
The Parliament of the Commonwealth of Australia

Report 37

Six Treaties Tabled on 10 October 2000

Joint Standing Committee on Treaties

December 2000

© Commonwealth of Australia 2000

ISBN



Contents

Membership of the Committee.....	vii
Recommendations.....	ix
1 Introduction.....	1
Purpose of the report.....	1
Availability of documents.....	2
Conduct of the Committee's review.....	2
2 Double Taxation Agreement with the Russian Federation.....	5
Proposed treaty action.....	5
Evidence Presented	7
Taxation of related party transactions	8
Accounting standards	9
Other matters.....	9
Conclusion and recommendation.....	10
3 Amendments to the International Whaling Convention.....	11
Proposed treaty action.....	11
Previous consideration	12
Automatic entry into force.....	13
Conclusion and recommendation.....	14

4	Agreement with Egypt on Protecting the Welfare of Children	15
	Proposed treaty action.....	15
	Evidence presented.....	16
	Conclusion and recommendation.....	18
5	Acts of the Universal Postal Union	21
	Proposed treaty actions.....	21
	Evidence presented.....	23
	Conclusions and recommendation	24
6	Protocol concerning the International Registration of Marks.....	27
	Proposed treaty action.....	27
	Evidence presented.....	28
	Conclusions and recommendation	29
	Appendix A - Extract from Resolution of Appointment	31
	Appendix B - National Interest Analyses	33
	Agreement between the Government of Australia and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol, done at Canberra on 7 September 2000.....	33
	Agreement Between the Government of Australia and the Government of the Arab Republic of Egypt Regarding Cooperation on Protecting the Welfare of Children.....	42
	Amendments, done at Adelaide on 6 July 2000, to the Schedule to the International Convention for the Regulation of Whaling of 2 December 1946	46
	Universal Postal Union: Fifth Additional Protocol to the Constitution of 10 July 1964, as amended; Convention, and Final Protocol; General Regulations; Postal Parcels Agreement, and Final Protocol, done at Seoul on 14 September 1994	49
	Universal Postal Union: Sixth Additional Protocol to the Constitution of 10 July 1964, as amended; Convention, and Final Protocol; General Regulations, done at Beijing on 15 September 1999.....	70
	Protocol relating to the Madrid Agreement Concerning the International Registration of Marks, done at Madrid on 27 June 1989.....	89
	Appendix C - Submissions	95

Appendix D - Witnesses at Public Hearings	97
Monday, 30 October 2000, Canberra	97
Monday, 6 November 2000, Canberra	97
Appendix E – Speech by the Deputy Commissioner of Taxation on Transfer Pricing	99



Membership of the Committee

Chair The Hon Andrew Thomson MP

Deputy Chair Senator Barney Cooney

Members	The Hon Dick Adams MP	Senator Andrew Bartlett
	The Hon Bruce Baird MP	Senator Helen Coonan
	Kerry Bartlett MP	Senator Joe Ludwig
	Anthony Byrne MP	Senator Brett Mason
	Kay Elson MP	Senator the Hon Chris Schacht
	Gary Hardgrave MP	Senator Tsebin Tchen
	De-Anne Kelly MP	
	Kim Wilkie MP	

Committee Secretariat

Secretary Grant Harrison

Inquiry Secretary Bob Morris

Administrative Officer Lisa Kaida



Recommendations

Double Tax Agreement with the Russian Federation

The Committee supports the proposed *Double Taxation Agreement with the Russian Federation* and recommends that binding treaty action be taken (Paragraph 2.24).

Amendments to Schedule of the International Whaling Convention

The Committee supports the amendments to the dates in Paragraphs 11 and 12 and Tables 1, 2 and 3 of the Schedule to the *International Convention on the Regulation of Whaling* (Paragraph 3.18).

Agreement with Egypt on Protecting the Welfare of Children

The Committee supports the proposed *Agreement with Egypt Regarding Cooperation on Protecting the Welfare of Children* and recommends that binding treaty action be taken (Paragraph 4.18)

Acts of the Universal Postal Union

The Committee supports the Acts of the 21st Congress of the Universal Postal Union in Seoul in September 1994 and the Acts of the 22nd Congress of the Universal Postal Union in Beijing in September 1999 and recommends that binding treaty action be taken (Paragraph 5.18).

Protocol concerning International Registration of Marks

The Committee supports the *Protocol relating to the Madrid Agreement Concerning the International Registration of Marks* and recommends that binding treaty action be taken (Paragraph 6.17).

Introduction

Purpose of the report

- 1.1 This Report contains advice to Parliament on the review by the Joint Standing Committee on Treaties (the Committee) of the following proposed treaty actions, which were tabled on 10 October 2000¹:
- *Double Taxation Agreement with Russia* in Chapter 2;
 - *Amendments to the Schedule of the International Whaling Convention* in Chapter 3;
 - *Agreement with Egypt regarding Cooperation in the Protection of Children* in Chapter 4;
 - *Various Acts of the Universal Postal Union* in Chapter 5; and
 - *Protocol concerning International Registration of Marks* in Chapter 6.
- 1.2 We have commenced but not yet completed our review of two other proposed treaty actions tabled on 10 October 2000:
- *the Statute for the International Criminal Court*; and
 - *Agreement on Privileges and Immunities for the International Tribunal for the Law of the Sea*.

¹ Senate Journal No. 145, 10 October 2000, p. 3345; House of Representatives, *Votes and Proceedings*, No 143, 10 October 2000, p. 1793

- 1.3 We have written to both the Minister for Foreign Affairs and the Attorney-General advising that we believe it is appropriate to conduct a comprehensive review of the proposed treaty action on the Statute for an International Criminal Court, including an examination of the legislation that the Government proposes to introduce, to enable ratification of the Statute. It is therefore unlikely that we will be in a position to report on whether the ratification of the Statute is in the national interest until the autumn sittings of Parliament in 2001.
- 1.4 We are still considering a number of matters in relation to the proposed Agreement on Privileges and Immunities for the International Tribunal on the Law of the Sea. It is unlikely that we will be in a position to report to Parliament before early 2001.

Availability of documents

- 1.5 The advice in this Report refers to, and should be read in conjunction with, the National Interest Analyses (NIAs) prepared for the proposed treaty actions. Copies of the NIAs are at Appendix B. The analyses were prepared for each proposed treaty action by the Government agencies responsible for the administration of Australia's responsibilities under the treaties. The NIAs were tabled in Parliament as an aid to Parliamentarians when considering these proposed treaty actions.
- 1.6 Copies of the treaty actions and NIAs can also be obtained from the Treaties Library maintained on the Internet by the Department of Foreign Affairs and Trade (DFAT). The Treaties library is accessible through the Committee's website at www.aph.gov.au/house/commtee/jsct.

Conduct of the Committee's review

- 1.7 Our review of the treaties tabled on 10 October 2000 was advertised in the national press and on our web site. Submissions received in response to the invitation to comment in the advertisement are listed at Appendix C.²
- 1.8 We also took evidence at public hearings held on 30 October 2000 and 6 November 2000. A list of witnesses who gave evidence at the hearings is at Appendix D.

2 Our review of the eight proposed treaty actions was advertised in *The Weekend Australian* on 14/15 October 2000, p. 9

- 1.9 A transcript of the evidence taken at the hearings can be obtained from the database maintained on the Internet by the Department of the Parliamentary Reporting Staff (www.aph.gov.au/hansard/joint/commtee/comjoint.htm), or from the Committee Secretariat.

Double Taxation Agreement with the Russian Federation

Proposed treaty action

- 2.1 The proposed *Agreement with the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion* is intended to promote closer economic cooperation between Australia and the Russian Federation by eliminating possible barriers to trade and investment caused by overlapping taxing jurisdictions. The Agreement will help provide legal and fiscal certainty within which trade and investment can take place and create a legal framework through which the tax administrations of both countries can prevent international fiscal evasion.¹
- 2.2 The proposed Agreement will reduce or eliminate double taxation by limiting taxing rights over various types of income flowing between the two countries. For example, the Agreement contains the standard tax treaty provision that neither country will tax business profits derived by residents of the other country unless the business activities in the other country are substantial enough to constitute a 'permanent establishment' and the income is attributable to that permanent establishment.
- 2.3 Generally, the allocation of taxing rights under the proposed Agreement is similar to the international practice set out in the OECD *Model Tax*

¹ Unless otherwise noted, the material in this section was drawn from the *National Interest Analysis for a Double Tax Agreement with the Russian Federation* (DTA with Russia).

Convention on Income and on Capital. In some instances, however, consistent with Australian practice, the proposed Agreement is influenced more by the United Nations' *Model Double Taxation Convention between Developed and Developing Countries.*

- 2.4 Unlike earlier treaties double taxation agreements (DTAS) we have reviewed, with the exception of the DTA with Argentina, the Agreement incorporates a Protocol. The Russian Federation sought to align the text of the principal Agreement with the structure of the OECD Model Tax Convention, to assist with its passage through the Russian Parliament. This meant that many of the country specific provisions are described in the text of the Protocol. The Protocol is however, an integral part of the treaty and its provisions are binding on both parties.
- 2.5 The key differences between this proposed agreement and earlier treaties are:
- the definition of Australia, which has been modified due to Russian sensitivities concerning Australia's claims to the Antarctic Territory;
 - a provision for a reduced rate of dividend withholding tax;
 - that Government service pensions will generally be taxed only in the source (paying) country; and
 - that with regard to transfer pricing decisions the Russian Federation need only give correlative adjustments when the original adjustments are "appropriate".
- 2.6 The proposed Agreement is likely to impact on :
- Australians and Russians investing in and trading with the other country;
 - Australians and Russians working in or supplying services to the other country;
 - the Governments of Australia and the Russian Federation; and
 - people receiving pensions from the other country.
- 2.7 The NIA for this proposed treaty action contains a detailed description of the key elements of the proposed Agreement, including an analysis of those aspects of the proposal that differ from the two model texts and from Australia's preferred tax treaty practice. A copy of the NIA is at Appendix B.
- 2.8 In 1999-2000 Australian exports to the Russian Federation were approximately \$A190m, including meat, dairy products and alumina,

while imports were \$A60m. The Russian Federation was Australia's 49th largest trading partner. It ranked 42nd amongst Australia's leading export destinations and 68th largest source of imports sources.

Evidence Presented

2.9 Although the trading relationship between the Russian Federation and Australia is not large at present, we were advised at our hearing, by witnesses from the Australian Taxation Office (ATO), that the proposed Agreement is considered to be of 'strategic importance' in settling the trade and investment framework between the parties.

This double tax agreement with Russia fills what we think is a very big hole in our treaties network. We have never had a treaty with Russia or the former USSR.²

2.10 In addition to canvassing the main differences between the proposed Agreement and the model provisions usually adopted in Australian DTAs, we discussed:

- the fact that proposed Agreement does not alter the requirement that Russian businesses seeking to invest in Australia must seek prior approval from the Foreign Investment Review Board;³
- the taxing rights allowed by the proposed Agreements, especially the right of the ATO to tax business profits derived by Russian businesses if their business activities in Australia are substantial enough to constitute a 'permanent establishment';⁴
- the taxation of related party transactions and the allocation of profit within multinational enterprises;⁵ and
- the use by Russian businesses of internationally accepted accounting practices.⁶

2.11 In a written submission provided after the hearing the ATO provided some additional information in relation to the last two points: the taxation of related party transactions and the accounting standards used by Russian businesses.

2 Micheal Lennard (ATO), *Transcript of Evidence*, 30 October 2000, p. TR26

3 Michael Lennard (ATO), *Transcript of Evidence*, 30 October 2000, p. TR28

4 Michael Lennard and Michael Nugent (ATO), *Transcript of Evidence*, 30 October 2000, p. TR28

5 See Michael Lennard (ATO), *Transcript of Evidence*, 30 October 2000, pp. TR29-31

6 Michael Lennard (ATO), *Transcript of Evidence*, 30 October 2000, p. TR31

Taxation of related party transactions

- 2.12 The internationalisation of economies is a significant issue for revenue agencies around the world. A large proportion of international trade is conducted by multinational enterprises and, as business becomes more complex and integrated, much of this activity is between related entities in the same organisation. The global integration of business can represent a risk to tax revenue, especially in the related areas of transfer pricing and global profit shifting.
- 2.13 Transfer pricing relates to the setting of prices by multinationals for the goods and services they supply to related companies, and to structuring of transactions and financial relationships.
- 2.14 Transfer pricing can result in significant underpayment of tax, either because of mistakes arising from flawed methodology or because of profit shifting to low tax or home jurisdictions.
- 2.15 The ATO's submission noted that the strategies developed to combat the revenue risks associated with transfer pricing go well beyond the scope of the proposed Agreement with Russia.⁷ The submission did, however, refer us to a speech given by the ATO's Deputy Commissioner (Large Business and International), Jim Killaly, outlining the progress made in responding to transfer pricing so as to obtain Australia's fair share of tax. A copy of Mr Killaly's speech is at Appendix E for the information of all Members of Parliament.
- 2.16 The ATO's submission also provided more information in response to general questions on the extent to which multinational companies pay their fair share of tax in Australia.
- 2.17 This information showed that effective tax rates for large companies increased during the 1990s and that total company tax collections have been increasing faster than nominal Gross Domestic Product. Some of the key statistics quoted are:

Broadly-based measures of effective tax rates available for large companies indicate a generally significant and fairly steady increase over the period 1991/92 – 1997/98:

- the ratio of tax payable to total assets *increased*, from 0.6% to 0.7%;
 - the ratio of tax payable to total income *increased*, from 1.5% to 1.7%;
 - the ratio of tax payable to sales *increased*, from 2.4% to 2.5%
-

7 ATO, *Submission No. 1 to the DTA with Russia*, p.1

The revenue benefits of these increases are estimated to have been worth over the period 1991/92 – 1997/98:

- for the increase in the ratio involving total assets, \$5.5 billion in tax payable;
- for the increase in the ratio involving total income, \$4.3 billion in tax payable;
- for the increase in the ratio involving total sales, \$3.5 billion.⁸

Accounting standards

2.18 In its submission, the ATO reported that accounting standards in Russia are currently being reformed to bring them into line with the International Accounting Standards. While there are some differences between the international standards and generally accepted Australian Accounting Standards, we are advised that the Australian Stock Exchange Listing Rules accept the use of international standards for foreign entities.⁹

Other matters

2.19 Among the provisions of this Agreement was one concerning Government service pensions which are to be taxed only in the source (paying) country. We were interested in the level of arrivals of persons born in the Russian Federation who may be affected by the pension provision. While statistics from the Department of Immigration and Multicultural indicate that in the vicinity of 10,000 Russian arrivals have occurred in the last 3 years, fewer than 300 of these are considered 'settler arrivals'. Hence the number of people in receipt of Russian pensions is likely to be very small, as is the total value of those pensions.¹⁰

2.20 The Western Australian Government indicated its support for the proposed Agreement, noting that it will help develop trade and investment between the two countries – possibly to the long term of advantage of the manufacturing services, agriculture and minerals industries in Western Australia.¹¹

8 ATO, *Submission No. 1 to the DTA with Russia*, Appendix C

9 ATO, *Submission 1 to the DTA with Russia*, p. 1

10 ATO, *Submission No. 1 to the DTA with Russia*, p. 2

11 Letter, Ministry of Premier and Cabinet (Western Australia), 13 November 2000, p. 1

Conclusion and recommendation

- 2.21 We have reviewed and supported double taxation agreements on a number of occasions over the last three years.¹²
- 2.22 We remain of the view that such agreements are an integral part of our network of bilateral trade arrangements. They help support international commercial opportunities for Australian companies and facilitate overseas investment in Australia. They also help the tax administrations in each country combat tax evasion.
- 2.23 We agree that the proposed Agreement with Russia is of importance to Australia, filling a gap in our network of tax agreements. The trade and investment relationship with Russia is one of great potential for Australian businesses and this Agreement will help unlock that potential.

Recommendation 1

- 2.24 **The Committee supports the proposed *Double Taxation Agreement with the Russian Federation* and recommends that binding treaty action be taken.**

12 See our *7th Report* (March 1997) for comment on the Agreement with Vietnam, our *Thirteenth Report* (March 1998) for comment on the Agreement with Finland, *Report 25, Eight Treaties Tabled on 11 August 1999* (September 1999) for comment on the Agreements with South Africa and Malaysia, *Report 28, Fourteen Treaties Tabled on 12 October 1999* (December 1999) for comment on the Agreements with Argentina and the Slovak Republic, and *Report 32, Six Treaties Tabled on 7 March 2000* (May 2000) for comment on the Agreement with Romania.

Amendments to the International Whaling Convention

Proposed treaty action

- 3.1 The *International Convention for the Regulation of Whaling* was agreed in 1946 to regulate the conservation and utilisation of whale stocks.¹
- 3.2 The initial focus of the Convention was to ensure international controls over post-war development of the commercial whaling industry. More recently, the Convention and the International Whaling Commission it established have proved to be effective vehicles for some major conservation measures. These include the 1982 decision to implement a moratorium on commercial whaling and the establishment in 1994 of the Southern Ocean Sanctuary.
- 3.3 The amendments tabled in Parliament on 10 October 2000 arise from the annual requirement to make current the dates listed in the Schedule to the Convention which describe the moratorium on commercial whaling. In effect, these amendments maintain the moratorium for a further twelve months.
- 3.4 They are routine amendments and do not impose any additional costs or obligations on Australia.

