interest Analysis
NPT	Nuclear Non-Proliferation Treaty
OECD	Organisation for Economic Cooperation and Development
RCA	Regional Cooperative Agreement
RIS	Regulation Impact Statement
SCOT	Commonwealth-State/Territory Standing Committee on Treaties
UAE	United Arab Emirates
WHT	Withholding taxes



List of recommendations

2 Treaty on Extradition between Australia and the State of the United Arab Emirates

Recommendation 1

The Committee supports the *Treaty on Extradition between Australia and the State of the United Arab Emirates* and recommends that binding treaty action be taken.

Recommendation 2

The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.

Recommendation 3

That the Australian Government develop and implement formal monitoring arrangements for Australia's bilateral extradition treaties which include the following elements:

- the Attorney-General's Department informs the Department of Foreign Affairs and Trade of each extradition, including the terms of the relevant extradition agreement and any special conditions applying to the case.
- The Department of Foreign Affairs and Trade would be expected to formally monitor all extradited Australians through the consular network.
- In the event that a foreign national is extradited to their country of citizenship, the extradition should be made on the understanding that

the Australian Government will be informed through its diplomatic representatives of the outcome of the prosecution and the ongoing status of the person while in custody as a result of a conviction. The Australian consular network would be expected to monitor and report on the condition of the extradited person until they had served their sentence and were released.

■ In the event that a foreign national is extradited to a third country, the extradited person's country of citizenship should be informed and asked to monitor that person's trial status and health and the conditions of the detention facility in which they are held and report to the Australian Government if it has the capacity and is willing to do so. In the event that an extradited person's country of citizenship does not have the capacity to monitor the extradited person or is not willing to do so, then the Australian Government should monitor that person's trial status and health and the conditions of the detention facility in which they are held through Australia's consular network until that person is acquitted or, if convicted and imprisoned, their sentence is served, they are released and leave the country.

Recommendation 4

The Committee recommends that the Attorney-General's Department and/or the Department of Foreign Affairs and Trade include in their annual report to Parliament the following information concerning the operation of Australia's extradition agreements:

- the number of extradition requests made, granted and refused including the countries making the requests and the alleged offences involved;
- whether any waivers to provisions in an extradition treaty have been sought by any country and, if so, whether they were granted;
- the number of persons extradited (Australian citizens, permanent residents of Australia, foreign nationals); and
- whether any breaches of bilateral extradition agreements have been noted by Australian authorities and what action was taken.

Also, in respect of each extradited person the following details should be reported:

- their name, nationality and the country to which they have been extradited;

- the person's trial status, ie whether they have been tried and sentenced, and the period of detention prior to trial;
- the means of monitoring the trial status and health of extradited persons and the conditions of the detention facilities in which they are held, i.e. through the Australian consular network or by some other means; and
- the outcome of the trial, if applicable, including convictions and sentencing.

3 Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters

Recommendation 5

The Committee supports the *Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters* and recommends that binding treaty action be taken.

Recommendation 6

The Committee recommends that the Parliamentary Joint Committee on Intelligence and Security be asked to undertake a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australian citizen to the death penalty.

4 Double Taxation Convention with Japan

Recommendation 7

The Committee supports the *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* and recommends that binding treaty action be taken.

5 Film Co-production Agreements with China and Singapore

Recommendation 8

The Committee recommends that where the subject matter of a treaty has a bearing upon freedom of expression issues, the Australian Government broaden its consultation to include relevant human rights organisations.

Recommendation 9

The Committee recommends that the Australian Government utilise any opportunities to make representations to the Chinese Government to lift its 20 foreign film quota significantly higher, with a view to eventually abolishing the quota.

Recommendation 10

The Committee supports the *Film Co-production Agreement between the Government of Australia and the Government of the People's Republic of China* and recommends that binding treaty action be taken.

Recommendation 11

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Singapore concerning the co-production of films* and recommends that binding treaty action be taken.

6 Fourth Extension to the Regional Cooperative Agreement for research, development and training related to nuclear science and technology**Recommendation 12**

The Committee supports the *Fourth Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training related to Nuclear Science and Technology* and recommends that binding treaty action be taken.

Appendix A- Submissions**Appendix B - Witnesses**

Introduction

Purpose of the Report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of six treaty actions tabled in Parliament on 12 March 2008.¹ These treaty actions are:
- *Treaty on Extradition between Australia and the State of the United Arab Emirates (Hobart, 26 July 2007)*²
 - *Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters (Hobart, 26 July 2007)*³
 - *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income, and Protocol (Tokyo, 31 January 2008)*
 - *Film Co-Production agreement between the Government of Australia and the Government of the People's Republic of China (Beijing, 27 August 2007)*

1 Australia, House of Representatives 2008, *Votes and Proceedings*, No. 10, p. 153, Australia, Senate 2008, *Journal*, No. 5, pp. 197-198.

2 This treaty was first tabled in the 41st Parliament on 18 September 2007, but the inquiry into the treaty action lapsed on dissolution of the Parliament on 17 October 2007.

3 This treaty was first tabled in the 41st Parliament on 18 September 2007, but the inquiry into the treaty action lapsed on dissolution of the Parliament on 17 October 2007.

- *Agreement between the Government of Australia and the Government of the Republic of Singapore concerning the co-production of films (Sydney, 7 September 2007)*
- *Fourth Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training related to Nuclear Science and Technology (Vienna, 22 June 2006)*

Briefing documents

- 1.2 The Report refers frequently to the National Interest Analysis (NIA) prepared for each proposed treaty action. This document is prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty. Copies of each NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

www.aph.gov.au/house/committee/jsct/12march2008/tor.htm

- 1.3 Copies of each treaty action and NIA may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:

www.austlii.edu.au/au/other/dfat/

Conduct of the Committee's Review

- 1.4 The reviews contained in this report were advertised in the national press and on the Committee's website.⁴ Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Members of Parliament and to individuals who have expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A.

4 The Committee's review of a number of proposed treaty actions was advertised in *The Australian* on 2 April 2008. Members of the public were advised on how to obtain relevant information both in the advertisement and via the Committee's website, and invited to submit their views to the Committee.

- 1.5 The Committee also received evidence at a public hearing on 8 May 2008 in Canberra. A list of witnesses who appeared before the public hearing is at Appendix B. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:

[www.aph.gov.au/house/committee/jsct/12march2008/hearings.
htm](http://www.aph.gov.au/house/committee/jsct/12march2008/hearings.htm)

Treaty on Extradition between Australia and the State of the United Arab Emirates¹

Introduction

- 2.1 The Treaty on Extradition between Australia and the State of the United Arab Emirates (UAE) was signed for Australia on 26 July 2007. It was tabled on 18 September 2007 but Parliament was dissolved before the Joint Standing Committee on Treaties (JSCOT) could report on the agreement. The purpose of the Treaty is to provide for more effective extradition arrangements between Australia and the UAE. The Treaty adds to Australia's existing network of extradition treaties with 35 other countries.²
- 2.2 The Treaty is based on Australia's model extradition treaty and the United Nations model extradition treaty which incorporate a 'no evidence' standard of information for extradition requests. Australia is following a general international trend towards a 'no evidence' standard.³

1 Full title: Treaty on Extradition between Australia and the State of the United Arab Emirates (Hobart, 26 July 2007).

2 National Interest Analysis (NIA), para 1.

3 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, p. 16.

- 2.3 Australia has over 30 bilateral extradition treaties that incorporate 'no evidence' standards of information for extradition requests.⁴ In evidence to the Committee, the Attorney-General's Department explained that this approach:

treats determination of guilt or innocence as fundamentally a matter for the courts of the requesting state; however, the treaty still requires the provision of sufficient information to determine that the person is sought in a legitimate pursuit of the enforcement of the criminal law and also to enable Australia to consider whether there is a basis for refusing the extradition request under the treaty.⁵

Reasons for Australia to take treaty action

- 2.4 Australia needs to ensure that criminals cannot evade justice simply by crossing borders. This requires an extradition system that can deal effectively with domestic and transnational crime, including terrorism, while providing appropriate safeguards.⁶
- 2.5 As with Australia's other extradition treaties, the Treaty with the UAE provides a mechanism for one State (the Requested State) to surrender an accused or convicted person to the other State (the Requesting State) to face criminal charges or to serve a sentence. The legislative basis for extradition matters in Australia is the *Extradition Act 1988* (Cth) (the Extradition Act). It sets out a number of mandatory requirements which must be met before Australia can make or accept an extradition request. Those requirements may be supplemented by requirements contained in a multilateral or bilateral treaty.⁷
- 2.6 Australia is able to make an extradition request to any country, but without an extradition agreement there is no assurance that the other country will consider Australia's request. Australia will be able to receive an extradition request from any country that is an 'extradition country' under the Extradition Act. An 'extradition country' is any country that is declared by regulations made under the Act to be an extradition country. The UAE is not currently an 'extradition country'.⁸

4 The term 'no evidence' does not mean 'no information'. Rather, it means that the information required for extradition does not need to include evidence of the alleged offence.

5 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, p. 9.

6 NIA, para 3.

7 NIA (2007), para 6.

8 NIA, paras 12-13.

Obligations

2.7 Key provisions of the Treaty with the UAE are:

- The Treaty will provide a modernised framework for Australia and the UAE to send and accept extradition requests (Article 1).
- An extraditable offence is an offence which, at the time of the request, is punishable under the laws of both countries by imprisonment for a minimum period of one year or by a more severe penalty (Article 3(1)).⁹
- The agreement in the Treaty to extradite is qualified by numerous internationally accepted mandatory and discretionary grounds for refusal which reflect grounds contained in the Extradition Act. The Requested State must refuse to extradite a person where, for example, it believes that a request for extradition has been made in relation to a political offence; for the purpose of prosecuting or punishing a person on account of that person's race, colour, sex, language, religion, nationality, ethnic origin, political opinion or that the person's position may be prejudiced for any of those reasons; or because the person whose extradition is requested would be exposed to double jeopardy. (See Article 4).
- Extradition shall not be granted if the offence for which the person sought is accused or convicted carries the death penalty, unless the Requesting State undertakes that the death penalty will not be imposed or, if imposed, will not be carried out (Article 4(1)(g)).¹⁰

2.8 Article 5 of the Treaty provides that if the extradition of a person is refused, the Requesting State may request that the Requested State prosecute that person in lieu of extradition. If such a request is made and the laws of the Requested State allow it, the Requested State is obliged to submit the case to its competent authorities.

2.9 The procedures and supporting documentation that are required in making a request for extradition are set out in Article 6. A request for extradition must be supported by:

- a statement of each offence, for which extradition is sought;
- a statement of the acts and omissions which are alleged against the person in respect of each offence;

⁹ However, extradition shall be granted only if at least six months of imprisonment remain to be served.

¹⁰ NIA, para 14.

- details necessary to establish the identity of the person and the current location of the person if known;
- the text of laws creating each offence and describing the penalty which may be opposed;
- where the person is accused of an offence, a warrant for the arrest of that person;
- where the person has been convicted and a sentence has been imposed, the request must include documentary evidence of the conviction, the sentence imposed and the extent to which the sentence has not been carried out; and
- where no sentence has been imposed, the request for extradition must be accompanied by documents that provide evidence of the conviction and a statement confirming that a sentence is to be imposed.¹¹

- 2.10 The Requested State may postpone the surrender of a person in order to prosecute that person, or so that the person may serve a sentence in relation to an offence other than the offence for which extradition is sought. If serving a sentence in the Requested State, the person may be temporarily surrendered to the Requesting State to be prosecuted where the offence for which extradition is sought is other than that for which the sentence is being served (Article 13).
- 2.11 Article 14 prevents the Requesting State from prosecuting or punishing an extradited person for offences other than those for which extradition was granted, unless the Requested State consents.
- 2.12 Article 15 provides that a person who has been extradited under the Treaty must not be re-extradited by the Requesting State to a third State for trial or punishment for any offence that was committed before extradition to the Requesting State unless the Requested State consents to that surrender or the person has voluntarily remained in the Requesting State for 30 days or returns to the Requesting State of their own volition. The consent of the Requested State must be sought prior to the surrender of the extradited person to an international tribunal established in accordance with a multilateral international convention which applies to the Requesting State.¹² Article 17(1) provides that the Requested State shall make all necessary

11 NIA, para 17.

12 However, where an extradited person leaves the Requesting State and returns voluntarily, or where the person does not leave the Requesting State within 30 days, that person may be re-extradited to a third State or relevant international tribunal.

arrangements for the representation of the Requesting State in any proceedings arising out of a request for extradition.

- 2.13 Article 19 provides that the Treaty shall enter into force 30 days after the exchange of instruments of ratification. Before this can be done for Australia, regulations will need to be made under the Extradition Act to implement the Treaty.

Human rights concerns

- 2.14 In its submission and in evidence to the Committee, Civil Liberties Australia (CLA) expressed concern in relation to human rights issues and the current extradition treaty system model.
- 2.15 CLA's submission points out that the UAE retains the death penalty and corporal punishment for crimes including murder, rape, arson causing death and treason and argues that this is inconsistent with penalty schemes in Australia and with Australia's formal stance on the death penalty.¹³
- 2.16 In addition, the UAE has a dual courts system where sharia courts and civil courts operate in parallel, covering different areas of the law. Sharia law generally applies to all criminal and family law matters. Under the UAE Penal Code defendants may be detained for extended periods of time without formal recourse to seek bail. Defendants have the right to legal counsel only after the completion of the investigation and trials are conducted before judges, but not judges and juries. National security and public morality issue trials are not heard publicly.¹⁴
- 2.17 CLA's submission states that although the language of the mutual obligation treaty requests jurisdictions to provide full and frank information regarding alleged offences and penalty schemes, the disparity between the legal systems in Australia and the UAE may present practical problems in identifying dual criminality and reconcilable sentencing schemes between the two jurisdictions.¹⁵
- 2.18 In addition CLA recommended that if the relevant Minister decides to extradite an individual, the Minister must provide to the person to be extradited written evidence that the Minister has considered the particular prison and detention environment in which the extradited

13 CLA, Submission No. 4, p. 1.

14 CLA, Submission No. 4, p. 1.

15 CLA, Submission No. 4, p. 1.

person will be placed and why the Minister has come to the decision to extradite the individual.¹⁶

- 2.19 Submissions from the governments of the Australian Capital Territory and Tasmania also expressed concerns in relation to the possibility of a person being extradited attracting penalties that are inconsistent with penalty schemes in Australia. The ACT Government further expressed concern that such applications 'have the real potential to violate and usurp the fundamental human rights protected under the ACT's *Human Rights Act 2004*'.¹⁷
- 2.20 Asked by the Committee to comment on issues raised in the CLA, ACT and Tasmanian Government submissions, the Attorney-General's Department responded that the source of the rights set out in the ACT legislation is the International Covenant on Civil and Political Rights, which Australia has ratified. As outlined in the NIA for the Treaty, the obligations regarding extradition are qualified by numerous internationally accepted grounds for refusal including the possible application of the death penalty and risk of torture.¹⁸
- 2.21 In addition, the Attorney-General's Department stated that it is not feasible to include a requirement that extradition assistance to another country may only be provided in circumstances where the penalty imposed by the requesting country directly corresponds with the relevant penalty under Australian law. As penalties for criminal offences often vary considerably between the various State and Territory jurisdictions, the Department suggested that it is difficult to see how such a requirement could operate in practice.¹⁹
- 2.22 In response to CLA's recommendation that the relevant Minister should be required to provide a person to be extradited with written reasons, the Attorney-General's Department argued that the rules of natural justice already apply and that a legislative requirement is unnecessary.²⁰ CLA also recommended regulations should be provided that specifically state 'the Minister must take into account the particular prison and detention environment (to which the person will be extradited)'. The Attorney-General's Department stated that the Treaty already includes specific grounds for refusal in respect of

16 CLA, Submission No. 4, p. 6.

17 ACT Government, Submission No. 5. Further, the ACT is concerned that such applications for extradition have the potential to violate and usurp the fundamental human rights protected under the ACT's Human Rights Act 2004.