¹ Unless otherwise indicated, the material used in this section is derived from the National Interest Analysis for the *Amendments, done at Adelaide on 6 July 2000, to the International Convention for the Regulation of Whaling*.

Previous consideration

- 3.5 We have considered and reported upon similar amendments on a number of previous occasions:
- in October 1996 (in a report entitled *Treaties Tabled on 10 & 11 September 1996*);
 - in April 1998 (in a report entitled *Thirteenth Report*);
 - in March 1999 (in *Report 19, The Fifth Protocol to the General Agreement on Trade in Services and Five Treaties Tabled on 30 June 1998*); and
 - in August 1999 (in *Report 23, Amendments proposed to the International Whaling Convention*).
- 3.6 On each occasion we have supported the maintenance of the moratorium on commercial whaling, stating and restating the view that 'the continuation of whaling in any form and by any nation or group, is repugnant to many Australians'.²
- 3.7 Our earlier reports have also canvassed a range of other issues, including:
- the positions taken by the Governments of Japan, Norway and Iceland in relation to decisions of the Commission;
 - the need to define certain phrases and concepts more clearly, such as 'aboriginal' and 'subsistence' whaling;
 - concerns about the renewal of the whaling quota for the Bequian people of St Vincent and The Grenadines;
 - the need to close existing loopholes in the Convention that allow 'scientific' whaling, and allow some commercial whaling via blanket objections to provisions in the Schedule to the Convention; and
 - the need to renegotiate and revise both the Schedule to the Convention and the Convention itself.
- 3.8 Most recently, in *Report 23*, we pressed for substantial revisions to the Convention, arguing that Australia should take a lead in developing proposals to revise the Convention, with the aim of deleting material that is no longer relevant, closing loopholes and clarifying definitions and objectives. Specifically, we proposed that the Government prepare a proposal to revise the Convention and its Schedule for consideration at the

2 See Joint Standing Committee on Treaties, *Report 23, Amendments proposed to the International Whaling Convention* (August 1999), p. 31

52nd annual meeting of the Commission (which was held in Adelaide in July 2000).

- 3.9 In response, the Government indicated that it had other priorities in the lead up to the 52nd meeting, but acknowledged that 'revision of the Convention and its Schedule would be highly desirable' and that 'it may be timely to begin work later in 2000 on a multilateral proposal for revisions'.³
- 3.10 We urge the Government to give serious consideration to this matter now.

Automatic entry into force

- 3.11 As described in the National Interest Analysis, amendments to the Schedule to the Convention automatically enter into force for each Party 90 days after the date of notification from the Commission, unless a Party lodges an objection to the amendment within that period.⁴
- 3.12 The 90 day period expired on 15 October 2000 and as the Australian Government did not lodge an objection to the amendments, the amendments have already entered into force for Australia.
- 3.13 In this instance we are happy to see the moratorium on commercial whaling maintained and we have no objection to the treaty action. But, as we have noted recently in relation to two other conservation treaties, automatic entry into force provisions can make a mockery of the Parliament's reformed treaty making process.
- 3.14 In *Report 34, Two Treaties Tabled on 6 June 2000* (August 2000) we discussed the operation of the automatic entry into force provisions in the *Convention on International Trade in Endangered Species* (CITES) and the *Convention on the Conservation of Migratory Species of Wild Animals*. We noted that providing Parliament with advice of amendments after they have been agreed by the Parties to a treaty, and shortly before they automatically come into force, runs contrary to the spirit of the treaty making reforms introduced by the Government in 1996.

3 See Government Response to Report 23, *Senate Hansard*, 17 August 2000, p. 16621. In its response the Government indicated that its priorities at the 52nd Meeting were to 'continue the current moratorium on commercial whaling, to support existing whale sanctuaries, to pursue the establishment of further whale sanctuaries including the South Pacific Whale Sanctuary, and to continue to seek an end to so-called 'scientific' whaling and to commercial whaling carried out under reservations'.

4 National Interest Analysis for the *Amendments, done at Adelaide on 6 July 2000, to the International Convention for the Regulation of Whaling*, p.1

- 3.15 We recommended that earlier advice to Parliament of proposed treaty actions would allow Parliament and the community a more meaningful opportunity to review and comment on the proposed treaty action than current procedures allow. The procedures we describe in *Report 34* in relation to future amendments to CITES and the Migratory Species Convention could be applied equally to proposed amendments to the International Whaling Convention.
- 3.16 We urge the Government to respond promptly to these recommendations.

Conclusion and recommendation

- 3.17 At the same time as urging the Government to consider again our recommendation about sponsoring revisions to the Convention and its Schedule and to respond to our recommendations calling for earlier notification of amendments which automatically enter into force, we express our continuing support for the maintenance of the moratorium on commercial whaling.

Recommendation 2

- 3.18 **The Committee supports the amendments to the dates in Paragraphs 11 and 12 and Tables 1, 2 and 3 of the Schedule to the *International Convention on the Regulation of Whaling*.**

Agreement with Egypt on Protecting the Welfare of Children

Proposed treaty action

- 4.1 The proposed *Agreement with Egypt Regarding Cooperation on Protecting the Welfare of Children* sets up a mechanism to assist nationals of either country whose children have been abducted to the other country or where difficulties with contact between a parent and child have arisen.¹
- 4.2 The proposed Agreement has been negotiated because Egypt is not a party to the *Convention on Civil Aspects of International Child Abduction* (the Child Abduction Convention) and, as its child custody laws are based on religious law, is unlikely to become a party to the Convention.
- 4.3 A key objective of both the Convention and the proposed Agreement is to combat the illicit transfer and non-return of children abroad.
- 4.4 The proposed Agreement reflects fundamental principle that 'the best interests of the child' are of primary importance in matters relating to parents' rights of residence and contact with their children. The Agreement also seeks to maintain a child's personal relations with both parents on a regular basis, where it is appropriate to do so. These principles are drawn from the *United Nations Convention on the Rights of the Child*.

¹ Unless otherwise indicated, the material in this section was drawn from the *National Interest Analysis for Cooperation Agreement with Egypt on Protecting the Welfare of Children*.

- 4.5 The proposed Agreement establishes a consultative mechanism to help resolve child abduction cases – it does not contemplate measures which require legal enforcement through the Courts of either country.
- 4.6 The establishment of a Joint Consultative Commission is a key feature of the proposed Agreement. The Commission, an administrative body comprising representatives of relevant authorities in both countries, will assist in locating children who have been abducted; encourage dialogue and the amicable resolution of issues between parents; and facilitate the issue of travel documents to parents and children.
- 4.7 The Commission will also follow the progress of cases with a view to providing timely status reports to relevant authorities and promoting cooperation between relevant authorities.
- 4.8 It is anticipated that proposed Agreement will be implemented in Australia by the same network of Commonwealth and State authorities that cooperate in relation to cases under the Child Abduction Convention.

Evidence presented

- 4.9 At our hearing, witnesses from the Attorney-General's Department stressed that the value to Australia of the proposed Agreement is that it would establish formal administrative and consultative procedures where there are none at present.²
- 4.10 At present, parents seeking to re-establish contact with a child who has been 'illicitly transferred and not returned' from one country to another have access only to consular assistance. The Consultative Commission to be established by the Agreement will enable parents to seek assistance from officials in both countries with direct knowledge of and expertise in the administrative and judicial structures in each country.³
- 4.11 We were advised that Australia's experience in managing cases under the Child Abduction Convention has shown that this type of direct communication between relevant authorities in each State is invaluable.⁴

2 Stephen Bourke (Attorney-General's Department), *Transcript of Evidence*, 6 November 2000, pp. TR41-42

3 Stephen Bourke (Attorney-General's Department), *Transcript of Evidence*, 6 November 2000, pp. TR41-42

4 Stephen Bourke (Attorney-General's Department), *Transcript of Evidence*, 6 November 2000, p. TR42

4.12 We also discussed at some length the concept of ‘wrongful removal or retention of a child’. Although this phrase is not used in the proposed Agreement, which instead refers to ‘illicit transfer and non-return’, it is used in the Child Abduction Convention, many elements of which are reflected in the proposed Agreement. Witnesses from the Attorney-General’s Department described a removal as being ‘wrongful’ when ‘processes are not put in place for continuing and ongoing contact’ between a child and both its parents.⁵

4.13 At the hearing we also sought information about:

- the processes that are currently available to parents seeking the return of children who have been illicitly transferred;⁶
- the procedures to be followed in Australia should the Consultative Commission seek assistance in locating a child illicitly transferred from Egypt to Australia;⁷
- the number of cases involving the illicit transfer and non-return of children between Australia and Egypt;⁸ and
- the nature of Egyptian law in relation to children.⁹

5 Stephen Bourke (Attorney-General’s Department), *Transcript of Evidence*, 6 November 2000, p. TR43. Article 3 of the Child Abduction Convention states that ‘the removal or retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention these rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention’.

6 Stephen Bourke (Attorney-General’s Department), *Transcript of Evidence*, 6 November 2000, p. TR45. Mr Bourke advised that parents seeking custody through the court systems in other countries can obtain financial assistance from the Attorney-General’s Department, subject to ‘a means and merit test’.

7 Stephen Bourke (Attorney-General’s Department), *Transcript of Evidence*, 6 November 2000, p. TR46

8 Stephen Bourke (Attorney-General’s Department), *Transcript of Evidence*, 6 November 2000, pp. TR44 and 46

9 Stephen Bourke (Attorney-General’s Department), *Transcript of Evidence*, 6 November 2000, p. TR46

- 4.14 In a subsequent written submission, the Attorney-General's Department provided copies of two background papers on Egyptian family law and further information about the number of abduction cases between Australia and Egypt. The following table shows the number of cases involving the illicit transfer of children from Australia to Egypt (with data on the number of abductions to other non-Convention countries as a point of reference):

Year	Abductions from Australia to Egypt	Abductions from Australia to other non-Convention countries
1998	2	41
1999	2	41
2000	3	59 (includes actual abductions and inquiries registered in the 3 rd Quarter of 2000)

Source Attorney-General's Department, *Submission No. 1*, p. 1

- 4.15 The Department also advised that neither the Department of Foreign Affairs and Trade nor the Egyptian Ministry of Foreign Affairs have any record of child abductions from Egypt to Australia.¹⁰

Conclusion and recommendation

- 4.16 It is clearly appropriate that the Australian Government establish a network of agreements, multilateral and bilateral, to protect the welfare of children.
- 4.17 In the past, we have expressed support for the Convention on the Rights of the Child and the *Convention on the Protection of Children and Cooperation in respect of Inter-country Adoption*. The proposed Agreement is a useful addition to this series of agreements. It will provide Australian parents whose children have been illicitly transferred to Egypt with information, assistance and, hopefully, a mediated resolution to their difficulties.

¹⁰ Attorney-General's Department, *Submission No. 1*, p 2

Recommendation 3

- 4.18 **The Committee supports the proposed *Agreement with Egypt Regarding Cooperation on Protecting the Welfare of Children* and recommends that binding treaty action be taken.**

Acts of the Universal Postal Union

Proposed treaty actions

- 5.1 The Government is proposing to take two sets of treaty actions relating to the operation of the Universal Postal Union (UPU): the first arising from the 21st Congress of the UPU held in Seoul in September 1994, and the second arising from the 22nd Congress of the UPU held in Beijing in September 1999.¹
- 5.2 The treaty actions arising from the Seoul Congress are:
- ratification of the Fifth Additional Protocol to the Constitution of the UPU;
 - approval of the Universal Postal Convention and Final Protocol; and
 - approval of the General Regulations of the UPU.
- 5.3 The treaty actions arising from the Beijing Congress are:
- ratification of the Sixth Additional Protocol to the Constitution of the UPU;
 - approval of the Universal Postal Convention and Final Protocol; and
 - approval of the General Regulations of the UPU.
- 5.4 The treaty actions arising from the Beijing Congress are intended to update and replace the instruments developed at the Seoul Congress. Before agreeing to the treaty actions developed at Beijing it is, however,

¹ Unless otherwise indicated, the material in this section is drawn from the National Interest Analyses for the *Fifth & Sixth Protocols to the Constitution of the Universal Postal Union*.

necessary to ratify the Seoul instruments, in order to establish an appropriate basis for the Beijing instruments.

- 5.5 The UPU is a specialised United Nations agency, comprising 189 member countries, responsible for the regulation of the flow of mail between member countries. Article 1 of the UPU's Constitution establishes a single postal territory for the reciprocal exchange of postal items with freedom of transit guaranteed throughout.
- 5.6 The earliest version of the UPU was established in 1874. Australia has been a member since 1907.
- 5.7 The principal outcomes of the Beijing Congress were:
- agreement to continued restructuring and reform of the main organs of the UPU;
 - introduction of the principle of 'universal service';
 - re-casting of the UPU Convention and the introduction of Postal Financial Services Acts;
 - formalisation of relations with the World Trade Organisation; and
 - further revision of the system of payments between postal organisations for the delivery of inward foreign letter post (known as 'terminal dues').
- 5.8 The National Interest Analysis at Appendix B describes in considerable detail the essential features of the instruments developed at the Beijing Congress.
- 5.9 The NIA also highlights a number of reservations Australia has expressed, prime amongst them a declaration that Australia will 'apply the Acts and regulations of the Beijing Congress in full compliance with its rights and obligations under the World Trade Organisation Agreement, and in particular to the General Agreement in Trade and Services'.
- 5.10 Australia's reservations to the Final Protocol of the Convention include the following:
- notwithstanding the provisions of Article 10, Australia does not agree to the extension of basic services to include postal parcels (Article IV (1));
 - the postal administration of Australia does not accept postal items of any kind containing bullion or bank notes. In addition, it does not accept registered items for delivery in Australia, or items in transit a descouvert, containing valuables such as jewelry, precious metals, precious or semi-precious stones, securities, coins or any form of

negotiable financial instrument. It declines all liability for items posted which are not in compliance with this reservation (Article XII (8));

- the postal administration of Australia does not accept postal items of any kind containing bullion or bank notes (Article XIII (9)); and
- notwithstanding reservations made by any country in respect of articles 49.13.3 and 51.1.3, the postal administration of Australia will not collect a signature for registered items for which the additional payment in respect of delivery has not been made (Article XXIV (3)).

Evidence presented

- 5.11 We heard evidence from Department of Communications, Information Technology and the Arts and from Australia Post that the Acts of the Seoul and Beijing Congresses represent significant steps in the continued restructuring and reform of the UPU, a process which began at the 20th UPU Congress in Washington in 1989. The aim of the reform process is to streamline decision-making and reduce functional overlap and duplication within the organisation.²
- 5.12 Australia has contributed actively to this process, being a member of a 'high level group on reform of the UPU which is charged with addressing this issue prior to the next congress to be held in 2004'. At the Beijing Congress Australia's standing was enhanced when it was elected as a member of both the Council of Administration and the Postal Operations Council.³
- 5.13 It is a time of rapid change in postal services. Many member States (including Australia) have moved towards the provision of postal services on a competitive commercial basis and the market for international postal services is becoming increasingly liberalised. We were advised that Australia can play an important part in helping ensure that the UPU remains relevant and that the rules governing the movement of post preserve the integrity of the international postal system, at the same time as being flexible enough to allow for the system to adapt to changing circumstances.⁴

2 John Neil (DCITA), *Transcript of Evidence*, 6 November 2000, p. TR49

3 John Neil (DCITA), *Transcript of Evidence*, 6 November 2000, p. TR50

4 John Neil (DCITA), *Transcript of Evidence*, 6 November 2000, p. TR50

5.14 At our hearing we also took evidence on:

- the advantages of having a multilateral system of international postal regulation rather than a series of bilateral arrangements;⁵
- the costs to Australia of membership of the UPU (which amounts to an annual contribution of \$A800 000 to the UPU's budget of \$36 million);⁶
- the importance Australia places on ensuring that any obligations described in the Acts of the UPU are consistent with obligations imposed by the World Trade Organisations;⁷ and
- the need to ensure that the Acts of the UPU only contain material which is appropriate to be described in a documents to which governments are committing themselves and that material describing commercial processes and transactions not be included in treaty status documents.⁸

Conclusions and recommendation

5.15 It is clearly in Australia's interest that the international postal system operates efficiently and effectively and that its rules adapt to the demands of the rapidly changing global postal market. Continued participation in the UPU is an important way of encouraging these outcomes.

5.16 We are pleased to note that Australia's representatives at the UPU have been elected to key posts in the organisation (the Council of Administration and the Postal Operations Council) and encourage the Government to use this opportunity to ensure that the reform momentum of recent years is maintained.

5.17 We note the declaration and reservations that Australia has expressed in relation to the instruments developed at the 22nd Congress in Beijing.