18 Attorney-General's Department, Submission No. 8, paras 16 and 18.

19 Attorney-General's Department, Submission No. 8, para 19.

20 Attorney-General's Department, Submission No. 8, paras 10 and 13.

the death penalty and torture and that prison conditions would be addressed under paragraph 4(2)(g) of the Treaty which allows for refusal of extradition:

if the Requested State considers the extradition of the person is unjust, oppressive, or incompatible with humanitarian circumstances in view of the age, health or other personal circumstance of the person.²¹

- 2.23 The Committee also asked for information concerning other bilateral extradition treaties with countries which may apply sharia law. The Attorney-General's Department advised that of the 35 extradition treaties currently in force, the legal systems in five extradition countries (Indonesia, Israel, Malaysia, the Philippines and Turkey) incorporate sharia law domestically to varying degrees. It was noted that in some regions sharia courts have limited jurisdiction over Islamic criminal offences such as alcohol consumption, gambling and conversion.²² Although serious offences are not usually governed by sharia law, the Attorney-General's Department advised that some penal codes are influenced by sharia law and may codify a range of Islamic offences. However, given the customary nature of sharia law and its varied application between and within countries, it is difficult to state comprehensively the extent to which sharia law might apply to offences that may be subject to extradition under bilateral extradition treaties. However, all requests for extradition must meet the dual criminality requirement, whether the offence is governed by sharia law or a state penal code. Extradition offences must also be subject to a minimum one year term of imprisonment. These safeguards should prevent extradition where the foreign criminal offence does not correspond to an offence under Australian law.²³

Australia's on-going responsibility towards extradited persons

- 2.24 CLA raised concerns in relation to the lack of formal monitoring of extradited persons after they have been transferred to the requesting country:

There is no responsibility on anyone to do anything. Nowhere in the agreement does it say that there is any reporting back, it does not appear to be an [Attorney-General's Department]

21 Attorney-General's Department, Submission No. 8, para 16.

22 Attorney-General's Department, Submission No. 8, para 38.

23 Attorney-General's Department, Submission No. 8, para 39.

responsibility to check that something has happened and we think that that is quite important.²⁴

- 2.25 The Attorney-General's Department confirmed that there is currently no formal monitoring system for extradited persons:

When it comes to extradition of Australian nationals, Australia has consular responsibilities and has the ability-- and in practice it does this -- to follow up the situation of the person who is being returned. However, when you have a circumstance whereby someone might be travelling through Australia and is sought for extradition, say, from the country in which they are a citizen, we do not have a mechanism in which we actually continue to check the prison conditions in which the person is being kept or continue to check on the processes that have been undertaken. In effect, Australia accepts the undertaking of the relevant country and that is where it stands.²⁵

- 2.26 The Committee is seriously concerned about the lack of a formal system for monitoring the trial status and health of extradited persons and the conditions of the detention facility in which they are held. Although an extradited Australian citizen may be monitored through the Australian consular system, there is no system in place to monitor the fate of foreign nationals (including permanent residents of Australia) who are extradited from Australia. At present there is no system to monitor whether such persons are dealt with in accordance with treaty obligations, whether they may be subjected to additional charges and criminal proceedings, or indeed whether they might be extradited or otherwise handed over to another country.²⁶
- 2.27 CLA makes the point that it is somewhat naïve to accept assurances that a country to which a person has been extradited will not be extradited to a third country.²⁷
- 2.28 Australia currently has 35 extradition treaties of which 31 are based on the 'no evidence' model. It would be prudent to monitor how these treaties operate in practice.²⁸
- 2.29 Australia has a moral obligation to protect the human rights of extradited persons beyond simply accepting the undertakings of

24 Mr Bill Rowlings, *Transcript of Evidence*, 8 May 2008, p. 5.

25 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, p. 13.

26 Mr Bill Rowlings *Transcript of Evidence*, 8 May 2008, p. 6.

27 CLA, Submission No. 4.1, p. 2.

28 CLA, Submission No. 4.1, p. 1.

countries making extradition requests. A formal monitoring procedure should be established to ensure that Australia is not party, directly or indirectly, to any injustice or abuse of the human rights of persons it has extradited.

Costs

- 2.30 Article 17 of the Treaty provides that the Requesting State must bear the expenses related to the translation of documents and the transportation of persons surrendered. The Requested State agrees to pay all other expenses incurred in the Requested State in connection with extradition proceedings concerning the person whose extradition is sought.
- 2.31 In accordance with the usual procedure for extradition cases, expenses incurred in extradition cases conducted under the Treaty will be met from existing budgets, principally of the Australian Attorney-General's Department, the Commonwealth Director of Public Prosecutions and the Australian Federal Police.

Consultation

- 2.32 The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the Treaty was provided to State and Territory representatives for consideration at a meeting of the Standing Committee on Treaties on 18 May 2007. The Governments of the ACT and Tasmania made brief submissions to JSCOT.

Conclusions

- 2.33 The Committee has concerns in relation to the general operation of Australia's current treaty model for extradition. Australia's responsibility for persons extradited from Australia should not end at the conclusion of the extradition process, but should extend to monitoring the detention of extradited persons, the judicial proceedings they are subject to, their sentencing and their imprisonment.

- 2.34 There should be a formal system established by the Department of Foreign Affairs and Trade and the Attorney-General's Department to monitor the status of persons extradited to other countries by Australia, regardless of whether these persons are:
- Australian citizens,
 - citizens of the requesting country; or,
 - citizens of a third country, other than Australia or the country requesting the extradition.
- 2.35 Although the Australian consular network may follow up the cases of Australian citizens who are extradited, a more formal system should be established whereby Australian consular officials monitor and report in detail on all extradited persons.

Country to country notification of extradited persons

- 2.36 Australia should formally notify countries whose citizens have been extradited by Australia to a third country. This would ensure that an extradited person's country of citizenship is aware of the extradition and alerted to the need to provide appropriate consular assistance.
- 2.37 Information concerning the particular conditions attached to the extradition of a person should be passed on to the extradited person's country of citizenship along with the general obligations arising from the applicable extradition treaty with a request that any breaches (for example mistreatment of the person extradited) should be reported back to Australia.
- 2.38 If the extradited person's country of citizenship is unable or unwilling to provide consular support and monitor their trial status and health and the conditions of the detention facility in which they are held on behalf of Australia, Australia should be prepared to provide appropriate assistance to the person.

Annual reporting to Parliament

- 2.39 An annual report to Parliament by the Attorney-General's Department and/or the Department of Foreign Affairs and Trade should be made that includes:
- the number of extradition requests made, granted and refused including the countries making the requests and the alleged offences involved;

- whether any waivers to provisions in an extradition treaty have been sought by any country and, if so, whether they were granted;
- the number of persons extradited (Australian citizens, permanent residents of Australia, foreign nationals); and
- whether any breaches of bilateral extradition agreements have been noted by Australian authorities and what action was taken.

2.40 Also, in respect of each extradited person the following details should be reported:

- their name²⁹, nationality and the country to which they have been extradited;
- the person's trial status, ie whether they have been tried and sentenced, and the period of detention prior to trial;
- the means of monitoring the trial status and health of extradited persons and the conditions of the detention facilities in which they are held, i.e. through the Australian consular network or by some other means; and
- the outcome of the trial, if applicable, including convictions and sentencing.

2.41 Annual reporting would facilitate public monitoring and would also inform future consideration by JSCOT on new extradition treaties.³⁰ Despite the widespread adoption of the 'no evidence' approach by Australia, JSCOT is not in a position to determine whether the existing arrangements are being upheld in respect of all extradited persons.

2.42 In the event that a country has breached the provisions of an extradition treaty or that there has been an abuse of the human rights of an extradited person, the matter should be reported to Parliament and stand referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report.

²⁹ The Committee understands that there may be privacy issues involved in publishing an extradited persons identity. However, extradition proceedings are normally conducted in open court before a magistrate. Publishing the name of an extradited person allows for greater scrutiny of each case and further monitoring by non-government agencies that may otherwise not be aware of the case.

³⁰ CLA, Submission No. 4.1.