5 Christopher Grosser (Australia Post), *Transcript of Evidence*, 6 November 2000, p. TR50

6 John Neil (DCITA) and Christopher Grosser (Australia Post), *Transcript of Evidence*, 6 November 2000, pp. TR50-51

7 John Neil (DCITA), *Transcript of Evidence*, 6 November 2000, p. TR52

8 John Neil (DCITA), *Transcript of Evidence*, 6 November 2000, pp. TR51, 52 and 53

Recommendation 4

- 5.18 **The Committee supports the Acts of the 21st Congress of the Universal Postal Union in Seoul in September 1994 and the Acts of the 22nd Congress of the Universal Postal Union in Beijing in September 1999 and recommends that binding treaty action be taken.**
- 5.19 We note also that Australia makes a relatively large annual contribution to UPU's budget. It is important that Australia's representatives to the UPU ensure that maximum transparency is brought to bear on the financial management of the organisation and that the Government is in a position to assess whether its contribution represents good value for money.

Protocol concerning the International Registration of Marks

Proposed treaty action

- 6.1 The *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* forms part of an international trade mark registration system administered by the World Intellectual Property Organisation (WIPO).¹
- 6.2 The Protocol is based upon the *Madrid Agreement Concerning the International Registration of Marks*, although the Australian Government is proposing to accede only to the Protocol, not to the Agreement itself.
- 6.3 The Protocol provides that a trade mark owner of a Contracting Party may secure protection of the mark in other Contracting Parties by filing an application for international registration with the International Bureau of WIPO. International registration will operate for ten years with an option for a further ten years. The Protocol provides also that the protection to be accorded to an internationally registered trade mark is to be the same as if the mark had been registered by the Office of that Contracting Party.
- 6.4 At present, in order to protect trade marks in overseas markets an Australian trade mark owner must register and maintain trademark protection in the trade mark office of each particular country where protection is required. This may involve filing multiple applications in languages other than English and the payment of government and legal fees on each occasion.

¹ Material in this section has been drawn from the NIA for the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*.

- 6.5 By contrast, under the Protocol, Australian trademark owners would be able to file single applications in Australia, in English, and pay fees to one office to obtain trademark protection in all or any of the other countries that are Parties to the Protocol.
- 6.6 So far, 49 countries have accepted the Protocol, including nine of Australia's top twenty trading partners. Japan, China, Singapore and a number of European Union countries are already Parties to the Protocol, while the United States of America and the Republic of Korea are taking steps towards ratification.
- 6.7 The NIA notes that Australia intends to make a written declaration, at the time of accession to the Protocol, extending the time limit within which a Party is able to refuse protection of a trade mark, from one year to 18 months.

Evidence presented

- 6.8 We were advised by witnesses from IP Australia and the Department of Foreign Affairs and Trade that accession to the Protocol is widely supported within the Australian business community.²
- 6.9 The simplified, lower cost international trade mark registration procedures described in the Protocol will be of significant benefit to Australian businesses seeking to trade overseas.
- The cost of securing trade marks overseas, which has to be done jurisdiction by jurisdiction can be exorbitant. There are fees, legal costs, documentation and red tape. This is a significant burden on small businesses especially and a real barrier to entry in some cases to international markets.³
- 6.10 In a written submission the Government of Western Australian Government supported accession to the Protocol, noting that the Protocol will:

2 Ross Wilson (IP Australia), *Transcript of Evidence*, 30 October 2000, p. TR54. At the hearing, in the NIA and subsequently in a written submission we received information about the extensive process of industry, professional and public consultation undertaken by IP Australia on the potential impact and advantages of the Protocol. The written submission included a description of the access that had been made to information published on IP Australia's Internet site and a description of the industry consultation that had been undertaken in Tasmania (see *Submission No.1 to Madrid Protocol*, 9 November 2000, p. 1)

3 Antony Taubman (DFAT), *Transcript of Evidence*, 30 October 2000, p. TR55

... provide a significant improvement in the level of protection for trademark owners [and]... make it easier for Australia companies to obtain protection overseas.⁴

- 6.11 The WA Government did, however, note that Australian companies will need to become aware of the benefits of seeking trade mark protection and more 'astute and professional in the management and protection of IP assets'. This is particularly an issue for smaller companies without resources or expertise in these areas.⁵
- 6.12 Accordingly, the WA Government urged the Commonwealth to 'continue its IP awareness strategies, such as those being implemented by IP Australia; and investigate ways to simplify and reduce costs associated with the protection and enforcement of intellectual property rights.'⁶
- 6.13 We also received a submission from the Government of South Australia, which while not arguing against accession, did note that accession may create a potential for disputes between trademark owners in different countries whose trade marks are identical.⁷ In the event of this situation arising it may be necessary for the Australian Trademarks Office to be called upon to exercise its power to object to international registrations.

Conclusions and recommendation

- 6.14 There are clear benefits to Australian exporters in acceptance of this Protocol.
- 6.15 Effective trade mark protection is, for many exporters, a key part of successfully establishing and maintaining a position in overseas markets.
- 6.16 Simplifying the processes involved in gaining international trade mark protection and reducing the costs of such protection, will be of great benefit to existing exporters and will help reduce market barriers for new exporters.

4 Ministry of Premier and Cabinet (Western Australia), *Submission No. 2*, p. 1

5 Ministry of Premier and Cabinet (Western Australia), *Submission No. 2*, pp. 2-3

6 Ministry of Premier and Cabinet (Western Australia), *Submission No. 2*, p. 3

7 Government of South Australia. *Submission No. 3*, p. 2

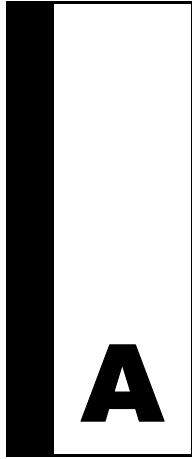
Recommendation 5

- 6.17 **The Committee supports the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* and recommends that binding treaty action be taken.**
- 6.18 We agree with the observation made by the WA Government that IP Australia will need to maintain an extensive and continuing program of business education about the advantages of international trade mark protection and about how to obtain the protection afforded by the Protocol. IP Australia should focus in particular on providing such support for small business without in-house expertise in this area.

ANDREW THOMSON MP

Committee Chairman

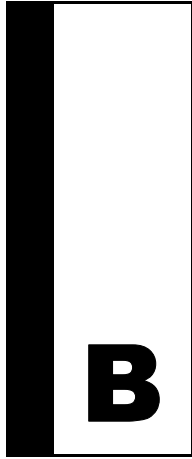
28 November 2000



Appendix A - Extract from Resolution of Appointment

The Resolution of Appointment for 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 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
- (c) 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.



Appendix B - National Interest Analyses

Agreement between the Government of Australia and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol, done at Canberra on 7 September 2000

NATIONAL INTEREST ANALYSIS

Date of Proposed Binding Treaty Action

The proposed Agreement between the Government of Australia and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol (“the Agreement”) was signed on 7 September 2000. It will enter into force once both Parties have notified each other in writing that their respective legal and constitutional procedures for entry into force are complete. It is proposed that Australia provide such advice to the Russian Federation by the end of 2000.

Date of Tabling of the Proposed Treaty Action

10 October 2000.

Reasons for Australia to Take the Proposed Treaty Action

General

The Agreement will add to Australia's existing income tax treaty network. Australia currently has 39 comprehensive income tax treaties (Argentina, Austria, Belgium, Canada, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hungary, India, Indonesia, Ireland, Italy, Japan, Kiribati, Malaysia, Malta, the Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Singapore, Slovak Republic, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, United Kingdom, United States of America, Vietnam and Romania – the latter signed on 2 February 2000 but not yet in force) and four Airline Profits Agreements

(China, France, Greece and Italy - Airline Profits Agreements are more limited, dealing only with cross-border taxation of airline profits).

Background

With the break-up of the USSR, the Treasurer approved the substitution of the Russian Federation for the USSR on the Australian tax treaty negotiation program. Negotiations with the Russian Federation commenced in 1992. A second round was held in 1997 and a third and final round was held in 1999.

Investment and Trade Relationship1

Once it is in force, the main impact of the Agreement will be on Australian enterprises investing in and trading with the Russian Federation.

In 1999-2000 Australian exports to the Russian Federation were approximately \$A190m (mostly meat, dairy and alumina) and imports were \$A60m. As at May 2000, the Russian Federation was Australia's 49th largest trading partner, was ranked 42nd amongst our export destinations, and was our 68th largest source of imports.

Australian investment in the Russian Federation is estimated at \$A35m and Russian investment in Australia is estimated at \$A36m. Given the size of the Russian economy and its import dependency, there is considerable potential for future growth in these areas.

Reasons for the Agreement

The two key objectives of the Agreement are to:

- promote closer economic co-operation between Australia and the Russian Federation by eliminating possible barriers to trade and investment caused by the overlapping taxing jurisdictions of the two countries, and providing a reasonable element of legal and fiscal certainty within which cross-border trade and investment can be carried on;
- create a legal framework through which the tax administrations of Australia and the Russian Federation can prevent international fiscal evasion.

The Agreement once in force will reduce or eliminate double taxation caused by the overlapping taxing jurisdictions, by limiting taxing rights over various types of income flowing between the two countries. For example, the Agreement contains the standard tax treaty provision that neither country will tax business profits derived by residents of the other country unless the business activities in the other country are substantial enough to constitute a "permanent establishment" (as defined in Article 5) and the income is attributable to a "permanent establishment" (Article 7). The countries also agree on methods of reducing double taxation where both countries have a right to tax.

In negotiating the sharing of taxing rights under bilateral agreements, Australia seeks an appropriate balance between source and residence country taxing rights. Generally the allocation of taxing rights under the Agreement is similar to international practice as set out in the *OECD Model Tax Convention on Income and on Capital* ("the OECD Model"), but consistent with Australian practice - there are a number of instances where the Agreement is biased more towards source

country taxing rights: the definition of "permanent establishment" is wider in some respects than the OECD Model, and the Business profits, Profits from the operation of ships and aircraft, Royalties, Income from alienation of property and Other income Articles also give greater recognition to source country taxing rights.

In common with Australia's other tax treaties, the Agreement provides an agreed basis for determining whether the income returned or expenses claimed on related party dealings by members of a multinational group operating in both countries can be regarded as acceptable (Articles 7 and 9), and in so doing addresses fiscal evasion in the form of international profit shifting. Another feature of the Agreement which assists in the prevention of fiscal evasion is the exchange of information facility (Article 25). The two tax administrations can also use the mutual agreement procedures (Article 24) to develop a common interpretation and resolve differences of application of the Agreement.

Impact of the Agreement

The Agreement is likely to have an impact on:

- Australians and Russians investing in and trading with the other country;
- Australians and Russians working in or supplying services to the other country;
- the Governments of Australia and the Russian Federation; and
- people receiving pensions from the other country.

Australians investing in and trading with the Russian Federation. The Agreement will reduce Russian taxation on interest, dividends and royalties. It will also restrict the circumstances in which Australians trading with the Russian Federation will be taxed by requiring the existence of a permanent establishment in the Russian Federation before Russian taxation will be imposed. The Agreement will assist Australian investors by increasing the certainty of the taxation rules applying to the cross-border investment.

Cross-border movement of personnel. The treaty will also assist in clarifying the taxation of individual Australians working in the Russian Federation. In particular Article 14 (Income from independent personal services) and Article 15 (Income from employment) set out circumstances in which the Russian Federation can tax individual consultants or employees. In addition, Article 19 (Income from government service) sets out special rules applying to government service remuneration, and Article 18 (Pensions and annuities) and Article 19.2 sets out rules for pensions.

There are important impacts on the **Governments** which are party to the Agreement.

- As mentioned the Agreement will promote greater co-operation between the relevant taxation authorities to prevent fiscal evasion and tax avoidance.
- The Agreement will also assist the bilateral relationship by adding to the existing network of commercial treaties between the two countries.

Overview of the Agreement

In general the Agreement follows the structure of the OECD Model. However, there are some influences from the more source country biased United Nations' *Model Double Taxation Convention between Developed and Developing Countries*. In addition both countries have proposed some variations to reflect their domestic tax rules, economic interests and legal circumstances (see *Key Departures* in Obligations below). Apart from these variations, the Agreement is substantially similar to Australia's recent tax treaties.

The Agreement applies to residents of either Australia or the Russian Federation. It applies to the following **taxes** (Article 2):

- the Australian federal income tax, and the resource rent tax.

- the Russian tax on profits (income) of enterprises and organisations and the Russian tax on the income of individuals.

It does not apply to Australian State or Territory taxes or the goods and services tax (GST).

Obligations

The Agreement requires the two Governments to relieve double taxation of cross-border income in accordance with its terms (Article 22).

It also establishes procedures for mutual agreement of issues that may arise under the Agreement (Article 24), and the exchange of information (Article 25).

In general the Agreement does not impose any greater obligations on residents of Australia than Australia's domestic tax laws would otherwise require. However, subject to secrecy and privacy safeguards, the Agreement may require information concerning the tax affairs of Australian residents to be supplied to the Russian revenue authorities. Similarly, the Australian Taxation Office (ATO) may obtain tax information from those authorities.

Under the terms of the Agreement:

- **Dual resident individuals** (i.e., persons who are residents of both Australia and the Russian Federation according to the domestic law of each State) are, in accordance with specified criteria, to be treated for the purposes of the Agreement as being residents of only one State. **Dual resident non-individuals** such as companies are to be treated as residents only of the State in which their effective management is located (Article 4).
- **Income from real property** (Article 6) may be taxed in full by the State in which the property is situated. Income from real property includes natural resource royalties.
- **Business profits** (Article 7 and Protocol Item 5) are to be generally taxed only in the State of residence of the recipient unless they are derived by a resident of one State through a branch or other prescribed **permanent establishment** (Article 5 and Protocol Item 4) in the other State, in which case that other State may tax the profits. **Profits of associated enterprises** (Article 9) may be taxed on the basis of dealings at arm's length, thus assisting the revenue authorities of both countries in combating tax avoidance arising from the artificial shifting of profits between multinational enterprises.
- Profits from **international operations of ships and aircraft** (Article 8 and Protocol Item 6) are generally to be taxed only in the State in which the operator is resident for tax purposes.
- **Dividends, interest and royalties** (Articles 10, 11 and 12 and Protocol Item 8) may generally be taxed in both States, but there are limits on the tax that the State in which the dividend, interest or royalty is sourced may charge on such income flowing to residents of the other State who are beneficially entitled to that income. These limits are 10 per cent for both royalties and interest. A limitation of 15 per cent applies to dividends unless certain conditions are met which reduce the maximum rate of tax to five per cent. These conditions are that the dividends have been fully taxed at the corporate level, the dividend recipient is a company that holds directly at least 10 per cent of the capital of the company paying the dividends, and the resident of the other State has invested a minimum of \$A700,000 or the Russian rouble equivalent in the company. In addition, for the five per cent limit to apply, where dividends are paid by a company that is resident in the Russian Federation, the dividends must also be exempt from Australian tax.
- **Income or profits from the alienation of real property** (Article 13 and Protocol Item 2) may be taxed in full by the State in which the property is situated. Subject to that rule and other specific rules in relation to business assets and some shares, capital gains are to be taxed in accordance with the domestic law of each State. The Agreement also includes revised

provisions designed to address the issues raised by the Federal Court in *Commissioner of Taxation v. Lamesa Holdings BV* (1997) 77 FCR 597 (the *Lamesa Holdings BV* case).

The Full Federal Court in *Lamesa Holdings BV* decided that real property held by a non-resident through a chain of companies did not fall within the terms of the alienation of real property provision in the Australia/Netherlands double tax agreement.

The decision of the Court means that, in double tax agreements that contain an alienation of property article similar to that in the Australia/Netherlands double tax agreement, that article applies where real property is held through a company, but not where the real property is held through a company at the bottom of a chain of companies and one of the higher tier companies is alienated. This decision has implications for all of Australia's double tax agreements and highlights opportunities for non-residents to escape Australian taxation on profits from the sale of real property and mining rights in Australia by the use of a chain of holding companies or trusts.

- **Income from professional services** (Article 14) and other similar activities provided by an individual will generally be taxed only in the State in which the recipient is resident for tax purposes. However, remuneration derived by a resident of one State in respect of professional services rendered in the other State may be taxed in the latter State, where derived through a fixed base of the person concerned in that State.
- **Employee remuneration** (Article 15 and Protocol Item 2) will generally be taxable in the State where the services are performed. However, where the services are performed during certain short visits to one State (maximum 183 days in any 12 month period) by a resident of the other State, the income will generally be exempt in the State visited. However, employment aboard a ship or aircraft operated in international traffic may be taxed in the State in which the operator is a resident.
- **Directors' fees and other similar payments** (Article 16) may be taxed in the State of residence of the paying company.
- Income of **entertainers and sportspersons** (Article 17) may generally be taxed by the State in which the activities are performed.
- **Pensions and annuities (excluding government service pensions)** (Article 18) may be taxed only in the State of residence of the recipient.
- **Government service remuneration** (Article 19) will generally be taxed only in the State that pays the remuneration. However, the remuneration may be taxed in the other State in certain circumstances where the services are rendered in that other State. Similarly, **government service pensions** (Article 19.2) will generally be taxed only in the paying State. However, if the pensioner is both a resident and a citizen of the other State and the services for which the pension is paid were rendered in that other State, the pension will be taxable only in that other State.
- Income of **visiting students** (Article 20) will be exempt from tax in the State visited in respect of payments received from abroad for the purposes of their maintenance or education.
- **Other income** (i.e., income not dealt with by other articles) may be taxed in both States (Article 21).
- **Source rules** are prescribed in the Agreement (Protocol Item 1(a)) to the effect that income or profits derived by a resident of Australia which, under the provisions of the Agreement may be taxed in the Russian Federation, shall be treated as being sourced in the Russian Federation.
- **Double taxation relief** (Article 22) for income which under the Agreement may be taxed by both States is required to be provided by the State in which the taxpayer is resident under the terms of the Agreement as follows:-

- in **Australia**, by allowing a credit for the Russian tax against Australian tax payable on income derived by a resident of Australia from sources in the Russian Federation;
- in the **Russian Federation**, by allowing a credit for the Australian tax against Russian tax payable on income derived by a resident of the Russian Federation from sources in Australia.