Recommendations

- 2.43 The Committee recognises the key role extradition plays in building strong cooperative relationships between countries to effectively combat transnational crime and the Committee supports this agreement. However the Committee has serious concerns in relation to the monitoring of outcomes for extradited persons under Australia's current extradition treaties and has made recommendations to the Government to act to address these concerns.

Recommendation 1

The Committee supports the *Treaty on Extradition between Australia and the State of the United Arab Emirates* and recommends that binding treaty action be taken.

Recommendation 2

The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.

Recommendation 3

That the Australian Government develop and implement formal monitoring arrangements for Australia's bilateral extradition treaties which include the following elements:

- **the Attorney-General's Department informs the Department of Foreign Affairs and Trade of each extradition, including the terms of the relevant extradition agreement and any special conditions applying to the case.**
- **The Department of Foreign Affairs and Trade would be expected to formally monitor all extradited Australians through the consular network.**
- **In the event that a foreign national is extradited to their country of citizenship, the extradition should be made on the**

understanding that the Australian Government will be informed through its diplomatic representatives of the outcome of the prosecution and the ongoing status of the person while in custody as a result of a conviction. The Australian consular network would be expected to monitor and report on the condition of the extradited person until they had served their sentence and were released.

- In the event that a foreign national is extradited to a third country, the extradited person's country of citizenship should be informed and asked to monitor that person's trial status and health and the conditions of the detention facility in which they are held and report to the Australian Government if it has the capacity and is willing to do so. In the event that an extradited person's country of citizenship does not have the capacity to monitor the extradited person or is not willing to do so, then the Australian Government should monitor that person's trial status and health and the conditions of the detention facility in which they are held through Australia's consular network until that person is acquitted or, if convicted and imprisoned, their sentence is served, they are released and leave the country.

Recommendation 4

The Committee recommends that the Attorney-General's Department and/or the Department of Foreign Affairs and Trade include in their annual report to Parliament the following information concerning the operation of Australia's extradition agreements:

- the number of extradition requests made, granted and refused including the countries making the requests and the alleged offences involved;
- whether any waivers to provisions in an extradition treaty have been sought by any country and, if so, whether they were granted;
- the number of persons extradited (Australian citizens, permanent residents of Australia, foreign nationals); and

- whether any breaches of bilateral extradition agreements have been noted by Australian authorities and what action was taken.

Also, in respect of each extradited person the following details should be reported:

- their name, nationality and the country to which they have been extradited;
- the person's trial status, ie whether they have been tried and sentenced, and the period of detention prior to trial;
- the means of monitoring the trial status and health of extradited persons and the conditions of the detention facilities in which they are held, i.e. through the Australian consular network or by some other means; and
- the outcome of the trial, if applicable, including convictions and sentencing.

Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters

Introduction

- 3.1 The Treaty between Australia and the United Arab Emirates on Mutual Legal Assistance in Criminal Matters was signed for Australia on 26 July 2007. It was tabled on 18 September 2007 but Parliament was dissolved before the Joint Standing Committee on Treaties (JSCOT) could report on the agreement.¹

Background

- 3.2 Mutual Assistance (MA) Treaties provide a framework for states to provide each other the widest measure of mutual assistance in connection with investigations, prosecutions and other proceedings relating to criminal matters, irrespective of whether the assistance sought is to be provided by a court or some other authority.
- 3.3 The National Interest Analysis (NIA) states that Mutual Assistance (MA) treaties:

allow Australia to obtain information and evidence for the investigation or prosecution of crime. They also facilitate the

1 National Interest Analysis, (NIA), para 1.

location, restraint, forfeiture and repatriation of instruments and proceeds of crime.²

- 3.4 Australia has mutual assistance treaties with 25 other countries and is also a party to a number of multilateral agreements that impose Mutual Assistance obligations.³

Obligations

- 3.5 Article 1 of the Treaty provides that Australia and the United Arab Emirates have agreed to grant each other Mutual Assistance in connection with investigations or proceedings relating to criminal matters. The Treaty further specifies that a criminal matter includes matters connected with offences against a law relating to customs duties, foreign exchange control and other revenue matters (Article 1(2)).
- 3.6 Under the Treaty, Mutual Assistance may include:
- the taking of evidence, including testimony and statements of persons, production of documents, records and other material including by video conference or television link (Articles 1 and 9);
 - locating and identifying persons (Article 1(3)(d));
 - executing letters rogatory⁴ (Article 1(3)(b));
 - the obtaining of statements of persons (Article 10);
 - the serving of documents (Article 8);
 - arranging for people to give evidence or to assist criminal investigations in the Requesting State, including the temporary transfer of people in custody for this purpose (Articles 11 and 12);
 - providing copies of documents and records that are open to public access (Article 14);
 - executing requests for searches, seizures and delivery of material (Article 16);

2 NIA, para 4.

3 NIA, para 3.

4 A Letter Rogatory is a formal request from a [court](#) to a foreign court for some type of judicial assistance. The most common remedies sought by Letters Rogatory are [service of process](#) and taking of evidence.

- locating, restraining or forfeiting proceeds of crime and instruments of crime that are needed in connection with a criminal investigation or proceeding (Articles 17 and 18); and
- returning embezzled public funds (Article 19).

3.7 Australia's obligation to provide Mutual Assistance is qualified by internationally accepted grounds for refusal that are set out in the Treaty.⁵ These grounds reflect the mandatory and discretionary grounds for refusal set out in subsections 8(1) and 8(2) of the Mutual Assistance Act. Article 3(1) of the Treaty obliges the Requested State to refuse to provide assistance if:

- the request relates to offences of a political character;
- the request relates to an offence under military law which is not also an offence under the ordinary criminal law of the Requested State;
- the request relates to the prosecution of a person for an offence in respect of which the offender has been finally acquitted or pardoned, or has served the sentence imposed;
- there are substantial grounds for believing the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinions, or that the person's position may be prejudiced for any of those reasons; or
- the request would prejudice the sovereignty, security, national interest or other essential interests of the Requested State.⁶

3.8 Article 3(2) gives the Requested State the discretion to refuse to provide assistance if:

- the request relates to the prosecution or punishment of a person for acts or omissions which would not constitute an offence under the laws of the Requested State;
- the request relates to the prosecution or punishment for an extraterritorial offence that does not constitute an extraterritorial offence under the laws of the Requested State;

5 NIA, para 12.

6 NIA, para 12.

- the prosecution or punishment for an offence which, had it been committed in the Requested State, could no longer be prosecuted by reason of lapse of time or any other reason;
- the provision of assistance sought could prejudice an investigation or proceeding in the Requested State;
- the provision of assistance sought could prejudice the safety of any person in the Requested State; or
- the provision of assistance sought could impose an excessive burden on the resources of the Requested State.⁷

3.9 Article 3(3) of the Treaty states that prior to refusing a request for assistance, the Requested State will consider whether assistance may be granted subject to such conditions as it deems necessary. If the Requesting State accepts the conditions for granting assistance, it is bound by the Treaty to comply with the conditions.⁸

3.10 The UAE retains the death penalty for serious crimes.⁹ Subsection 8(1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act) requires that a request for assistance must be refused where the provision of assistance relates to the prosecution or punishment of a person where the death penalty may be imposed, unless the Attorney-General or the Minister for Home Affairs, having regard to the special circumstances of the case, is of the opinion that the assistance should be granted.¹⁰

3.11 Pursuant to section 8(1B) of the Mutual Assistance Act a request for assistance may be refused if the Attorney-General or the Minister for Home Affairs believes that the provision of the assistance may result in the death penalty being imposed and, having taken into consideration the interests of international criminal cooperation, is of the opinion that assistance should not be granted. These provisions of the Mutual Assistance Act are reflected in the Treaty. Article 3(2)(e) allows Australia to refuse to grant a Mutual Assistance request that may result in the death penalty being imposed or executed.¹¹

7 NIA, para 13.

8 NIA, para 16.

9 The US Department of State human rights reports for 2006 and 2007 provide further information on capital punishment in the UAE. The reports can be found at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78865.htm> and <http://www.state.gov/g/drl/rls/hrrpt/2007/100608.htm>.