In the case of Australia, effect will be given to the double tax relief obligations arising under the Agreement by application of the general foreign tax credit system provisions of Australia's domestic law, or relevant exemption provisions of the law where applicable.

- **Limitation of benefits** (Article 23). This bilateral provision excludes all tax privileged regimes from the benefits of the Agreement.
- **Consultation and exchange of information** between the two taxation authorities is authorised by the Agreement (Articles 24 and 25). The exchanged information is restricted to that permitted under the existing domestic laws of the two countries but is not limited only to residents of either State (Article 25.1). The information is to be treated as secret but may be disclosed to duly authorised persons and authorities directly involved in tax administration (including courts).
- The **Entry into force** Article (Article 27) provides that the Agreement will have effect in the case of Australia for withholding tax on income derived by a non-resident and for other Australian tax, in relation to income or profits of any year of income beginning on or after 1 July in the calendar year next following the date on which the Agreement enters into force. In the case of the Russian Federation, it has effect for taxable years and periods beginning on or after 1 January in the calendar year next following that in which the Agreement enters into force.

Key departures from preferred Australian tax treaty practice (for many of which there are precedents in other Australian tax treaties)

As a general comment, the Russian Federation had sought to align the text of the principal Agreement with the structure of the OECD Model and to remove to the Protocol as many of the country specific specialities as possible. Their reasoning for doing so was to ensure as smooth a passage as possible through the Russian Duma – the Russian experience with the Duma on some of their other recently concluded tax treaties had been difficult due to the various treaty texts looking somewhat different from the OECD Model. The Russian Federation indicated a desire to avoid as far as possible a repeat of those difficulties with the text of this Agreement. In most areas, Australia was able to accommodate their wishes, given that the Protocol will, when signed, form an integral part of the Agreement and will have the same standing at international and domestic law as the principal Agreement text. Australia has recently made use of the Protocol in a similar fashion in the case of the Argentine tax treaty.

- **Taxes covered.** The final paragraph of Article 2 contains a departure from Australian and OECD practice in that there is no requirement for the two States to notify each other in the event of a significant change in the taxation laws of the respective States.
- **Definition of Australia.** The definition of Australia (Article 3.1(b) and Protocol Item 3) has been modified due to Russian sensitivities concerning Australia's claims to the Antarctic Territory.
- **Permanent Establishment (PE) - Heavy Industrial Equipment.** Under paragraph 4(b) of Article 5 an enterprise will be deemed to have a PE in the other country if heavy industrial equipment is being used in that country by, for or under contract with, the enterprise. Examples of heavy industrial equipment will include oil or gas exploration equipment such as drilling rigs and cranes, as well as other equipment. Australian treaty practice generally prefers the term "substantial equipment" however the Russian Federation preferred a more precise term.
- **Permanent Establishment exclusions - delivery.** Consistent with Russian requirements, delivery of goods or merchandise is treated as a business activity conducted through a PE.

Accordingly the provision of a delivery service is not an activity that may be excluded from constituting a PE under the terms of paragraph 3 of Article 5.

- **Non-portfolio dividends.** Paragraph 2 of Article 10 of the Agreement provides for a reduced rate of dividend withholding tax limit of five per cent in certain circumstances and a 15 per cent rate in other circumstances. The Agreement provides a more restrictive set of criteria before the reduced rate of withholding tax of five per cent may be imposed on dividends. With respect to dividends flowing to Russian companies, as well as the normal domestic franking requirement, it will be necessary for the Russian company to directly hold at least 10 per cent of the capital of the company, and to have invested at least \$A700, 000 or the roubles equivalent in the capital of that company. The Russian Federation is restricted to taxing dividends flowing to Australian companies at five per cent if the dividends are paid out of profits that are "assessable to tax" in the Russian Federation, the Australian company holds directly at least 10 per cent of the capital of the Russian company and the dividends are exempt from tax in Australia. This minimum investment threshold for the five per cent dividend withholding tax rate limit is consistent with the Russian Federation's treaty practice (eg. the Russian Federation's tax treaties with Korea and Sweden). Australia agreed to a limit of \$A700, 000 being broadly comparable with the \$US500, 000 proposed by the Russians.
- **Royalties.** A provision has been included in the Agreement (Article 12.3(h)) that deems radiofrequency spectrum licence payments to be royalties for the purposes of the Agreement. This is the first occasion that such a provision has been included in an Australian tax treaty and is in accordance with the Treasurer's Press Release of 11 March 1998 concerning revised taxation treatment to be afforded to spectrum licences. In this respect, the Agreement with the Russian Federation was the first to be (re)negotiated following the granting of Royal Assent to the necessary spectrum amendments to the income tax laws passed by the Parliament in June 1999.
- **Alienation of property - sweep up clause.** Generally Australian tax treaties have referred to 'gains of a capital nature' in the sweep up clause of the Alienation of property article rather than 'capital gains' as agreed in Article 13.5 of this Agreement. However to ensure that there is no possibility that income gains can also be dealt with under Article 13.5, it was agreed with the negotiators for the Russian Federation that Article 13.5 relates only to gains of a capital nature.
- **Government service pensions** (Article 19.2). Such pensions will generally be taxed only in the source (paying) country. However, such pensions will generally be taxed only in the country of residence of the recipient if the pensioner is a citizen or national of that country and the services for which the pension is paid were rendered in that country. (Although this is not Australia's preferred approach, this accords with similar provisions in the OECD Model and in a number of other Australian tax treaties.)
- **Limitation of benefits.** Australia is concerned that the Russian Federation may have established a tax privileged region under its law which could potentially deny access to information by treaty partners and accordingly treaty benefits should not be available to this region. Accordingly a bilateral provision which excludes all tax privileged regimes from the benefits of the Agreement was agreed. Thus Article 23 of the Agreement denies treaty benefits in relation to income or profits derived from activities which are preferentially taxed and where information concerning that income or profits is granted greater than usual confidentiality.
- **Correlative adjustment** (Protocol Item 7(a)). To allay Russian concerns about the need to grant double taxation relief by correlative adjustment for all transfer pricing adjustments made by Australia, it was necessary to include in the Protocol a provision mirroring the OECD Model Commentary's amplification of this point. This clarifies that the Russian Federation need only give correlative adjustments when the original adjustments are "appropriate" but that this issue depends on objective international standards.

- **Competent authority** (Protocol Item 7 (b)). Australia also agreed to the Russian Federation's request to include the Russian Ministry of Taxes and Duties as a 'competent authority' for certain administrative purposes concerning such adjustments - and in other cases, it is their Ministry of Finance.

Costs

Once it is in force, the Agreement is not expected to result in increased administration or compliance costs. Nor is there expected to be significant revenue effects.

There may be some reduction in Australian Government revenue from taxation of Russian investments and other business activities in Australia (because the Agreement restricts source country taxation of certain items of income) but this has to be balanced against probable increases in trade and investment arising from the Agreement. In addition, the limitation of Russian taxation rights in circumstances where Australia may have given credit for Russian taxation may lead to increased Australian tax revenue.

Future Protocols etc

The Agreement does not provide for the negotiation of future legally binding instruments (although this does not preclude the two Governments from agreeing in the future to amendments of the Agreement: e.g. Protocol Item 5(b) dealing with non-resident insurance businesses and Protocol Item 8 concerning the domestic laws relating to the taxation of dividends).

Implementation

As the Agreement affects Commonwealth income tax legislation, enabling legislation must be enacted by the Commonwealth to give the Agreement the force of law in Australia. This will be achieved by incorporating the text of the Agreement as a schedule to the *International Tax Agreements Act 1953*, prior to its coming into force for Australia. Consequential amendments to the Act itself will also be necessary. No action is required by the States or Territories and no change to the existing roles of the Commonwealth, or the States or Territories in tax matters will arise as a consequence of implementing the Agreement.

Consultation

The Australian Taxation Office (ATO) has established a Tax Treaties Advisory Panel to review proposed tax treaty actions. As advice on double tax agreement matters is largely provided to industry through specialist tax professional firms, membership of the Panel is composed of tax professional specialists, industry representatives and officials from the ATO, Commonwealth Treasury and Attorney-General's Departments. The Panel includes representatives from the Australian Bankers' Association, CPA Australia, Business Council of Australia, Corporate Tax Association, Institute of Chartered Accountants, International Fiscal Association, Law Council of Australia, Metal Trades Industry Association (now the Australian Industry Group), Minerals Council of Australia and Taxation Institute of Australia.

At the inaugural meeting of the Tax Treaties Advisory Panel on 5 December 1997, the ATO gave an overview of the key aspects of the proposed Agreement with the Russian Federation and members of the Panel were invited to provide written comments on the Agreement.

On 13 February 1998 the Panel met again to consider various proposed tax treaties including the proposed Agreement with the Russian Federation. All Panel members including those unable to attend that meeting, were provided with copies of the full draft tax treaty texts along with draft national interest analyses for each of the respective treaties in advance of that meeting. Panel members were also invited to provide comments on the agenda items prior to the meeting.

The four Panel members unable to attend that meeting (those representing Corporate Tax Association and Business Council of Australia; the Law Council of Australia; the Metal Trades Industry Association; and the Australian Bankers' Association) received all related papers prior to the meeting and minutes from the meeting.

At the February 1998 meeting, all the articles of the proposed Agreement with the Russian Federation were discussed in depth by the Panel. In particular, the written comments provided by two members of the Panel (representing Corporate Tax Australia and Business Council Australia; and Taxation Institute of Australia) were addressed in turn. The Panel supported the signature of the Agreement subject to further work on the "land rich entities" provision (Article 13.4) – which had been revised following the decision in *Lamesa Holdings BV* case. Prior to finalising the negotiation of the Agreement, the ATO reached agreement with the Russian negotiators on a revised provision to address the issues raised by this case and the Panel's discussion.

The Agreement was reconsidered by the Panel at its 5 May 2000 meeting due to the need to consider the new matters raised by the Russians during the 1999 talks not dealt with at earlier meetings. A senior representative from the Australia, Russia and New Independent States Business Council joined the meeting when the proposed Agreement with the Russian Federation was discussed by the Panel. He advised that his Council was pushing hard for the Agreement to be 'fast-tracked' at Government level in both countries so that it can be signed soon. The Panel supported these endeavours as well as the final text of the proposed Agreement with the Russian Federation.

The Department of Foreign Affairs and Trade has had an ongoing involvement in the finalisation of the Agreement. The Department has sought to facilitate increased commercial links with the Russian Federation and to encourage an increase in bilateral trade and investment. The Department has indicated strong support for early finalisation of the agreement which will provide a significant boost to our commercial relations and to a number of important prospective trade and investment projects.

Information in relation to the proposed Agreement has been provided to the States and Territories by the Commonwealth through the Standing Committee on Treaties' Schedule of Treaty Action. To date there have been no requests for further information.

Withdrawal or Denunciation

The Agreement provides for termination (Article 28) by either of the Contracting States by written advice through the diplomatic channel on or before 30 June in any calendar year beginning after the expiration of five years from the date of entry into force. Otherwise the Agreement shall continue indefinitely.

If such written notice of termination is given, the Agreement would cease to have effect in Australia for withholding tax on income that is derived by a non-resident and for other Australian tax, in relation to income, profits or gains for any year of income beginning on or after 1 July in the calendar year next following the year in which the notice is given. In the case of the Russian Federation, the Agreement would cease to have effect for taxable years and periods beginning on or after 1 January in the calendar year next following that in which the notice of termination is given.

Contact Details

Treaties Unit
International Tax Division
Australian Taxation Office

Agreement Between the Government of Australia and the Government of the Arab Republic of Egypt Regarding Cooperation on Protecting the Welfare of Children

NATIONAL INTEREST ANALYSIS

Date of Proposed Binding Treaty Action

The proposed Agreement between the Government of Australia and the Government of the Arab Republic of Egypt Regarding Cooperation on Protecting the Welfare of Children ('the Agreement') is yet to be signed. After signature has taken place, the Agreement will not enter into force until both Parties have notified each other that their respective legal requirements for entry into force have been met. It is proposed that signature of the Agreement take place following Executive Council approval. Subject to completion of domestic treaty making processes, Australia's notification for entry into force would then be provided by the end of 2000.

Date of Tabling of the Proposed Treaty Action

10 October 2000. The Agreement is being tabled prior to signature, as decided by both Parties.

Reasons for Australia to take the Proposed Treaty Action

The Agreement is required because there is currently no mechanism to assist Australian nationals whose children have either been abducted to Egypt or where difficulties with contact between a parent and child have arisen. The Agreement will establish formal procedures to assist Australian nationals in these circumstances.

The Agreement is in Australia's interests because Egypt is not a party to the Hague Convention on the Civil Aspects of International Child Abduction of 1980, (the 'Child Abduction Convention'). Hence the mechanisms and protocols available under the Child Abduction Convention cannot be utilised in cases involving Egypt. Egypt is one of several countries with child custody laws based on religious law and is unlikely to become a party to the Child Abduction Convention.

The Agreement is important because it reflects the provisions of the United Nations Convention on the Rights of the Child. Article 11 of that Convention specifically obliges States to take measures to combat the illicit transfer and non-return of children abroad and to promote the conclusion of bilateral agreements to this end.

The Agreement will benefit Australia as it mandates 'the best interests of the child' as being of primary importance in matters relating to parents' rights of residence and contact with their children (residence and contact in Australian law equate to custody and access in the Agreement). It also seeks to maintain the child's personal relations with both parents on a regular basis and aims to assist a child to recover from any harmful effects suffered in the removal of the child by a parent from the territory of one Party to the territory of the other Party (Article 1).

Obligations

The Agreement is of a facilitative and administrative nature. It provides a consultative mechanism to formulate and implement recommendations to effectively resolve child abduction cases. There are no measures that require legal enforcement, for example, through the courts of either country. The Agreement extends to children who are of Egyptian, Australian or dual Australian and Egyptian nationality (Article 2).

Article 3 of the Agreement provides for the establishment of a Joint Consultative Commission ('the Commission'). The Commission is an administrative body made up of representatives from government authorities in both countries. In Australia the government authorities are the Commonwealth Attorney-General's Department and the Commonwealth Department of Foreign Affairs and Trade. In Egypt the government authorities are the Ministries of Foreign Affairs, Justice and the Interior. The Commission will assist in locating children who have been abducted, encouraging dialogue between parents and facilitating the return of children in some cases. The Commission will, in accordance with the laws of each Party:

- act as a monitoring body which will consider and assist attempts to resolve individual cases;
- perform an educative and promotional function with respect to the rights of children (Articles 5 and 6);
- assist parents and children to obtain travel documentation (Article 6(e)). The Agreement provides that the Commission may only consider immigration matters in these circumstances (Article 5(2));
- play a role in mediating and settling disputes between parents, and it may take recommendations to the appropriate authorities to assist in taking all appropriate measures, in accordance with the laws of each Party, to achieve the objectives of the Agreement;
- follow the progress of cases with a view to providing timely status reports to the concerned authorities of both countries and promoting awareness and cooperation between the concerned authorities; and
- receive and exchange information and documents related to cases and facilitate the transmission of such information and documents to the concerned authorities of either Party as required.

The Agreement provides some guidance as to how the Commission will do its work. It will communicate using diplomatic channels (Article 7), and meetings of the Commission will be arranged when requested by either Party (Article 8). Commission reports concerning the operation of the Agreement will be sent to the Ministry of Foreign Affairs (Egypt) and the Commonwealth Department of Foreign Affairs and Trade (Australia) (Article 10).

The Agreement:

- is not meant to affect the rights and obligations arising from other treaties which apply to both Parties, and in particular the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations;
- is meant to complement, rather than displace, other means of communication and consideration of cases between the Parties;
- allows court proceedings to be commenced before the judicial or administrative authority of a Party in respect of a child (Article 11); and
- provides that cases that began before the Agreement commenced can be considered under the Agreement (Article 15).

Costs

Costs will be incurred in performing the Commission's functions (Articles 5 and 6), arranging and attending Commission meetings (Article 8), recording and reporting on the Commission's work (Articles 9 and 10), and translating written communications (Article 11). The performance of these tasks provided for in the Agreement will be funded from current budgets of the Commonwealth Department of Foreign Affairs and Trade and the Commonwealth Attorney-General's Department.

Future Protocols, Annexes, other legally binding Instruments

The Agreement does not provide for any future protocols or other legally binding instruments.

Implementation

No legislation is required to implement the Agreement.

The Agreement will be implemented in Australia by departmental representatives on the Commission, from the Commonwealth Department of Foreign Affairs and Trade and the Commonwealth Attorney-General's Department. They will undertake appropriate liaison and co-ordinate communications with Egyptian Joint Consultative Commission representatives.

In order to implement the Agreement, Australia will utilise the expertise and experience of officers within the Attorney-General's Department responsible for implementing the Hague Convention on the Civil Aspects of International Child Abduction. Australia will draw upon the existing governmental framework and communication channels as appropriate. In addition, in suitable cases, assistance may be sought from States and Territories, for example in locating and aiding abducted children within their jurisdictions.

In implementing the Child Abduction Convention in Australia, officials from the Attorney-General's Department and officers from relevant state and territory agencies currently perform prescribed functions pursuant to the Family Law (Child Abduction Convention) Regulations 1986. These functions are performed by Commonwealth, State and Territory Central Authorities established under the Regulations.

The Central Authority locates children wrongfully removed and attempts to secure their voluntary return. It also provides information of a general character as to the law of the child's State. Where necessary it commences judicial proceedings with a view to obtaining the return of the child. It also has a role in securing the effective exercise of rights of contact.

Consultation

During the first half of 2000, the Commonwealth Attorney-General's Department consulted widely on the Agreement. The Department wrote to State and Territory Governments, the Family Court of Australia, the Federal Magistrates Service, and representatives of the Egyptian community in Australia, advising of its intention that Australia enter the Agreement and inviting comments. Comments received were supportive of the Agreement and no objections to the Agreement were raised by any of those consulted. A list of those consulted follows:

Representatives of the Egyptian Community

Embassy of the Arab Republic of Egypt

President: Australian Egyptian Association of Victoria

President: Egyptian Federation of Victoria
Islamic Women's Association of QLD
Organisation for Egyptians in Tasmania
The Society of Greeks from Egypt
Egyptian Association of Queensland
Australian Egyptian Association
Egyptian Federation of Australia
Federation of Ethnic Community Councils of Australia Inc.
Ethnic Communities Councils of WA; NT; TAS; NSW; VIC; and QLD

State and Territory Governments

Premier's Office in NSW; QLD; SA; and VIC
Chief Minister: NT
Chief Executive: Chief Minister's Department, ACT
Minister for Health: TAS
Office of the Solicitor General, TAS

Australian Courts

Chief Justice: Family Court of Australia
Chief Federal Magistrate: Federal Magistrates Service

Legal Aid Agencies

Chief Executive Officer: Legal Aid Office, ACT
Directors of Legal Aid Western Australia and Queensland; Legal Aid Commission of Western Australia, NSW, NT; Legal Aid Commission Tasmania; and Legal Services Commission of South Australia
National Legal Aid
Women's Legal Resources Centre, NSW

Withdrawal or Denunciation

Article 16 provides that the Agreement shall remain in force until terminated by either Party. Either Party may terminate the Agreement at any time by giving written notice to the other Party to that effect. Termination shall take effect six months after receipt of the notice. It also provides that, notwithstanding termination, the Commission shall make every effort to finalise cases brought to its attention prior to notice of termination.

Contact Details

International Family Law Section
Family Law and Legal Assistance Division
Attorney General's Department

Amendments, done at Adelaide on 6 July 2000, to the Schedule to the International Convention for the Regulation of Whaling of 2 December 1946

NATIONAL INTEREST ANALYSIS

Date of Proposed Binding Treaty Action

15 October 2000.

The Schedule is an integral part of the International Convention for the Regulation of Whaling, 1946 (the Convention). It is amended from time to time, in accordance with the provisions of Article V of the Convention, to take account of decisions of the International Whaling Commission established under the Convention (the Commission). Amendments to the Schedule become effective with respect to each Contracting Government ninety days following the date of notification from the Secretariat of the Commission unless a Contracting Government lodges an objection to the amendments in that period.

Should any Contracting Government lodge an objection, the amendment would not enter into force for any of the Contracting Governments for an additional 90 days. Thereafter the amendments become binding on all Contracting Governments other than those that have lodged objections.

Should no objection be lodged, the amendments will automatically come into force on 15 October 2000. Australia does not propose to lodge an objection to these amendments.

Date of Tabling of the Proposed Treaty Action

10 October 2000.

Reasons for Australia to take the Proposed Treaty Action

The treaty action involves amendments to the Schedule to the Convention to which Australia has been a party since it came into force in 1948. The amendments arise from the annual requirement to make current the dates in Paragraphs 11 and 12 and Tables 1, 2 and 3 of the Schedule to the Convention which maintain the moratorium on commercial whaling (zero catch limits). The dates will be changed from 1999/2000 pelagic season to 2000/2001 pelagic season, from 2000 coastal season to 2001 coastal season, from 2000 season to 2001 season, and from 2000 to 2001 respectively.

The Convention is a multilateral treaty which regulates the conservation and utilisation of whale stocks. Although negotiated at a time when the primary focus was to ensure international controls over post-war development of the commercial whaling industry, the Convention and the Commission created by it have proved more recently to be an effective vehicle for some major conservation measures. These include the 1982 decision to implement a moratorium on commercial whaling and the establishment in 1994 of the Southern Ocean Sanctuary.

Australia has been a strong advocate of conservation measures within the Commission since the closure of the last Australian shore-based whaling operation in 1979. The Commission is

considered the most appropriate forum for pursuit of improved international efforts for the conservation of whales.

The amendments to Paragraphs 11 and 12 and Tables 1, 2 and 3 of the Schedule substitute the dates for the coming year on whale catch limits, all of which are set at zero for commercial catches in accordance with Schedule Paragraph 10(e). These are routine changes that maintain the moratorium and the currency of the Schedule.

Obligations

The amendments to the Schedule will not add to Australia's existing obligations under the Convention. Australia already prohibits whaling. The *Environment Protection and Biodiversity Conservation Act 1999*, which prohibits killing, injuring or interfering with whales in Australian waters, affords a higher level of protection to whales in Australian waters than is afforded under the Convention.

Costs

This treaty action is not expected to impose any additional costs to Australia. The amendments to the Schedule will not require any new domestic agencies or management arrangements to be put in place, as the amendments simply maintain the existing moratorium on commercial whaling.

Future Protocols

The Schedule is an integral part of the Convention and is amended from time to time in accordance with the provisions of Article V of the Convention, by three quarters majority of the Commission. Amendments are usually, but not necessarily, made at meetings of the Commission. The Rules of Procedure do provide that between meetings of the Commission or in the case of emergency, a vote may be taken by post, or other means of communication. Amendments to the Schedule will continue to be agreed by the Commission and these would constitute further treaty action under this Convention. There are no current proposals for the development of additional Protocols, which would require a Conference of Governments outside the normal Commission meetings.

Implementation

The amendments to dates for the zero catch limits for commercial whaling do not require any additional measures by Australia. The *Environment Protection and Biodiversity Conservation Act 1999* prohibits the killing of whales and provides for the preservation, conservation and protection of whales and other cetaceans in Australian waters, including to the outer limits of the Exclusive Economic Zone.

Consultation

Environment Australia convenes a meeting with non-government organisations and other Government departments prior to each annual Commission meeting to canvass views on Commission issues. Prior to the July 2000 Commission meeting, the National Task Force on Whaling met to consider current issues. The National Task Force on Whaling was established in September 1996 to report to the Commonwealth Minister for the Environment and Heritage on options the Federal Government might take to end commercial whaling world-wide. The views expressed at the Task Force and non-government organisations' meetings are taken into account in developing Australia's position on the proposals to be considered by the Commission. Following each annual meeting of the Commission a report from the delegation is sent out to non-government organisations, government departments, scientists and institutions. Representatives

of two non-government organisations (Project Jonah and Whales Alive) participated as members of the Australian delegation at the 2000 annual meeting.

The amendments resulting from this Annual Meeting are not the result of decisions made at the meeting, and result only from the need to make current the dates in the Schedule which relate to the maintenance of the moratorium on commercial whaling. Therefore there is no requirement for further consultation than that which has already occurred and been described above.

The possibility of treaty action was advised to the States and Territories through the Standing Committee on Treaties' schedule of treaty action.

Withdrawal or Denunciation

Australia may withdraw from the Convention by giving notice to the Depository Government (Government of the United States of America) on or before 1 January of any year, whereby the withdrawal becomes effective as of 30 June of the same year.

Contact Details

Marine and Water Division
Environment Australia

Universal Postal Union: Fifth Additional Protocol to the Constitution of 10 July 1964, as amended; Convention, and Final Protocol; General Regulations; Postal Parcels Agreement, and Final Protocol, done at Seoul on 14 September 1994

NATIONAL INTEREST ANALYSIS

Date of Proposed Binding Treaty Action

It is proposed that binding treaty action be taken for Australia as soon as practicable after 5 December 2000 but before the end of 2000.

The proposed binding treaty action is ratification of the Fifth Additional Protocol to the Constitution of the Universal Postal Union as amended ("Fifth Additional Protocol – UPU Constitution") and approval of the Universal Postal Convention, and Final Protocol ("UPU Convention and Final Protocol"); the General Regulations of the Universal Postal Union ("UPU General Regulations"); and the Postal Parcels Agreement and Final Protocol.

The Final Protocols to the UP Convention and the Postal Parcels Agreement mentioned above incorporate reservations lodged by Australia and other UPU members. The reservations in Australia's case are notified in Article VII(4) of the UP Convention Final Protocol and Articles VIII and XVI of the Postal Parcels Agreement (further detail on these reservations is provided below).

The above instruments were incorporated into the Acts of the 21st Congress of the Universal Postal Union (UPU), Seoul, which were signed by Australia, subject to ratification and approval, on 14 September 1994.

The Acts entered into force generally on 1 January 1996 in accordance with the following provisions:

- i.) Article IX, Fifth Additional Protocol to the UPU Constitution – the Additional Protocol came into force on 1 January 1996 and shall remain in force for an indefinite period;
- ii.) Article 60, UP Convention – the Convention and its Final Protocol came into force on 1 January 1996 and shall remain in operation until the entry into force of the Acts of the next Congress, ie 1 January 2001);
- iii.) Article 131, General Regulations – the General Regulations came into force on 1 January 1996 and shall remain in operation until the entry into force of the Acts of the next Congress (the next Congress took place in September 1999 at Beijing and the Acts of that Congress shall enter into force on 1 January 2001); and
- iv.) Article 43, Postal Parcels Agreement - the Agreement and its Final Protocol came into force on 1 January 1996 and shall remain in operation until entry into force of the Acts of the next Congress, ie 1 January 2001.

Article 25(3) of the Constitution requires that a signatory country shall ratify Additional Protocols to the Constitution (in this case the Fifth Protocol), while Article 25(4) states that approval of the Acts other than the Constitution shall be governed by the constitutional requirements of the signatory country (in Australia's case, treaty action is required).

Although Australia's proposed treaty action in relation to the Acts of the Seoul Congress is belated, it is to ensure that the appropriate basis is established for ratification of the Acts of the 1999 Beijing Congress before they enter into force on 1 January 2001. The principles of the Acts in the meantime

have been implemented by way of administrative action through the Australian Postal Corporation (Australia Post). For the purposes of the Acts of the UPU, Australia Post has been designated by Australia as the postal administration responsible for implementing and abiding by the provisions of the Acts (see Implementation section below).

The term “postal administration” in the Acts of the UPU is defined by each member country within the framework of its domestic legislation.

Date of Tabling of the Proposed Treaty Action

10 October 2000.

Reasons for Australia to take the Proposed Treaty Action

Background

The UPU is a specialised agency of the United Nations comprising 189 member countries. Article 1 of the Constitution of the UPU establishes a single postal territory for the reciprocal exchange of letter post items with freedom of transit guaranteed throughout. The aim of the UPU is to secure the organisation and improvement of universal postal services and to promote in this sphere the development of international collaboration. Since its inception in 1874 the UPU has provided the focus for the establishment and further development of the rules and regulations governing the transmission of postal items between member countries. Australia joined the UPU on 1 October 1907.

The treaty status documents of the UPU include the Constitution of the UPU (and Fifth Protocol), as the basic Act of the UPU, the General Regulations, the Universal Postal Convention (and Final Protocol), and four optional Agreements (the Postal Parcels Agreement, the Money Orders Agreement, the Cash-on-Delivery Agreement and the Giro Agreement). The four optional Agreements are only binding upon those UPU members who elect to become a party to them. Of them, Australia is only party to the Postal Parcels Agreement.

The Constitution contains the fundamental rules of the UPU, providing for its legal foundation and is binding on all member countries. Basically, the 1964 Constitution is a continuous Agreement which each Congress revises with a new “Protocol”.

The General Regulations comprise provisions which ensure the application of the Constitution and the day-to-day working of the UPU and are binding on all members of the UPU.

The Universal Postal Convention (and its Detailed Regulations) comprise the rules applicable throughout the international postal service and provisions concerning the letter-post services and are binding on all members of the UPU. Technically, the Universal Postal Convention does not constitute a continuous agreement. Each UPU Congress (held approximately every five years) agrees to a new version of the Convention and the prior version lapses when the new agreement becomes effective.

The Congress held prior to the 1994 Seoul Congress was the 1989 Washington Congress. The principal outcome of the 1994 Seoul Congress was the decision to restructure the organisation with the aim of streamlining decision-making processes and reducing functional overlap and duplication that had developed within the previous structure.

Reasons

The UPU is the key international agency responsible for the regulation of the flow of mail between member countries. The extent of the UPU’s membership reflects both the universal nature of its mandate and the extent to which it is recognised as the key forum dedicated to addressing issues

relating to the exchange of international mail and the role and nature of international postal services between States.

If Australia Post, as the designated Australian postal administration, is to continue to provide efficient and price competitive postal services, within and outside Australia, Australia's continuing active participation as a member of the UPU is essential.

Australia has been a member of the UPU since 1907 and has contributed actively, not only at Congresses, but also to initiatives between Congresses through, for example, representation on the UPU Councils. Continued participation in the UPU provides Australia the opportunity to voice its opinion concerning the conduct of the UPU's affairs and the operation of the universal postal service over which the UPU presides, and strengthens Australia Post's capacity to fulfil its mandate.

The UPU remains an important forum for Australian participation given the increasing trend by member States to provide postal services on a competitive basis internationally, and the increasing significance of market liberalisation of postal services in the deliberations of the UPU and the Australian domestic setting. As an active contributor to the activities of the UPU, Australia has sought continuing reform and efficiency in its operation. Consequently, Australia has been influential in ensuring that the UPU remains a forum effective in securing a more competitive international postal regime while at the same time being able to meet the challenges of a fast changing global market environment.

Since the 1989 Washington Congress, the UPU has recognised increasingly the requirement for reform, both in the context of its own structure and the extent to which market regulation impedes the operation of more efficient market forces. Decisions flowing from the 1994 Seoul Congress are reflective of an increased awareness of the need for an organisational structure which would allow the UPU to meet the structural and policy demands that would flow from a less regulated and more competitive international postal market. The growth of competition, the impact of technology, and the need to streamline structures and decision-making in order to improve the ability of the UPU to respond collectively to the changing dynamics of the global economy were the key influences on the 1994 Seoul Congress to endorse the reforms proposed.

In this context the major reform initiatives endorsed at the 1994 Seoul Congress were:

- i.) the adoption of the restructure of the principal organs of the UPU;
- ii.) the redraft of the Universal Postal Convention and the Postal Parcels Agreement;
- iii.) the recognition of the need to clarify any distinction between the primary actors within the domestic postal market of member countries; and
- iv.) the adoption of the 'Seoul Postal Strategy'.

It was recognised that postal administrations now and in the future will have to carry out their universal service obligations and maintain an adequate revenue base to fulfill these obligations in an increasingly commercialised and competitive environment. Governments are becoming progressively more sensitive to public demands for efficiency, service quality, and cost control and are increasingly giving consideration to deregulation, contractual relations with private service providers, and expanding competition as a means to improve the response to such public demands (while maintaining universal service obligations). Against this backdrop the UPU has sought to strengthen its ability to identify and take into account developments with respect to governmental policies on postal issues, deregulation and competition while sharpening its focus on service quality, commercial and technological developments, and operational issues.

The re-drafting of the Universal Postal Convention and the Postal Parcels Agreement began prior to the 1989 Washington Congress, although the impetus for the focus on the subject documents were Resolutions C2 and C4 of that Congress. The intention was to modernise language and terms considered archaic and to simplify provisions considered to be unnecessarily complex. The work undertaken at the 1994 Seoul Congress was also a reflection of ongoing reforms within the UPU whereby some of the rule-making functions of the Congress were to be transferred to the Executive

Council (now known as the Council of Administration). The revised Universal Postal Convention and the Postal Parcel Agreement (and their respective Detailed Regulations) were adopted at the 1994 Seoul Congress.

At the Seoul Congress it was recognised that there were an increasing number of countries in which government oversight of postal services was being separated from the actual commercial and operational management of postal services. It was agreed therefore, that a member country may choose to designate more than one entity, public or private, as a postal operator to be responsible for fulfilling obligations arising from adherence to the Acts of the UPU. As a consequence it was decided that each member country within the framework of its national legislation would define the term "postal administration".

The 'Seoul Postal Strategy' (SPS) was adopted in recognition of the need for the universal postal service to respond effectively to changing market requirements and customer needs and the parallel need to monitor and improve the quality of postal products and services. It supplements the UPU's Permanent Project to Safeguard and Enhance the Quality of and to Modernise Postal Service, established in recognition of a decline in market service and a rapidly changing market environment.