10 Mr Steven Marshall, *Transcript of Evidence*, 8 May 2008, pp. 10 and 14. NIA, para 15.

11 NIA, paras 12 and 13.

- 3.12 Each country may require that an application for assistance, its contents and related documents, and the granting of assistance be kept confidential (Articles 7(1) and 7(2)). The Treaty requires that information and evidence obtained under the Treaty not be used for purposes other than those stated in the request without the prior consent of the Requested State (Article 7(3)).¹²

Implementation

- 3.13 Article 24 of the Treaty provides that the Treaty shall enter into force 30 days after the exchange of instruments of ratification. Before Australia can exchange instruments of ratification, regulations need to be made under the Mutual Assistance Act to implement the Treaty.¹³
- 3.14 Section 7 of the Mutual Assistance Act provides that regulations may provide that the Act applies to a foreign country subject to any Mutual Assistance treaty between Australia and that country.¹⁴

Police-to-police cooperation and other information exchanges

- 3.15 The Committee is aware that mutual assistance in criminal matters is often confused with assistance provided under police-to-police cooperation arrangements. Mutual assistance arrangements allow governments to make requests to another government to exercise coercive powers to obtain evidence or information for the purposes of an investigation or a prosecution. There are also a range of other agency-to-agency relationships, which are usually done in the form of a memorandum of understanding for the essentially voluntary exchange of information.¹⁵
- 3.16 The Committee has previously expressed concern that investigations for some crimes in particular countries can only result in a limited number of outcomes, for example, successful drug trafficking investigations are very likely to result in the death penalty in particular countries.¹⁶

12 NIA, para 18.

13 NIA, para 2

14 NIA, para 19.

15 JSCOT Report 79, p.20.

16 JSCOT Report 79, p.22.

- 3.17 Australia may attach conditions to the use of information provided through police-to-police agreements, however, the Committee understands from evidence received in earlier inquiries that this is not normal practice.¹⁷
- 3.18 In evidence to the Committee, Civil Liberties Australia expressed its concerns and noted previous comments by the Committee in relation to this issue:
- In relation to intelligence and data exchange, we wish to revisit our continuing contention that the AFP should be formally restrained by words in this type of treaty and/or by formal instruction from the minister. We believe the AFP should not be permitted to pass on intelligence against Australian citizens which might result in their being subjected to the death penalty in a foreign nation if the intelligence in question or other information available to the AFP means that the Australian citizen could be charged in Australia with a similar or related offence. We believe that JSCOT should require words to be drafted so that future treaties and AFP guidelines reflect JSCOT and CLA's concerns.¹⁸
- 3.19 These issues may arise in the context of police-to-police relationships and in relation to other intelligence sharing arrangements. In this regard it also should be noted that Australia has concluded memoranda of understanding on cooperation on counter-terrorism activities with thirteen countries: Indonesia, the Philippines, Malaysia, Cambodia, Thailand, Brunei, Fiji, Papua New Guinea, East Timor, India, Pakistan, Afghanistan and Turkey. The texts of these memoranda of understanding are all security classified and not in the public domain.¹⁹
- 3.20 While this is an issue separate from consideration of the terms of the Mutual Assistance Treaty with the UAE, the Committee remains concerned that information shared lawfully through police-to-police assistance or other intelligence and security cooperation arrangements may result in the imposition of the death penalty.

17 JSCOT Report 79, p. 22.

18 Mr Bill Rowlings, *Transcript of Evidence*, 8 May 2008, pp. 3-4.

19 See <http://www.dfat.gov.au/globalissues/terrorism.html> and answer to Question on Notice 1813, 10 August 2005, House of Reps *Hansard* p. 256.

- 3.21 After careful consideration, and reflecting on this Committee's predecessors' inquiries relating to Mutual Assistance and other arrangements (*See Reports 79, 84 and 87*), the Committee has concluded that there should be a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australian citizen to the death penalty.
- 3.22 In view of the agencies and issues involved, a review of the current policy and procedures would appropriately be undertaken by the Parliamentary Joint Committee on Intelligence and Security.

Costs

- 3.23 Under Article 21(2) of the Treaty, the Requested State will meet all ordinary costs of fulfilling a request for assistance. The Requesting State shall bear the expenses associated with:
- conveying any person to or from the Requested State and any fees, allowances or expenses payable to that person while in the Requesting State for the purpose of providing evidence, testimony or assistance with an investigation;
 - conveying custodial or escorting officers;
 - the establishment and operation of electronic communication facilities, and the interpretation of proceedings;
 - service of documents when such expenses are imposed in accordance with the law of the Requested State; and
 - exceptional expenses in fulfilling the request, following consultation between the States.
- 3.24 Requests for Mutual Assistance are to be made through diplomatic channels to a designated Central Authority, in Australia the Commonwealth Attorney-General's Department. Departmental expenses incurred in making and receiving requests for Mutual Assistance will be met from existing Departmental funds.

Consultation

- 3.25 The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties. Information on the negotiation of the Treaty was provided to State and Territory representatives for consideration at its meetings on 27 September 2006 and 18 May 2007. No requests for further information or comments on the Treaty were received.²⁰
- 3.26 Negotiations with the UAE about the Treaty were not in the public domain as Australia follows the international practice that a bilateral treaty remains confidential to the parties until it is signed. As the Treaty will operate within the existing framework set out in the Mutual Assistance Act and is based on the model bilateral Mutual Assistance treaty, no wider consultations were conducted.²¹

Conclusions and recommendation

- 3.27 The Committee recognises the importance of international cooperation in combating transnational crime and strongly supports the establishment of a framework which will ensure Australia and the UAE can provide and receive timely assistance in accordance with clearly defined and mutually agreed terms. However, the Committee remains concerned about the adequacy of the current arrangements for ensuring that police-to-police cooperation and other information exchanges outside formal Mutual Assistance Arrangements, including intelligence sharing arrangements, do not expose Australian citizens to the death penalty.

Recommendation 5

The Committee supports the *Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters* and recommends that binding treaty action be taken.

20 NIA, Consultation, p.1.

21 NIA, Consultation, p.2.

Recommendation 6

The Committee recommends that the Parliamentary Joint Committee on Intelligence and Security be asked to undertake a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australian citizen to the death penalty.

Double Taxation Convention with Japan¹

Introduction

- 4.1 This agreement replaces an existing 1969 agreement with Japan and will bring taxation arrangements between Australia and Japan into line with Australia's recent tax treaties.² A complete treaty revision was prompted by a number of factors, including changing business operations, the significance of the trade relationship and the age of the existing agreement between the two countries.³
- 4.2 The key objectives of the agreement are to:
- promote closer economic cooperation by reducing barriers to trade and investment caused by overlapping taxing jurisdictions; and
 - upgrade the framework to prevent tax evasion.⁴
- 4.3 Japan has been Australia's largest export market for 40 years with bilateral merchandise trade totalling A\$54.5 billion in 2007.⁵ Japan is

1 Full Title: Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income, and Protocol, done at Tokyo on 31 January 2008.

2 Regulation Impact Statement (RIS), para 2.29.

3 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 43.

4 National Interest Analysis (NIA), para 3.

5 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 44.

also Australia's third largest investor, with a total stock of investment worth A\$51 billion at the end of 2006.⁶

The revised agreement

- 4.4 The Committee was advised that the proposed treaty is generally consistent with recent tax treaties concluded by Australia and includes a number of changes from the existing treaty.⁷ The key differences are reduced rates of withholding taxes (WHT) on dividends, interest and royalties, and improved integrity measures, particularly relating to rules for the exchange of information on tax matters. The treaty also introduces rules for real property which align the Capital Gains Tax treatment closely with that of the Organisation for Economic Cooperation and Development (OECD).⁸
- 4.5 Treasury advised that it sought greater clarity in the revised agreement. The organisations that would be subject to exemptions for interests to withholding taxes have been expanded to include the Australian Export Finance and Insurance Corporation, the public authority that manages the investments of Australia's Future Fund, the Japan Bank for International Cooperation, and Nippon Export and Investment Insurance.⁹
- 4.6 Treasury summarised the other key changes to the agreement as:
- The inclusion of anti-treaty shopping provisions in relation to withholding tax rates on dividends, interest and royalties;
 - The inclusion of a comprehensive limitation on the benefits clause to ensure treaty benefits pass only to qualified persons;
 - Rules to prevent tax discrimination;
 - Updated provisions for the taxation of business profits from natural resource activities, building sites and the operation of substantial equipment;
 - New rules to deal with the taxation of income derived through business trusts; and

6 RIS, para 2.12.

7 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, pp. 43-44.