The SPS specifically targets:

- i.) the effect on the postal sector of deregulation of transport and communications and the resultant growth in competition;
- ii.) the possible consequences for the postal sector of the establishment of the World Trade Organization (WTO) and the conclusion of the General Agreement on Trade in Services (GATS) - concerning liberalisation of international trade in the services sector; and
- iii.) the effect of new technology on postal services, particularly in the fields of telecommunications and data processing.

Under the SPS, the UPU member countries are to seek to:

- i.) improve their domestic postal networks making the international network more competitive;
- ii.) give postal administrations sufficient management independence, financial autonomy and accountability, allowing them to respond to modern management systems and the commercial approach necessary to respond more effectively to customer demands;
- iii.) redefine the limits of the postal monopoly and the reserved services related to it, bearing in mind the need to provide universal postal services at affordable prices; and
- iv.) continue and expand their technical cooperation activities.

Improved and ongoing efficiency in the UPU's operations allows for the most effective use of the compulsory member contributions to the budget of the UPU, including those of Australia. The reform initiatives being undertaken also assist the UPU in remaining relevant to its members with the continued participation of countries like Australia bolstering the reform process and helping to maintain the necessary momentum.

Australia participated in discussions and voted on proposals to amend the Acts that were put to the 1994 Seoul Congress of the UPU and supported changes to the Acts by its signature of the Final Acts at the conclusion of the Congress. Australia has applied the provisions of the Acts since their entry into force on 1 January 1996 and their ratification would be both expedient and appropriate.

The UPU

The overall organisational structure of the UPU is set out in Chapter III of the Constitution. Article 13 of the Constitution (amended by Article II of the Fifth Additional Protocol) makes provision for

a Congress, a Council of Administration (CA) a Postal Operations Council (POC) and an International Bureau (IB) as the UPU's principal bodies.

The Congress

Article 14 of the Constitution provides that the Congress (comprising representatives of all UPU member countries) is the supreme authority of the UPU. The Congress meets not later than five years after the Acts of the previous Congress unless exceptional circumstances justify the convening of an extraordinary Congress. Article 106 of the General Regulations stipulates that each Congress shall apply the Rules of Procedure of Congresses, which are annexed to the General Regulations.

The fundamental task of the Congress is to revise or supplement the Acts of the UPU. Revisions or supplements to the Acts are done by way of 'Proposals' brought before the Congress in accordance with the procedures detailed at Articles 14 and 15 of the Rules of Procedure of Congresses.

The Council of Administration

The Council of Administration (CA) was given its current nomenclature as part of the restructuring of the UPU undertaken at the Seoul Congress, replacing the Executive Council (EC) – Articles 13 and 17 of the Constitution and Article 102 of the General Regulations refer. The CA consists of 41 members elected by Congress on the basis of equitable geographic distribution with appointed representatives being competent in postal matters (Articles 102(1) and 102(3) of the General Regulations refer).

Postal Operations Council

The Postal Operations Council (POC) has its origins in the Consultative Council for Postal Studies (CCPS) established by the 1969 Tokyo Congress. The CCPS was remade into the POC as part of the structural reform process undertaken at the Seoul Congress, the aim being to give greater emphasis to operational and commercial issues – Articles 13 and 18 of the Constitution and Articles 102 and 103 of the General Regulations refer. The POC consists of 40 members elected by Congress on the basis of qualified geographical distribution (Articles 104(1) and 104(2) of the General Regulations refer).

The International Bureau

The International Bureau (IB) is the only permanent body of the UPU and is headquartered in Berne, Switzerland. It serves as an instrument of liaison, information, and consultation for postal administrations of member States providing the full range of secretariat and administrative functions for the UPU, the CA and the POC. The full range of functions of the IB is described at Chapter II, Articles 109 to 119 of the General Regulations of the UPU. At the Seoul Congress the decision was taken to place the IB under the control of the CA.

The IB provides the secretariat and support for the CA and the POC, with its structure adapted to complement their revised structures and needs. The IB is also charged with new responsibilities in the areas of strategic planning and programme budgeting (Chapter II, General Regulations).

The Acts of the UPU

The Constitution

The Constitution is the basic Act of the UPU, setting out the fundamental rules that provide the legal basis for its foundation. The Constitution (concluded at Vienna on 10 July 1964) is amended by Additional Protocols. The Fifth Additional Protocol (done at Seoul) further amends the Constitution.

General Regulations

The General Regulations implement the UPU's Constitution and contain provisions for the operation of the UPU. They set out the rules regarding the composition, functioning and meeting of the major bodies of the UPU. The General Regulations are re-enacted as a whole by the Congress and are binding on all member countries by virtue of Article 22 (2) of the Constitution.

Universal Postal Convention

The Universal Postal Convention (and its Detailed Regulations) contain the common rules applicable throughout the international postal service and provisions concerning letter-post services. It is binding on all member countries by virtue of Article 22 (3) of the Constitution. The Final Protocol to the Convention reflects agreed amendments to the Convention and lists reservations made by member States of the UPU.

UPU Agreements

The Agreements of the UPU regulate the services other than those of letter-post between those member countries that are parties to them and are binding on those countries only (by virtue of Article 22(4) of the Constitution). As stated above, Australia is a party to the Postal Parcels Agreement.

The Postal Parcels Agreement (and Final Protocol) regulates the exchange of parcels within the postal territory of the UPU. The Final Protocol reflects amendments to the Agreement and lists reservations made by member States of the UPU.

Currently there are three optional Agreements to which Australia is not a party. These are the Money Orders Agreement, the Giro Agreement and the Cash-on-Delivery Agreement.

Obligations

The primary obligations imposed on Australia as a member of the UPU are the requirement to abide by its Acts, and, as a consequence, to provide postal services in accord with established international norms, particularly in respect of services standards and charging regimes. Australia is also required to contribute annually to the UPU budget on the basis of the provisions of Article 126 of the General Regulations of the UPU. Amendments to the Acts of the UPU, which resulted from deliberations of the 1994 Seoul Congress, do not substantively change those primary obligations.

Australia Post, as the designated postal administration for the purposes of implementing the Acts of the UPU, has primary responsibility for ensuring that Australian postal services are in accord with the overarching requirements of those Acts. In the context of the 1994 Seoul Congress additional obligations imposed by virtue of the recast Acts were not sufficiently substantive in nature to warrant significant changes to Australia's existing postal service practices.

The texts of the Universal Postal Convention and the Postal Parcels Agreement were redrafted at the 1994 Seoul Congress in order to focus these Acts on fundamental principles and inter-administration relations with matters covering the implementation of these Acts and procedure being dealt with in detailed regulations. Amendments throughout the Acts reflect the name changes of bodies associated with the restructure of the organisation which were considered to better suit the new nature of their activities.

Amendments to the Constitution

In the Fifth Additional Protocol to the Constitution, Articles I, II and III and IV and V give effect to the changes required of the Constitution ie Article 8(2), Articles 13(1) and 13(2), Articles 17 (1) and 17(2), Article 18 and Article 20 respectively.

Amendment of Article 18 of the Constitution (Article IV of the Fifth Additional Protocol) is intended to highlight the importance of the role of the POC in considering “operational, commercial, technical and economic questions”.

Article 20 (Article V of the Fifth Additional Protocol) was also amended to clarify the intrinsic role of the IB, reinforcing its responsibilities and their role, “serving as an organ of execution, support, liaison, information and consultation”.

The 1994 Seoul Congress transferred to the POC the authority to draw up and revise the Detailed Regulations of the UPU, a role previously undertaken by the UPU Congress. The Detailed Regulations contain the rules necessary for the implementation of the UPU’s Convention and Agreements. Changes to Articles 22 and 25 of the Constitution (Protocol Articles VI and VII) reflect this decision.

Amendments to the UPU General Regulations

The amendments made to the General Regulations reflect the structural changes to the UPU detailed above. Accordingly, references to the role and functions of both the EC and the CCPS have been replaced by references to the CA and the POC.

Amendments were made to a number of Articles of the General Regulations reflecting the UPU’s revised organisational structure and the most important of these are as follows:

Article 102: Composition, functioning and meetings of the CA

Article 102(1) raised the number of CA members from 40 to 41 to reflect the increase in the number of member countries of the UPU (appointed on the “basis of equitable geographic distribution) elected by the Congress.

Article 102(4) was amended to require members of the CA to appoint representatives “competent in postal matters”. The original provisions required the representative of each of the members of the then EC to be appointed by the postal administration of the member country and that the representative be a qualified official of the postal administration.

Article 102(6) provides for a detailed description of the functions of the CA that resulted from the restructure of the UPU. A key amendment to the Article was the deletion of paragraph 102(6.2) of the earlier text reflecting the decision to transfer authority to draw up the Detailed Regulations from the CA to the POC.

Article 102(6.31) requires the CA to “review and draft the Strategic Plan for presentation to Congress developed by the POC with the support of the IB” and to “review and approve annual revisions of the Plan approved by Congress on the basis of recommendations from the POC and to consult with the POC on the development and annual updating of the Plan”.

Article 102(10) and the amendment of Article 104(5) and 104(8), reflected a resolution of the 1994 Seoul Congress on roles and responsibilities for strategic planning and programme budgeting within the UPU (Resolution C46). Both the CA and the POC are required to establish a Strategic Planning Working Party and a Management Committee in order to formalise the strategic planning process.

Article 103: Documentation on the activities of the CA

Article 103(1) - In the interests of ensuring greater accountability to member States the CA is required to send a summary record and notification of its resolutions and decisions following each session. Article 103(2) requires the CA to provide a comprehensive report to Congress on its work and to ensure that the report is sent to postal administrations at least two months prior to the opening of Congress.

Articles 102 and 103 generally describe the CA's main roles and responsibilities which include the following:

- i.) overseeing approval of proposals to change provisions in the Acts of the UPU between Congresses;
- ii.) intergovernmental aspects of technical cooperation;
- iii.) providing a forum for considering the implications of governmental policies with respect to competition, deregulation, and trade-in-service issues for international postal services;
- iv.) overseeing quality of service issues (policy and principles); and
- v.) approval of budgets.

Article 104: Composition, functioning and meetings of the Postal Operations Council (POC)

Article 104(1) was amended to raise the number of members of the POC from 35 to 40. Article 104(2) was amended to reflect qualified geographic distribution for membership of the POC (with 24 seats reserved for developing countries and 16 seats for developed countries). Previously, Article 104 simply noted that in principle, members were to be elected on the basis of as wide a geographical distribution as possible. Further, mandatory rotation of the POC members was introduced, with at least half of the members to be renewed at each Congress (Article 104(2)).

Amendments to Article 104(9) reflect the changes in the role and functions of the POC resulting from the restructuring of the UPU. Responsibilities of the POC include, inter alia:

- i.) study of the operational, commercial, technical, economic and technical cooperation issues of interest to postal administrations of member countries (including questions having major financial repercussions (eg charges, terminal dues, transit charges, airmail and parcel-post rates) and to prepare "information, opinions and recommendations for action" on them (Article 104(9.1));
- ii.) revision of the Detailed Regulations of the UPU within six months following the end of a Congress (subject to the CA guidance on matters of fundamental policy and principle Article 104(9.2));
- iii.) co-ordination of measures to develop and improve international postal services and to take, subject to the CA approval, action considered necessary to safeguard and enhance the quality and modernisation of the international postal service Articles 104(9.3) and 104(9.4);
- iv.) to revise between Congresses, and in accordance with the procedure laid down in the Universal Postal Convention, and subject to the CA approval, the postage charges for letter-post items (Article 104(9.5)); and
- v.) to develop with IB support and in consultation with the POC, the draft Strategic Plan for consideration by Congress and to revise the plan approved by Congress on an annual basis (Article 104(9.10)).

Articles 109 and 110: The International Bureau

Articles 109 and 110 reflect the revised structure of the UPU, particularly in the context of the role of the CA vis the position of the Director-General, and address both the appointment of the Director-General and Deputy Director-General of the IB.

Article 110 gives additional focus to the duties of the Director-General whose primary responsibility is to “organise, administer and direct the International Bureau of which he is the legal representative” (Article 110(1)). The decision was taken at the 1994 Seoul Congress to include a number of additional responsibilities, for example: to execute the specific activities requested by UPU organs and those required by virtue of the Acts.

Article 125: Fixing and regulation of the expenditure of the UPU

Article 125(1), sets the annual expenditure figures for the bodies of the UPU as follows (all figures in Swiss Francs):

1996 - 35,278,600 (approximately \$A36 million)

1997 - 35,126,900

1998 - 35,242,900

1999 - 35,451,300

2000 - 35,640,700

In the interest of facilitating payments of arrears of compulsory contributions to the UPU Articles 125(9) and (10) now provide for the CA to release a member country from all or part of interest owed if the member concerned has paid the full capital amount of its debt in arrears.

Article (2bis) authorised the CA to exceed the general expenditure ceilings to take account of the publication of the International List of Post Offices and sets the amount of overrun authorised for this purpose.

Amendments to the Convention and Final Protocol

The Universal Postal Convention and its Detailed Regulations provides the regulatory framework for the international postal service and sets down the rules in common that apply to the letter-post service. It is the subject of revision at each Congress. The Final Protocol lists reservations made by member States.

The Convention provides for the following:

Part I: Sole Chapter – Rules Applicable in common throughout the international postal service.

Articles 1 to 7.4: General Provisions which include Freedom of Transit (Article 1), Ownership of Postal Items (Article 2), Postage Stamps (Article 5) and Charges (Article 6).

Part II: Provisions concerning the letter post: Provision of services.

Chapter 1: Basic Services - Articles 8 to 41 which include letter-post items (Article 8), postage charges (Article 9) and Preferential Rates (Article 11).

Chapter 2: Special Services - Articles 16 to 24 which include Registered Items (Article 16), Insured items (Article 18) and Perishable Biological Substances and Radioactive Materials (Article 24).

Chapter 3: Special Provisions - Articles 25 to 30 which include Prohibitions (Article 26) and Undeliverable items (Article 28).

Chapter 4: Customs matters - Articles 31 to 33 which include Customs Control (Article 31) and Customs Duty and Other Fees (Article 33).

Chapter 5: Liability - Articles 34 to 38 which include Liability of Postal Administrations, Indemnities (Article 34) and Non-liability of Postal Administrations (Article 35).

Chapter 6: Electronic Mail - Articles 39 to 41.

Part III: Provisions concerning letter post: Relations between postal administrations

Chapter 1: Treatment of letter-post items - Articles 42 to 45_which includes Quality of Service Targets (Article 42).

Chapter 2: Treatment of Cases of liability - Article 46.

Chapter 3: Transit Charges and terminal dues - Articles 47 to 51.2_Transit Charges (Article 47) and Terminal Dues (Article 49) and Accounting for Transit Charges and Terminal Dues (Article 51).

Chapter 4: Air conveyancing dues - Articles 52 to 53.

Final Protocol

The Final Protocol to the Universal Postal Convention lists reservations made by member States in relation to the provisions of the Convention. Australia has previously stated that Article 2 of the Convention shall not apply (Article I of the Final Protocol) and that Article 29 shall only apply in so far as it is consistent with Australia's domestic legislation (Article X(2)) of the Final Protocol and these reservations have been retained. Article 2 addresses ownership of postal items and declares that a postal item remains the property of the sender until it is delivered except when the item is lawfully seized. Article 29 addresses the right of withdrawal of postal items for the purposes of correcting or altering the delivery address.

Amendments to the UP Convention

The following amendments were made to the UP Convention.

Article 1: Freedom of transit

Changes to Article 1 of the Convention introduce a security aspect into the principle of freedom of transit, requiring postal administrations to forward always by the most secure means which it uses for its own items, closed mails and *à découvert* (without cover) letter-post items which are passed to it by another postal administration. Article 1(2) and Article 1(4) were transferred to the Detailed Regulations of the Convention when the 1989 Washington Acts were recast by the UPU's Executive Council. However, they were transferred back into the Convention by the 1994 Congress as it was argued that these provisions are not simply applications of the principle of freedom of transit, but rather restrictions to the fundamental principle of the UPU, freedom of transit. Amendment was made to Article 1(5), (Article 1(4), of the previous Text), to delete the reference to postal administrations in recognition of the notion that the decision to impose a restriction(s) on freedom of transit lies within government competence in countries where the regulator and operator are separate.

Article 6: Charges

Changes to Article 6 of the Convention update the text to reflect a decision by the 1989 Washington Congress to transform the letter post charges into guideline charges only. The amendment of Article 6(1) relates the charges for international postal services as laid down in the Convention and Agreements to the cost of providing these services.

Article 8: Letter post items

Changes to Article 8 include amending the classification of letter-post items to, for example, clearly identify speed and/or method of conveyance.

Article 8(3.2) was amended to raise the weight limit for printed papers from 2kg to 5kg. This was done to meet customer requests for greater flexibility.

Article 8(6) adds a definition of bulk mail, offering postal administrations the possibility of requesting specific payment for these items.

The changes to Article 8 are reflected where applicable throughout the Convention including in the guideline postage charges (Article 9).

Article 9: Postage charges

Article 9(3) was amended to reflect the restructure of the UPU giving authority to the POC to amend the guideline postage charges set down in Article 9(2), subject to CA approval. Two other amendments remove the specification that the guideline charges can only be revised or amended once between two Congresses (see Article 10(3) of the previous Text) and that these changes were made on the basis that the decision to transform them charges into guideline charges only had considerably reduced the need to change them between Congresses.