8 NIA, para 4.

9 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 44.

- Provisions preventing double exemption of income derived by temporary residence.¹⁰
- 4.7 The treaty will also reduce tax impediments to the cross-border movement of people, capital and technology between Australia and Japan and facilitate cooperation between the taxation authorities to reduce fiscal evasion.¹¹

Reasons for Australia to take treaty action

- 4.8 Reduced WHT on dividend, interest and royalty payments is expected to reduce barriers to bilateral trade and investment resulting from the overlapping tax jurisdictions between the two countries. Treasury told the Committee that:

[b]usinesses on both sides of the relationship will face greater certainty about who has the right to tax, greater certainty around resolving disputes about tax and lower withholding taxes more generally.¹²

- 4.9 It is also anticipated that it will be cheaper for Australian businesses to obtain business loans and intellectual property from Japan and that Japanese businesses will be encouraged to make direct investments into Australia by the reduced WHT on dividend payments from an Australian subsidiary to its Japanese parent company. The treaty will also provide important benefits to Australian businesses looking to expand into Japan, including easier repatriation of profits back into Australia, greater certainty for Australian businesses looking to expand offshore, and a competitive advantage to Australian lenders and owners of intellectual property.¹³ Treasury advised that:

[r]eductions in withholding taxes will provide long-term benefits for business through lowering the costs of intellectual property, equity and finance for the expansion of Australian business.¹⁴

10 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 44.

11 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 44.

12 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 45.

13 NIA, Attachment E.

14 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 44.

- 4.10 The Committee understands that the treaty also enhances the existing treaty framework to prevent international tax evasion by updating the exchange of information rules in line with the 2005 OECD standard.¹⁵

Costs

- 4.11 Treasury estimates that the first round effects on forward estimates will be \$345 million resulting from the reductions in dividend, interest and royalty withholding tax rates.¹⁶ There may be additional costs as Australia will be obliged to enter into negotiations to provide similar WHT reductions to other countries with 'most favoured nation' clauses.¹⁷ Treasury informed the Committee that the Government is currently determining the priorities for future negotiations for eight other treaties with 'most favoured nation' obligations.¹⁸
- 4.12 Treasury advised that compliance costs are expected to be reduced through closer alignment with recent Australian and international treaty practice.¹⁹ Administrative costs associated with implementation will be managed with existing ATO and Treasury resources.²⁰
- 4.13 Although Treasury has not costed the flow on effects from the treaty, the Committee notes that it expects there could be an increase in foreign investment in Australia and economic activity, resulting in increases in other forms of tax collection.²¹ Mr Michael Rawstron of the Treasury told the Committee:

... if you look at the trading relationship between Australia and Japan, it is significant. It is our No. 1 export market. It is the second-largest overall trade and investment relationship of all Australia's economic relationships around the world. Basically, from the discussions and consultations we had with industry when we were putting the treaty together and consulting with business, it is quite clear that there is an

15 NIA, para 10.

16 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 44.

17 NIA, para 16.

18 Mr Martin Jacobs, *Transcript of Evidence*, 8 May 2008, p. 47.

19 NIA, para 17.

20 NIA, para 18.

21 NIA, para 21.

expectation of enhanced investment in Australia from the Japanese sector, particularly in natural resources.²²

Implementation

The treaty will enter into force on the thirtieth day after the exchange of diplomatic notes indicating approval in accordance with the legal procedures of each State. The provisions of the treaty will take effect in two stages, being applicable from 1 January or 1 July in the calendar year following entry into force.²³

Prior to the treaty coming into force in Australia, the *International Tax Agreements Act 1953* will be amended by incorporating the treaty text as a schedule to the Act.²⁴

Consultation

- 4.14 Consultation with the business community occurred through the Tax Treaties Advisory Panel.²⁵ Submissions from stakeholders and the wider community were invited more broadly in November 2006. Business and industry groups supported similar outcomes to those in the 2003 United Kingdom Tax Convention and 2001 United States Protocol. The Committee notes that the proposed treaty will provide similar outcomes to those treaties.
- 4.15 States and Territories were consulted via the Standing Committee on Treaties.

22 Mr Michael Rawstron, *Transcript of Evidence*, 8 May 2008, p. 45.

23 NIA, para 1.

24 NIA, para 15.

25 Members include the Business Council of Australia, CPA Australia, Corporate Tax Association, Institute of Chartered Accountants in Australia, International Fiscal Association, Investment and Financial Services Association, Law Council of Australia, Minerals Council of Australia, Taxation Institute of Australia, and Property Council of Australia. NIA, Attachment A, para 1.

Conclusion and recommendation

- 4.16 The Committee accepts that this agreement will revise taxation arrangements between Australia and Japan, bringing them into line with Australia's other recent tax treaties, and that it will reduce barriers to trade and investment between the two countries and aid in the prevention of tax evasion.

Recommendation 7

The Committee supports the *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* and recommends that binding treaty action be taken.

Film Co-production Agreements with China and Singapore

Introduction

- 5.1 The Australia International Co-production Program for films was established in 1986 and since then has supported approximately 100 co-produced film and television productions worth over \$900 million.¹
- 5.2 The objectives of the program are to:
- increase the output of high-quality productions through allowing the capacity for greater equity investment from partner countries;
 - open up new markets for Australian films;
 - share the risk and cost of film production;
 - enable the interchange of creative talent and skills; and
 - strengthen diplomatic ties while creating employment opportunities for Australian practitioners in this important industry.²
- 5.3 Australia currently has film co-production agreements of treaty level status with Canada, the United Kingdom, Italy, Israel, Ireland and

1 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 25.

2 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 26.

Germany. It also has Memoranda of Understanding with France and New Zealand.

- 5.4 The proposed treaty actions are two film co-production agreements: one with China and the other with Singapore.³

Definitions

- 5.5 'Film' has been defined differently in the two agreements. For the China agreement, film includes feature films, animations, documentaries and telemovies, limiting the definition to content expected to be shown in theatrical cinemas and feature films made for television.⁴ Other television formats were not included in the scope of the treaty because at the time of negotiations the Chinese government did not have an authority with responsibility for these formats.⁵
- 5.6 Film is defined in the Singapore agreement to include feature films, television, video recordings, animations and digital format productions. Both parties agreed to the scope of the agreement being as broad as possible, thus the definition of film includes all of the above productions.⁶

Obligations

- 5.7 Both agreements set out procedures for the competent authorities of each party to approve projects, including provisions for:
- Consultation between parties to ensure a project conforms with the terms of the agreement;
 - Monitoring the balance of creative and financial contributions;
 - According benefits to co-productions that are provided to national films;

3 Full Title: Film Co-Production Agreement between the Government of Australia and the Government of the People's Republic of China, done at Beijing on 27 August 2007 and Agreement between the Government of Australia and the Government of the Republic of Singapore concerning the co-production of films, done at Sydney on 7 September 2007.