Article 10: Rate-fixing based on method of conveyance or speed

Paragraph 10(1) as revised by the 1994 Seoul Congress specifies that priority items shall always be conveyed by the quickest route (air or surface) and that the charges applicable to them shall include any additional costs of fast transmission.

Article 12: Special Charges

The delivery charge for small packets has been abolished except in the case of countries where domestic small packet items of over 500g are subject to a delivery charge (new Articles 12(1) and 12(2)). This change aims to allow senders of small packets to expect an all-inclusive price.

Article 15: International Reply Coupons

Amendments in Article 15(3) clarify the value of exchange for international reply coupons (in the case of priority items), by specifying that international reply coupons are exchangeable for stamps representing the minimum postage prepayable on an unregistered priority item. The Washington text did not specify that the priority items referred to were unregistered.

Article 18: Insured items

In consideration of inflation, the amount to which postal administrations may limit the insured value of insured items has been raised, with the proviso that the limit of the insured value in a country's internal postal service shall be applicable if it is less than the limit set down in Article 18.

Article 19: Express items

The amendments to Article 19 aim to enhance the quality of service for express items by making the regulations for their handling more specific.

Article 23: International Business Reply Service

Amendment of Article 23(2) provides for procedures for the International Business Reply Service to be incorporated into the Detailed Regulations of the Universal Postal Convention. Previously, these procedures were contained in a resolution of the 1989 Washington Congress.

The addition of Article 23(4) allows postal administrations to introduce a compensation system, on the basis of bilateral agreements, to cover imbalances in mail flows between countries of international business reply service items. The compensation system should take account of the costs borne by the administration of destination.

Article 25: Posting abroad of letter-post items

Article 25(1) relates to “ABA” remailing where mail originating in country A is transported across the border outside of postal channels and put into the postal system in country B for forwarding via the international system back to country A for delivery to addressees in country A. Article 25(1) also has the effect of authorising a postal administration to refuse to handle such mail if it can be shown that the mail was transported to exploit favourable rate conditions.

The words ‘lower charges’ have been replaced with the words ‘more favourable rate conditions’ (Article 25(1)) to refer to a broader concept than simply the level of charges.

Article 25(3) sets out measures relating to “ABA” remailing where mail originating in country A is transported across the border outside of postal channels and put into the postal system in country B for forwarding via the international postal system back to country A for delivery to addressees in country A.

The key measures under this Article include the establishment of a hierarchy among the various measures, giving priority to that designed to re-establish economic balance through application of internal rates. The possibility of claiming payment of the internal rates not only from the sender, but also from the administration of posting is introduced. Another new element in this Article is the right of the postal administration of destination to return the mail to the administration of posting if payment of internal rates is not made within the established time limit, while having the right to be reimbursed for its return costs.

Article 25(4) addresses ‘ABC’ remailing where mail originating in country A is transported across the border outside of postal channels and put into the postal system in country B, for forwarding via the international postal system to country C and delivery to addressees in country C.

Amendments to Article 25(4) include replacing the phrase ‘the administration concerned’ with ‘the administration of destination’ whereby the administration of posting does not have the right to apply the measures provided in the Article. The phrase “without receiving appropriate remuneration” has been added to make clear the reason justifying recourse to the measures set out in this paragraph while eliminating the seemingly arbitrary nature of the wording in the 1989 Washington Text. A key amendment to this Article introduces the principle that domestic postal administrations have the right to receive from the administration of posting, payment commensurate with the expense incurred in handling this mail.

Together with a number of other countries, Australia lodged a reservation to Article 25(4) reserving the right to limit payments associated with bulk mail to those authorised in the Convention and Detailed Regulations (Article VII, Final Protocol). The reservation was made as Australia saw the provisions of Article 25(4) as having the potential to undermine the terminal dues bulk mail provision of the Convention and because the amended provisions would have the effect of breaching the principle of competitive neutrality, enabling countries to give preferential rates to domestic postal administrations over outside competition.

Article 30: Inquiries

Article 30(4) was amended and Articles 31(4) and 31(5) were deleted, to make acceptance of inquiries free of charge except where a request is made for transmission of an inquiry by telecommunications or EMS. The reasons given for these changes included that when a customer has paid for a service to be performed, it is unreasonable to expect payment of an additional fee to accept an inquiry about possible non-performance of that service. It was argued that all inquiries should be accepted free of charge in the interest of a customer-focussed service.

The addition of Article 30(2) lays down the procedure for inquiries relating to undelivered items where the anticipated transmission time has not yet expired. The aim of this amendment is to avoid premature inquiries in loss cases by taking into account the expected transmission time between countries.

Article 32: Presentation-to-Customs charge

Article 32 was amended so that a Presentation-to-Customs charge can only be collected for items which have attracted customs charges or any other similar charge. The amendment was required as many items are submitted to customs authorities for clearance when not liable to custom duty.

Article 34: Liability of postal administrations. Indemnities

Amendments include increasing, to take into account inflation, the amount of indemnities payable for registered items and clarification that the amounts set down governing the indemnity for lost registered items include the cost of the charges paid on posting the item.

Article 35: Non-liability of postal administrations

The addition of Article 35(1.3) allows for the maintenance of liability of a postal administration where the internal regulations of a country allow a registered item to be delivered to a private mailbox and the addressee makes a declaration that the item was not received.

Article 37: Payment of indemnity

The amendment of Article 37(3) and the addition of Article 37(4) aim to encourage faster and more efficient response to inquiries. Amendment of Article 37(3) reduces the time allowed (from three to two months) for a response to an inquiry before a postal administration is entitled to indemnify a claimant on behalf of an administration responsible for settling or reporting on the matter. The addition of Article 37(4) allows a postal administration to indemnify a claimant where an inquiry form is not properly completed by the postal administration responsible for it, and has to be returned for more information, thus causing the set time limit for the inquiry to be exceeded.

Article 39: General provisions

The 1994 Seoul Congress created a new chapter in the Convention addressing electronic mail services (Chapter 6). Electronic mail is defined in Article 39(2) and the provisions of Article 39(1) makes provision for postal administrations of UPU member countries to agree with each other to participate in these services.

Article 42: Quality of service targets

Changes to Article 42 of the Convention dealing with quality of service targets for letter-post items have the objective of encouraging member postal administrations to publish service standards, conduct quality of service measurements and provide operational information such as latest acceptance times.

Article 43: Exchange of items

Changes to Article 43(2) remove the obligation, where mail is conveyed in transit through a country without the participation of the postal administration of that country, of obtaining authorisation in advance. The amended paragraph now requires that the postal administration of the transit country shall be merely informed in advance.

Article 47: Transit charges

Article 47(2) has been added to allow for remuneration of postal administrations to cover the costs of reforwarding surface mail in transit *à découvert* through their countries. The conditions of application of this principle are specified in the Detailed Regulations of the Convention.

Article 48: Transit charge scales

Article 48(2) has been added to authorise the POC of the UPU, between UPU Congresses, to revise and amend transit charge scale. Any revision must be based on reliable and representative economic and financial data and will enter into force at a date set by the POC.

Article 49: Terminal Dues

Article 49 of the Convention addresses those charges which postal administrations of UPU member countries may seek from each other for the inward dispatch of international mail.

Amendments to Article 49(1) establish the principle of the right to collect terminal dues on all mail flows received, rather than on the difference between flows received and sent as was the case previously. References to the previous system have been deleted.

The addition of Article 49(2) sets a single rate for terminal dues payment for letter-post items (excluding M Bags and possibly bulk items). References to classification of items by category (LC and AO), and consequent rates of payment, have been deleted as a consequence of the new single rate that covers all items except M bags.

Article 49(3) relates to the revision mechanism – a means of altering the calculation of terminal dues rates when a mail flow between two countries exceeds 150 tons a year. Amendments to this paragraph allow application of the revision mechanism where the average number of items contained in 1 kilogram of mail deviates from the world average (ie 17.26 items).

Article 49(3.1.3) was added to provide that downward revision of the rate is not applicable to mail flows intended for developing countries, in order to preserve their revenue. Article 49(3.1.4) has been added to provide that when an administration invokes revision of the rate, reciprocity is granted to the corresponding administration, even though the flow in the other direction may be less than 150 tons per annum. However, it was agreed that this last provision would not apply to developing countries (Article 49(3.1.4.1)).

Article 49(4) was added to introduce a system for terminal dues payments applicable to bulk mail. Remuneration is based on two possible systems – one based on world average rates per item and per kilogram and the other reflecting handling costs in the country of destination. Article 49(4.2) provides that where an administration of destination requests specific remuneration for bulk mail, the dispatching administration may ask for application of the revision mechanism to the rest of the flow, although this provision does not apply downwards for flows intended for developing countries.

Article 49(5) was added to Article 49 to give the POC the authority to amend, between Congresses, the rates listed under Articles 49(1.1) and 49(2) in order to take account of changes in the market. Article 49(5) also gives the POC the authority to define ways and means of implementing the payment system for remuneration for bulk mail outlined in Article 49(4.1.2).

Article 48 of the 1989 Washington Text (dealing with terminal dues for priority items, non priority items and combined items) was deleted by the 1994 Seoul Congress on the basis that this article was null and void because the proposed single rate was applicable to the whole mail flow, regardless of the category of items.

The changes to the terminal dues system made at the 1994 Seoul Congress fell far short of Australia's preferred position of a system that reflected the efficient cost of delivery in each country. However, as there was little scope for Australia to influence the terminal dues debate at the Congress, Australia indicated acceptance of the changes as a first step, whilst strongly supporting further work being undertaken.

Article 51: Accounting for transit charges and terminal dues

Article 51 was amended in order to reflect the new principles for terminal dues provided for at Article 49. The wording of Articles 51(1.1) and 51(2.1) have been amended to establish the principle that mails sent in a certain year are taken into account for establishing transit charges and terminal dues for that year even if they are not actually received until the following year. Amendments to Articles 51(2.1) and 51(2.3) and the insertion of Article 51(2.2) result from the creation of a billing minimum of 5 kg for M bags. Article 50(2.3) from the 1989 Washington Text was deleted due to the elimination of separate rates for LC and AO mail. Article 52(2.4) was inserted to establish the legal basis of terminal dues accounting for bulk mail, under conditions to be specified in the Detailed Regulations of the Convention. Article 51(2.5) was amended as the

statistics for determining the proportions of LC and AO mail were abolished. If the revision mechanism is applied, the statistical system provided for envisages several possibilities for determining the period of statistical operations.

Article 52: General principles

The provision stating that conveyance dues should be uniform for all administrations using specific sectors was deleted. This change reflects the consequence of various special agreements in force between postal administrations and airlines whereby prices for conveyance over the same sector may be different. Article 52(4) was inserted so that those countries operating a terminal dues payment system based on costs or on domestic rates may not claim reimbursement for internal air conveyance of mail.

It was agreed that a system based on costs or on domestic rates already includes the costs of transport within the country of destination. Article 52(5) was inserted to address mail received under a terminal dues system based specifically on costs or on domestic rates and excludes it from the calculations which set the weighted average distance (an element in determining air conveyance dues payments).

Article 53: Basic rates and calculation of air conveyance dues

Article 53(1) was amended such that the basic rate for settlement of accounts between postal administrations in respect of air conveyance be approved by the POC and calculated by the IB according to a formula specified in the Detailed Regulations of the Universal Postal Convention. Previously, the basic rate had been fixed in the Convention.

Article 54: General Provisions (New Article)

The Seoul Congress inserted a new chapter on the subject of telematic links with the aim of setting down general rules and procedures that postal administrations must follow when setting up telematic links. The provisions cover choice of suppliers and technical facilities and principles of payment for these services.

Article 57: EMS (Express Mail Service)

A new provision relating to EMS (Article 57(2)) has been inserted in order to specify that EMS (the quickest postal service by physical means) is to be regulated on the basis of bilateral agreements, with any aspects not covered by these being subject to the appropriate provisions of the UPU Acts. It was considered that such an approach could serve to eliminate the disputes that may occur over the regulations to which certain operational and accounting aspects of EMS are subject.

Article 59: Conditions for approval of proposals concerning the Convention and its Detailed Regulations

Amendments to Article 59 of the Convention reflect the decision to transfer authority to the POC to amend or redraft the Detailed Regulations (Article 59 (2); the role was previously undertaken by the Executive Council which the POC replaced. Amendments to Article 59(3) provide that proposals involving any amendment to designated Articles of the Convention or amendments of substance to any other Article of the Convention introduced between Congresses must have obtained replies to consultation from at least one half of the member countries of the UPU to become effective (this is a new requirement). In addition, such proposals must have obtained, depending on the provisions in question, either two thirds of the votes (previously unanimity) or a majority of the votes (previously two thirds of the votes).

Article 59(4) was inserted and provides that a member country whose national legislation is incompatible with a proposed amendment to the Convention between Congresses may make a statement, within 90 days of notification of the proposed amendment, that it is unable to accept the amendment.

Amendments to the Postal Parcels Agreement and Final Protocol

The Postal Parcel Agreement governs postal parcel services between countries and regulates the universal conveyance of parcels between States that are signatories to the Agreement.

The principal matters addressed by the Agreement are as follows.

Part I: Preliminary provisions - Purpose of the Agreement (Article 1) and Operation of the service by transport companies (Article 2).

Part II: Provision of services.

Chapter 1: General provisions - Articles 3 to 9, which includes Principles (Article 3), the Weight system (Article 4) and Principal charges (Article 5).

Chapter 2: Special services - Articles 10 to 17, which includes Express parcels (Article 10), and Consignment service (Article 14).

Chapter 3: Special provisions - Articles 18 to 22, which includes Prohibitions (Article 18), and Redirection (Article 19).

Chapter 4: Customs matters - Articles 23 to 25.

Chapter 5: Liability - Articles 26 to 30, which include Liability of Postal Administrations - Indemnities. (Article 26) and Non-liability of postal administrations (Article 27).

Part III: Relations between postal administrations.

Chapter 1: Treatment of parcels - Articles 31 to 32, which includes Quality-of-service targets (Article 31) and Exchange of parcels (Article 32).

Chapter 2: Treatment of cases of liability - Article 33.

Chapter 3: Rates and conveyance dues - Articles 34 to 38 which includes Inward land rates (Article 34) and Transit land rate (Article 35).

Final Protocol – Articles I to XVII.

The Final Protocol to the Postal Parcels Agreement lists reservations made by member States in relation to the provisions of the Convention. In this context Australia has previously stated that notwithstanding Article 26 the Australian postal administration shall have the right not to pay compensation for uninsured parcels, lost, rifled or damaged in their service (Article VIII). Also, by virtue of Article XVI Australia was authorised to claim reimbursement of the additional costs incurred for providing air conveyance of foreign-origin air parcels within Australia. This is with the proviso that such air conveyance dues shall be uniform for all mails from abroad whether or not the air parcels are forwarded by air.

The primary amendments made to the Postal Parcels Agreement are as follows.

Article 2: Operation of the service by transport companies

A sentence added to Article 2(1) of the Agreement reaffirms the responsibility of the designated postal administration when implementation of the Agreement is entrusted to other enterprises.

Article 3: Principles

Amendment of Article 3(1) increases the maximum individual weight of parcels from 20 kg to 31.5 kg on the basis of studies undertaken by UPU Committees.

Article 7: Special charges

Article 7 has been amended to reduce the number of special charges associated with postal parcels as it was argued that senders of postal parcels expect a door-to-door service at an all-inclusive price and the collection of various charges from the addressee undermines this concept.

Article 11: Insured parcels

Article 11(2), which deals with insured parcels, has been amended to raise the minimum amount to which an administration may limit the insured value of a parcel in consideration of inflation.

Article 14: Consignment service (New Article)

A new article was added to the Agreement in relation to the consignment service (Article 14). Article 14 was introduced in recognition of the fact that an increasing number of postal administrations are providing collective items consignment service.

Article 16: Parcels for delivery free of charges and fees (Article 15(1))

The Article was amended to delete the provision whereby a sender can request, after posting, for a parcel to be delivered free of charges and fees on the basis that this service was costly and little used.

Article 22: Inquiries

The addition of Article 22(2) provides for processing of inquiries to be free of charge except where the customer requests transmission of an inquiry by telecommunications or by EMS, and this may be subject to a charge equivalent to that of the service requested. It was argued that all inquiries should be accepted free of charge in the interest of a customer-focussed service.

Amendment to Article 22(1) sets down the procedure for inquiries relating to undelivered items where the anticipated transmission time has not yet elapsed. The aim of the amendment is to avoid premature inquiries in loss cases by taking into account the expected transmission time between countries.

Article 24: Presentation-to-Customs charge

Article 24(2) was amended so that a Presentation to Customs Charge is only collected for the submission to Customs and customs clearance of items which have attracted a customs charge or similar charge. The amendment was made on the basis that many parcels submitted to Customs authorities for clearance are released without any customs charges being raised and that the initial presentation to customs should be considered as an integral part of the international parcel service as paid for by the sender.

Article 26: Liability of postal administrations. Indemnities

Revisions incorporated the principle of a universal rate that combines a rate per parcel along with a rate per kilogram of gross weight of the mail. In the past, a series of weight steps was used. The weight steps used to determine the limit of indemnity in the 1989 Washington Text have been removed and replaced by a method of calculation which combines a rate of 40 SDR per parcel and a rate of 4.50 SDR per kilogram of the parcel ie "universal rate".