4 China National Interest Analysis (NIA), para 3.

5 China NIA, 'Consultation', para 7.

6 Singapore NIA, para 3 and 'Consultation', para 5.

- Facilitating the import and export of equipment and the entry of nationals of the other party; and
- Implementation arrangements.⁷

Reasons for Australia to take treaty action

- 5.8 An important aspect of film co-production agreements is that each country must treat co-productions as local content. This includes providing producers with the benefits that would ordinarily be reserved for local productions, such as tax incentives, financing arrangements and more liberal broadcast rights.
- 5.9 Australian-Chinese and Australian-Singaporean co-productions will be eligible to apply for any benefits or programs of assistance available in each country. In Australia, they would be eligible to access the Australian Screen Production Incentive – Producer Offset under the *Income Tax Assessment Act 1997* and would be eligible to qualify as ‘Australian program content’ for the purposes of the Australian Content Standard for commercial television broadcasting.⁸ In addition, official co-productions will be able to access direct film agency funding through the Australian Film Commission and Film Finance Corporation Australia.
- 5.10 In China and Singapore, an official co-production will be considered a Chinese or Singaporean production for the purposes of official financial support and audiovisual regulation. In the case of China, approved projects will be treated as national films and afforded preferential access to China’s distribution and exhibition sectors. Such films will also bypass the strict foreign film quota of 20 films per annum.⁹
- 5.11 The Committee notes that the issue of the foreign film quota of 20 films was considered outside the scope of negotiations for this agreement.¹⁰ The Committee considers, however, that the Government should take the opportunity in appropriate fora to make representations to the Chinese Government to lift the 20 foreign film quota significantly higher with a view to eventually abolishing it.

7 Singapore NIA, paras 13 to 19 and China NIA, paras 13 to 18.

8 China NIA, para 9 and Singapore NIA, para 9.

9 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 26.

10 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 27.

- 5.12 Both agreements will open new markets for Australian film in Asia, which the Committee understands is an increasingly important region for the global film and television industry. In particular, Singapore has positioned itself as a global media hub within the Asian region. Australian producers' access to the Singaporean market and consequently the broader Asian market will therefore be facilitated by this agreement.¹¹
- 5.13 The agreements will also facilitate government approvals for location filming, provide access to studio facilities at reduced rates and allow for more favourable revenue sharing arrangements from distribution and box office takings.¹²
- 5.14 Mr Peter Young of the Department of the Environment, Water, Heritage and the Arts told the Committee that:
- [t]hrough these agreements the industries and filmmakers of the participating countries can improve the quality and competitiveness of their productions by allowing for a pooling and exchange of creative and financial elements which may not otherwise occur.¹³
- 5.15 The Department also expected that the agreements would result in an increase in production levels in both countries as:
- [w]hat the co-production agreement can do is make the difference between a film being made and not being made at all.¹⁴
- 5.16 The agreements are based upon a principle of reciprocity, with the expectation that financial and creative contributions will be balanced over a period of time so that the film industries of both countries benefit equally.¹⁵
- 5.17 The film industry, and especially producers, strongly support the agreements as 'they see the capacity to utilise these arrangements to inject significant additional resourcing into their projects'.¹⁶
- 5.18 The Committee notes, however, that human rights organisations or other groups that may have an interest in freedom of speech issues in
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11 Singapore NIA, para 10.

12 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 26.

13 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 26.

14 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 27.

15 Mr Stephen Richards, *Transcript of Evidence*, 8 May 2008, p. 28.

16 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 30.

China and Singapore were not consulted as part of negotiations.¹⁷ The Committee questioned the Department about any censorship concerns in relation to both China and Singapore, particularly given the two stage approval process outlined in the China agreement and the potential for a film to be approved at the initial stages and then not receive final approval. The Committee heard that it was unlikely a film would not receive final approval provided it had been made in accordance with the approved script, as any issues would be raised in the provisional approval stage.¹⁸ In relation to Singapore, limitations on foreign participation will remain in line with the Singapore-Australia Free Trade Agreement.¹⁹

- 5.19 The Committee considers that where the Government is aware that a treaty under negotiation has a bearing on freedom of expression issues, consultation should include human rights organisations.
- 5.20 The Committee also raised issues with the Department about the wages and conditions of workers coming to Australia under these agreements and whether these must meet Australian requirements. The Department advised that the relevant visa category provides that the applicant is to be employed or engaged in Australia in accordance with the standards for wages and working conditions provided for under relevant Australian legislation and awards. Union consultation is also part of the sponsorship process for all cast and crew members.²⁰
- 5.21 While administrative costs will be absorbed by Screen Australia,²¹ the Committee notes that in terms of providing funding assistance for co-productions, it will be a competitive process with potentially more parties competing for funding.

Implementation

- 5.22 All legislative measures, including taxation, migration and customs legislation, required to implement this agreement are already in place.

17 Mr Peter Young, *Transcript of Evidence*, 8 May 2008, p. 28.

18 Ms Catherine Waters, *Transcript of Evidence*, 8 May 2008, p. 29.

19 Mr Peter Rayner, *Transcript of Evidence*, 8 May 2008, p. 29.

20 Department of the Environment, Water, Heritage and the Arts, Submission No. 6.1, p. 2.

21 Existing film agencies will be merged into Screen Australia on 1 July 2008.

Conclusion and recommendations

- 5.23 The Committee has previously reviewed a number of film co-production treaties and in each case recommended that binding treaty action be taken. The Committee considers that the proposed co-production agreements with China and Singapore will also contribute to employment, technical development and cultural exchange within the film industry and recommends that binding treaty action be taken.

Recommendation 8

The Committee recommends that where the subject matter of a treaty has a bearing upon freedom of expression issues, the Australian Government broaden its consultation to include relevant human rights organisations.

Recommendation 9

The Committee recommends that the Australian Government utilise any opportunities to make representations to the Chinese Government to lift its 20 foreign film quota significantly higher, with a view to eventually abolishing the quota.

Recommendation 10

The Committee supports the *Film Co-production Agreement between the Government of Australia and the Government of the People's Republic of China* and recommends that binding treaty action be taken.

Recommendation 11

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Singapore concerning the co-production of films* and recommends that binding treaty action be taken.

Fourth Extension to the Regional Cooperative Agreement for research, development and training related to nuclear science and technology¹

Background

- 6.1 The Regional Cooperative Agreement for research, development and training related to nuclear science and technology (the RCA) entered into force on 12 June 1987 and was subsequently extended for five year periods in 1992, 1997 and 2002. The RCA establishes a regime for cooperative research, development and training projects to be undertaken between International Atomic Energy Agency (IAEA) member states in the Asia-Pacific region. It has been continually extended as a result of its usefulness as a regional framework.
- 6.2 The provisions of the RCA closely follow those of an original agreement of the same name concluded in 1972 (and extended in 1977 and 1982), but were updated to enhance overall coordination and supervision of cooperative projects carried out under RCA arrangements. RCA projects are implemented under the auspices of the Technical Cooperation Programme administrated by the IAEA.²

1 Full Title: Fourth Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training related to Nuclear Science and Technology, done at Vienna on 22 June 2006.

2 National Interest Analysis (NIA), para 6.

- 6.3 Australia became a party to the Regional Cooperative Agreement in 1977. The other participants are Bangladesh, Burma, China, India, Indonesia, Japan, the Republic of Korea, Malaysia, Mongolia, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand and Vietnam.³

The Fourth Extension Agreement

- 6.4 The purpose of the Fourth Extension Agreement is to extend the RCA for a further five year period. The extension agreement came into force on 26 February 2007 and as at November 2007, thirteen states had accepted the agreement.⁴ The Committee notes that the other States that are yet to ratify are expected to do so when their domestic processes are completed.⁵
- 6.5 The extension agreement will not impose any new obligations and Australia's obligations will remain those accepted in the RCA, including promoting and coordinating cooperative research, development and training, attending meetings and making facilities and personnel available for cooperative projects, and reporting to the IAEA.⁶

Nuclear non-proliferation

- 6.6 The RCA is an important mechanism in fulfilling the technical cooperation provisions of the Nuclear Non-Proliferation Treaty (the NPT). The NPT is the centrepiece of the non-proliferation regime, which, for 35 years, has helped keep the region free from nuclear weapons proliferation. Under the NPT, non-nuclear weapon states have foresworn nuclear weapons and accepted comprehensive safeguards to verify compliance with this commitment. However, they retain the right to research, develop and use nuclear energy for peaceful purposes.⁷

3 NIA, para 7.

4 States, apart from Australia, which had not accepted the Agreement as at that date, were Mongolia, New Zealand and Thailand.

5 Dr John Easey, *Transcript of Evidence*, 8 May 2008, p. 21.

6 NIA, para 13.

7 NIA, para 5.

- 6.7 The Committee was informed of a lesser known aspect of the non-proliferation regime, which is that in exchange for not acquiring nuclear weapons, non-nuclear weapons states are 'guaranteed' access to nuclear science and technology for peaceful purposes.⁸
- 6.8 As a party to the NPT, Australia has made a commitment:
... to facilitate ... the fullest possible exchange of equipment, materials and scientific and technical information for the peaceful uses of nuclear energy.⁹
- 6.9 The RCA is one of the main mechanisms by which Australia fulfils these obligations.
- 6.10 In addition to the benefits under the NPT, the RCA contributes to social and economic development in the region by strengthening regional regimes governing the safety and security of radioactive materials. This in turn assists in preventing potentially dangerous material and technical know-how from being utilised by terrorist organisations.¹⁰
- 6.11 Dr John Easey of the Australian Nuclear Science and Technology Organisation (ANSTO) told the Committee that:
[o]n the practical side, the extensive networking that occurs between the counterpart agencies engenders a cooperative atmosphere that assists mutual understanding and facilitates regional contacts across a wide range of science and technologies and beyond.¹¹

Collaborative projects

- 6.12 The RCA allows Australia to participate in mutually beneficial collaborative projects with 16 regional countries and to maintain and extend a national capacity in cutting-edge nuclear technologies. Australia's technical support to the RCA has focused strongly on projects in the areas of radiation protection infrastructure, environment, health care and industrial applications of isotopes.¹² The

8 Mr Ian Biggs, *Transcript of Evidence*, 8 May 2008, p. 21.

9 NIA, para 8.

10 NIA, para 9.

11 Dr John Easey, *Transcript of Evidence*, 8 May 2008, pp. 20-21.

12 Dr John Easey, *Transcript of Evidence*, 8 May 2008, p. 20.

Committee notes that the RCA programme has matured since its inception and moved from:

... being largely focussed on capacity building to being one that applies appropriate nuclear technologies to assist in addressing and providing environmentally sustainable solutions to development problems and challenges of collective importance.¹³

6.13 Dr Easey told the Committee that:

[t]he strong focus of the RCA program on the peaceful applications of isotopes and radiation to development and environmental sustainability offers clear benefits to the people of developing countries in our region.¹⁴

6.14 The Committee understands that the cooperation program covers the broad thematic sectors of human health, environment, industry, radiation protection, research reactor, agriculture and energy. Dr Easey outlined the nature of current cooperative activities in the health and environment areas and the Committee was particularly interested to note the significant input Australia has provided in healthcare. This includes projects to improve, upgrade and accelerate the training of medial personnel across the region.¹⁵

Australia's contributions to the RCA

6.15 The budget of the RCA for 2007-08 is approximately \$6.27 million, about 80 percent of which is provided by the IAEA through its Technical Cooperation Fund. The remainder is sought through extra-budgetary support from donors in the region.¹⁶

6.16 Australia has the option of providing financial and 'in kind' contributions to facilitate effective implementation of cooperative projects. Australia is a long term major extra-budgetary donor and Australia's extra-budgetary financial support to date totals just under A\$7 million, which has been provided through AusAID, with other agencies, particularly ANSTO, providing considerable in-kind assistance in terms of provision of expertise, training and access to

13 Dr John Easey, *Transcript of Evidence*, 8 May 2008, pp.19-20.

14 Dr John Easey, *Transcript of Evidence*, 8 May 2008, p. 20.

15 Dr John Easey, *Transcript of Evidence*, 8 May 2008, p. 20.

16 Dr John Easey, *Transcript of Evidence*, 8 May 2008, p. 20.

facilities.¹⁷ The cost of in-kind contributions is met by relevant agencies from their existing resources.

Implementation

6.17 Legislation is not required to give effect to the obligations contained in the Fourth Extension Agreement, which can be implemented by way of administrative action. The Committee notes that previous extension agreements have been implemented in this manner.

Consultation

6.18 Relevant agencies consulted by the ANSTO have indicated their support for Australia's acceptance of the Fourth Extension Agreement. Information was also provided to the States and Territories through the Standing Committee on Treaties.

Conclusion and recommendation

6.19 According to Dr Easey, the RCA:

... is an effective and visible vehicle for the discharge of our obligations and commitments under article IV of the nuclear non-proliferation treaty ... Much of Australia's strong regional profile in nuclear science and technology is a result of the efforts that have been invested in the support of the RCA for more than 30 years.¹⁸

6.20 The Committee concurs with this view and recommends that binding treaty action be taken.

17 Dr John Easey, *Transcript of Evidence*, 8 May 2008, p. 20.

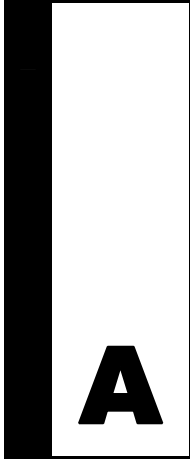
18 Dr John Easey, *Transcript of Evidence*, 8 May 2008, pp 20-21.

Recommendation 12

The Committee supports the *Fourth Agreement to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training related to Nuclear Science and Technology* and recommends that binding treaty action be taken.

Kelvin Thomson MP

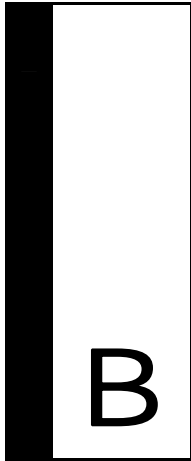
Committee Chair



Appendix A- Submissions

Treaties tabled on 12 March 2008

- 1 Australian Patriot Movement
- 1.1 Australian Patriot Movement
- 1.2 Australian Patriot Movement
- 1.3 Australian Patriot Movement
- 2 Humane Society International
- 2.1 Humane Society International
- 3 Northern Territory Legislative Assembly
- 4 Civil Liberties Australia CLA
- 4.1 Civil Liberties Australia CLA
- 5 ACT Government
- 6.1 Department of the Environment, Water, Heritage and the Arts
- 7 The Treasury
- 8 Attorney-General's Department



Appendix B - Witnesses

Thursday, 8 May 2008 – Canberra

Attorney-General's Department

Mr Bill Campbell, First Assistant Secretary, Office of International Law

Mr Steven Marshall, Assistant Secretary, International Assistance and Treaties Branch

Ms Corinne Vale, Senior Legal Officer, International Assistance and Treaties Branch

Australian Film Commission

Ms Catherine Waters, Manager, Legal Affairs and Co-production

Australian Nuclear Science & Technology Organisation

Dr John Easey, Senior Adviser

Mr Steven McIntosh, Senior Adviser, Government Liaison

Civil Liberties Australia CLA

Mr Bill Rowlings, Chief Executive Officer

Mr Lance Williamson, Director and Webmaster

Department of Foreign Affairs and Trade

Mr Ian Biggs, Assistant Secretary

Mr Grant Dooley, Director, China Economic and Trade Section

Mr Warren King, Director, Japan Section

Mr Christopher King, Executive Officer, Arms Control Section, Arms Control and Counter Proliferation Branch

Ms Katy Lin, Desk Officer, International Law Section, International Legal Branch

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Mr Ben Milton, Director, International Law Section, International Legal Branch, International Legal Division

Mr Peter Rayner, Director, Malaysia, Brunei and Singapore Section, South-East Division

Ms Rachel White, Executive Officer, International Legal Branch

Mr Justin Whyatt, Director, Middle East Section

Department of the Environment, Water, Heritage and the Arts

Ms Raelene Glenn, Assistant Manager, Film Incentives and International Section, Film and Creative Industries Branch

Mr Stephen Richards, Manager, Film Incentives and International Section, Film and Creative Industries Branch

Mr Peter Young, Assistant Secretary, Film and Creative Industries Branch

The Treasury

Mr Thomas Abhayaratna, Analyst, Costing and Quantitative Analysis Unit, Tax Analysis Division

Mr Martin Jacobs, Manager, Tax Treaties Unit, International Tax and Treaties Division

Mr Martin Pook, Analyst, Tax Treaties Unit, International Tax and Treaties Division

Mr Michael Rawstron, General Manager, International Tax and Treaties Division

Mr Greg Trigg, Senior Adviser, Tax Treaties Unit, International Tax and Treaties Division