The amount of indemnity given in Article 26(4) was updated by the Congress to reflect the new universal rate system.

It was decided to add Australia to the list of countries that have taken a reservation to Article 26. The reservation states the right of the countries listed in the reservation not to pay compensation for parcels lost, rifled or damaged in their services. The addition of Australia was made to give Australia Post the right, consistent with domestic practice, to not pay compensation for parcels and to retain flexibility according to circumstances.

(The currency value of the SDR is determined daily by the International Monetary Fund by summing the values in U.S. dollars, based on market exchange rates, of a basket of four major currencies - the euro,

Japanese yen, pound sterling, and the U.S. dollar. The valuation basket was last modified on an interim basis on January 1, 1999 to take account of the introduction of the euro. The SDR valuation basket is normally reviewed every five years. The next scheduled review will take place in 2000, with any revisions in the valuation basket taking effect on January 1, 2001. Its value in September 2000 was U.S.\$1.00=SDR 0.764668.)

Article 29: Payment of indemnity

Amendment of Article 29(3) and the addition of Article 29(4) aims to encourage faster and more efficient response to inquiries. Amendment of Article 29(3), reduced the time limit allowed for a response to an inquiry before a postal administration is entitled to indemnify a claimant on behalf of an administration responsible for settling or reporting on the matter. The addition of Article 29(4) allows a postal administration to indemnify a claimant where an inquiry form is not properly completed by the postal administration responsible for it and has to be returned for more information, thus causing the set time limit for the inquiry to be exceeded.

Article 31: Quality of service targets

Article 31(4) was added to Article 31 to require that postal administrations monitor their actual performance against their service targets.

Article 33: Determination of liability between postal administrations

The method of determining the maximum amount of indemnity for an uninsured parcel to be borne equally by the administration of origin and the administration of destination (excluding intermediate administrations) has been amended in Article 33(2). It was done in order to make reference to the new universal rate system for calculating the limit of indemnity for parcels set down in Article 26 (3.2).

A further amendment to Article 33 sets as the basis for calculation a parcel of 1 kilogram, rather than a parcel of up to 5 kilograms as previously. It was recognised that applying the universal rate system to a 5 kilogram parcel would increase the maximum amount applicable in this case by 42 per cent compared to the amount set in the previous Text.

Article 34: Inward land rate

The 1994 Seoul Congress, on the basis of a UPU study, revised Article 34 dealing with inward land rates for parcels. The revised system was devised to better reflect actual costs. It bases the calculation of inward land rates on a universal rate which combines a rate per parcel (to take account of fixed costs) and a rate per kg of gross weight of mail (to reflect variable costs), replacing the weight steps previously used.

The revised system is reflected in Articles 4 (Weight system), Article 26 (2.3) and (4), Article 35 (Transit land rates), Article 36 (Sea rate) and Article 37 (Allocation of rates).

The concept of outward land rates was deleted by the 1994 Seoul Congress as it was seen to be ineffective and generally misunderstood.

Article 35: Transit land rate

Amendments to Article 35(1) apply the principle of a universal rate to the calculation of the transit land rate, presenting it in the form of a rate per parcel combined with a rate per kilogram of gross weight of the mail instead of the weight steps previously used.

Amendment of Article 35(2) increases the amount claimable by an intermediate postal administration for a parcel sent in transit *à découvert* from 0.33SDR per item to 0.40SDR per item. In addition, the specification of air parcels in this paragraph has been removed. A paragraph was added to both Article 35(4) and Article 36(4) giving the POC authority to amend certain transit land rates and sea rates between Congresses.

Article 35(5) was transferred from Article 37(4) of the 1989 Washington Text dealing with Air Conveyance dues as it deals with transit land rates dues.

Article 36: Sea rate

Amendment of Article 36(2), applies the principle of a universal rate to the calculation of the sea rate, presenting it in the form of a rate per parcel combined with a rate per kilogram of gross weight of the mail instead of the weight steps previously used.

Article 37: Allocation of rates

Having adopted the principle of a universal rate for calculating inward land rates and accounting standardised on that basis, the 1994 Seoul Congress approved a proposal calling for the abolition of accounting which may be agreed between postal administrations of origin and destination on the basis:

- a) either of rates in bulk for each weight step;
- b) or an amount per parcel;
- c) or an amount per kilogram of gross weight of the mails.

The approval of this proposal by the 1994 Seoul Congress resulted in the deletion of Articles 36(2) and 36(3) of the previous Text.

Consequent amendments are the deletion of Articles 33(2), 34(2) and 35(3) of the previous Text.

Article 38: Air conveyance dues

Article 37(2) of the 1989 Washington Text entitled postal administrations of destination that provided air conveyance of air parcels within their country, to reimbursement of the additional costs of such conveyance, subject to certain conditions. The paragraph was deleted by the 1994 Seoul Congress on the basis that international parcels should be given the same treatment as the equivalent category of domestic parcel within the destination country, and that charges for such items might reasonably be expected to take the form of a single charge.

A number of countries, including Australia, lodged reservations to this Article (Final Protocol, Article XVI) stating that these countries shall be authorised to claim reimbursement of the additional costs incurred for providing air conveyance of foreign origin air parcels within their country, and that these air conveyance dues shall be uniform for all mails from abroad whether or not the air parcels are reforwarded by air. The reasons given for the reservation were that in the interests of maintaining speedy quality delivery for incoming airmail parcels, the countries taking the reservation wished to continue to transmit such items by air within their domestic network.

Article 42: Conditions for approval of proposals concerning this Agreement and its Detailed Regulations

Amendments to Article 42(2), replacing the term "Executive Council" by "Postal Operations Council", reflects the decision by the 1994 Seoul Congress to transfer authority to amend the Detailed Regulations to the POC.

Amendments to Article 42(3.1) provide that to become effective, proposals relating to the Agreement introduced between Congresses involving the addition of new provisions or amendments of substance to the articles of the Agreement and of its Final Protocol, must have obtained replies to consultation from at least one half of the member countries of the UPU which are parties to the Agreement. This is a new requirement.

Article 42(2) was inserted to cover the situation where a member country's national legislation is incompatible with a proposed amendment or addition to the Agreement between Congresses. The inserted provisions state that a member country may, within 90 days from the date of notification of the amendment or addition, make a written declaration to the Director-General of the IB stating that it is unable to accept the amendment or addition.

As noted above, Australia made the following reservations in relation to the Postal Parcels Agreement Final Protocol:

- a) Article VIII - Compensation – Notwithstanding the provisions of Article 26 of the Postal Parcels Agreement Australia, inter alia, would have the right not to pay compensation for uninsured parcels lost, rifled or damaged in its service.
- b) Article XVI - Air Conveyance Dues, Australia, inter alia, shall be authorised to claim reimbursement of the additional costs incurred for providing air conveyance of foreign origin air parcels within Australia.

The reservations reflect the preferred postal practise within Australia.

Costs

Article 21 of the UPU Constitution states that “The expenses of the UPU, including where applicable the expenditure envisaged in paragraph 2, shall be jointly borne by the member countries of the UPU. For this purpose, each member country shall choose the contribution class in which it intends to be included. The contribution classes shall be laid down in the General Regulations.” On this basis, Australia, Contribution Class – 20 Units, provides approximately \$A800,000 per annum to the UPU budget of approximately \$A36 million. This amount is paid by Australia Post. The proposed treaty action does not impose any additional contribution costs on Australia.

Other costs, operational in nature, may be incurred by Australia Post as a result of implementing revised or newly adopted postal regimes.

Future Protocols, Annexes, other legally binding instruments etc

The UPU Congress meets every five years, the most recent meeting being 23 August to 15 September 1999 in Beijing. For Australia, any treaty status amendments arising from UPU Congress meetings, will be subject to the required domestic treaty processes.

Implementation

No legislative measures are required for Australia to implement the obligations under the Fifth Additional Protocol to the Constitution of the UPU or other Acts of the UPU. Implementation is effected by way of administrative action by Australia Post, with portfolio supervision of the Commonwealth Department of Communications, Information Technology and the Arts (DCITA).

The Australian Postal Corporation (Australia Post), as the designated postal administration for the purposes of the UPU Acts, has responsibility for implementing obligations which arise as a result changes made to the Acts. Implementation is undertaken by Australia Post, ensuring that its domestic and international mail services are in accord with the requirements of the UPU Acts and the *Australian Postal Corporation Act 1989*.

Section 14 of the Act requires Australia Post to “supply postal services within Australia and between Australia and places outside Australia.” Section 18 of the Act empowers Australia Post to supply postal services for Australia’s external territories and foreign countries and to supply any services other than postal services to or on behalf of the Commonwealth, the States and Territories and foreign countries. Section 28 of the Act states that Australia Post shall perform its functions in a way consistent with Australia's obligations under any Convention to which Australia is a Party and Section 32C requires Australia Post to carry and deliver within Australia letters received from a country outside Australia in compliance with charging regimes that would apply by virtue of the provisions of a Convention to which Australia is a Party (eg the Universal Postal Convention).

In light of its statutory obligations and the provisions of the UPU Acts to which Australia is a Party, Australia Post seeks to ensure that the provision of Australian postal services and associated practises and procedures are in conformity with international postal standards. Accordingly, such

administrative action considered necessary to reflect those standards is undertaken by Australia Post (in consultation with DCITA as necessary).

Consultation

The proposed treaty action was advised to the States and Territories through the Standing Committee on Treaties' Schedule of Treaty Action. No comments were received from the States and Territories. The then Commonwealth Department of Communications and the Arts (DCA) consulted with Australia Post prior to Australia's attendance at the 1994 Congress. Australia Post was well represented on the Australian Delegation to the 1994 Seoul Congress of the UPU. Australia Post supports the proposed treaty action.

Withdrawal or Denunciation

Article 12 of the Constitution of the UPU provides for the voluntary withdrawal of any member country from the UPU by means of a notice of denunciation of the Constitution given by the Government of the country concerned to the Director-General of the IB of the UPU. The Director-General is required to communicate such a denunciation to the Governments of member countries. Withdrawal takes effect one year after the day on which the Director-General receives the notice of denunciation.

Contact Details

Enterprise and Postal Policy Section
Enterprise and Radiocommunications Branch
Department of Communications, Information Technology and the Arts

Universal Postal Union: Sixth Additional Protocol to the Constitution of 10 July 1964, as amended; Convention, and Final Protocol; General Regulations, done at Beijing on 15 September 1999

NATIONAL INTEREST ANALYSIS

Date of Proposed Binding Treaty Action

It is proposed that binding treaty action be taken for Australia as soon as practicable after 5 December 2000 but before the end of 2000.

The proposed binding treaty action is ratification of the Sixth Additional Protocol to the Constitution the Universal Postal Union (Sixth Additional Protocol – UPU Constitution) and approval of the Universal Postal Convention, and Final Protocol (“UP Convention and Final Protocol”) and the General Regulations of the Universal Postal Union (“UPU General Regulations”).

Sixth Additional Protocol – UPU Constitution and the Final Protocol to the UP Convention mentioned above, incorporate declarations and reservations lodged by Australia and other UPU members. The declaration/reservations in Australia’s case are notified in Article III of the Sixth Additional Protocol – UPU Constitution and Articles IV(1), XII(8), XIII(9) and XXIV(3) of the Final Protocol to the UP Convention (further detail on these is provided below in Obligations).

The above instruments were incorporated into the Acts of the 22nd Congress of the Universal Postal Union (UPU), Beijing, which were signed by Australia, subject to ratification and approval, on 15 September 1999.

The Acts will enter into force generally on 1 January 2001 in accordance with the following provisions:

- i.) Article V, Sixth Additional Protocol - UPU Constitution: provides that the Constitution shall come into force on 1 January 2001 and remain in force for an indefinite period;
- ii.) Article 65 of the Universal Postal Convention: provides that the Convention (and Final Protocol) shall come into force on 1 January 2001 and remain in operation until the entry into force of the Acts of the next Congress; and
- iii.) Article 132 of the General Regulations: provides that the General Regulations shall come into force on 1 January 2001 and remain in operation until entry into force of the Acts of the next Congress.

The 23rd Congress of the UPU is scheduled to be held in the Republic of Côte d’Ivoire in 2004.

Article 25(3) of the Constitution requires that a signatory country shall ratify Additional Protocols to the Constitution (in this case the Sixth Protocol), while Article 25(4) states that approval of the Acts other than the Constitution shall be governed by the constitutional requirements of the signatory country (in Australia’s case, treaty action is required).

For the purposes of the Acts of the UPU, Australian Postal Corporation (Australia Post) has been designated by Australia as the postal administration responsible for implementing and abiding by the provisions of the Acts (see Implementation section below).

The term “postal administration” in the Acts of the UPU is defined by each member country within the framework of its domestic legislation.

Date of Tabling of the Proposed Treaty Action

10 October 2000.

Reasons for Australia to take the Proposed Treaty Action

Background

The Universal Postal Union (UPU) is a specialised agency of the United Nations comprising 189 member countries. Article 1 of the Constitution of the UPU establishes a single postal territory for the reciprocal exchange of postal items with freedom of transit guaranteed throughout (see below for details of UPU organisation and Acts). The aim of the UPU is to secure the organisation and improvement of universal postal services and to promote in this sphere the development of international collaboration. Since its inception in 1874 the UPU has provided the focus for the establishment and further development of the rules and regulations governing the transmission of postal items between member countries. Australia joined the UPU on 1 October 1907.

The treaty status documents of the UPU include the Constitution of the UPU, as the basic Act of the UPU, the General Regulations, the Universal Postal Convention and the Postal Payment Services Agreement and Regulations (the latter an optional Agreement, to which Australia is not a party). The Constitution contains the fundamental rules of the UPU, providing for its legal foundation and is binding on all member countries; the General Regulations comprise provisions which ensure the application of the Constitution and the day-to-day working of the UPU and is binding on all members of the UPU; and the Universal Postal Convention (and the Letter Post and Parcel Post Regulations) comprises the rules applicable throughout the international postal service and provisions concerning the letter-post and parcel post services and are binding on all members of the UPU.

The Constitution sets out the fundamental rules that provide the legal basis for its foundation. The Constitution (concluded at Vienna on 10 July 1964) is amended by Additional Protocols. The Sixth Additional Protocol (done at Beijing) is the most recent amendment to the Constitution.

The General Regulations implement the Constitution and contain provisions for the operation of the UPU. They set out the rules regarding the composition, functioning and meeting of the major bodies of the UPU. The General Regulations are re-enacted as a whole by the UPU Congress and are binding on all member countries by virtue of Article 22(2) of the Constitution.

The UP Convention (and its Detailed Regulations) comprise the rules applicable throughout the international postal service and provisions concerning the letter-post services. It is binding on all members of the UPU. Technically, the UP Convention does not constitute a continuous agreement. Each UPU Congress (held approximately every five years) agrees to a new version of the Convention and the prior version lapses when the new agreement becomes effective.

The Congress held prior to the 1999 Beijing Congress was the 1994 Seoul Congress. The principal outcome of the 1999 Beijing Congress was continued restructuring and reform of the principal organs of the UPU, introduction of the principle of “Universal Service”; the recasting of the UPU Convention and the introduction of the Postal Financial Services Acts, formalisation of relations with the World Trade Organization (WTO) and further revision of the UPU Convention’s Terminal Dues Provisions.

Reasons

The UPU is the key international agency responsible for the regulation of the flow of mail between member countries. The UPU's membership now comprises 189 member States reflecting both the universal nature of its mandate and the extent to which it is recognised as the key forum dedicated to addressing issues relating to the exchange of international mail and the role and nature of international postal services between member States.

If Australia Post, as the designated Australian postal administration, is to continue to provide efficient and price competitive postal services, within and outside Australia, Australia's continuing active participation as a member of the UPU is essential. Australia has been a member of the UPU since 1907 and has contributed actively, not only at UPU Congresses, but also to initiatives between Congresses through, for example, representation on the UPU bodies. At the 1999 Beijing Congress Australia was elected as a member of the Council of Administration (CA) and the Postal Operations Council (POC). Australia is required to appoint a representative to the CA who should be competent in postal matters (Article 102(4)). The representative to the POC is appointed by the designated postal administration, ie Australia Post. Both appointments are until 2004.

Continued participation in the UPU provides Australia the opportunity to voice its opinion concerning the conduct of the UPU's affairs and the operation of the universal postal service over which the UPU presides, and also strengthens Australia Post's capacity to fulfil its mandate. The UPU remains an important forum for Australian participation given the increasing trend by member States to provide postal services on a competitive basis internationally, and the increasing significance of market liberalisation of postal services in the deliberations of the UPU and the Australian domestic setting. As an active contributor to the activities of the UPU, Australia has sought continuing reform and efficiency in its operation. Consequently, Australia has been influential in ensuring that the UPU remains a forum effective in securing a more competitive international postal regime while at the same time being able to meet the challenges of a fast changing global market environment.

Since the 1989 Washington Congress, the UPU has recognised increasingly the requirement for reform, in the context of both its own structure and the extent to which market regulation impedes the operation of more efficient market forces. Decisions flowing from the subsequent 1994 Seoul Congress reflected an increased awareness of the need for an organisational structure which would allow the UPU to meet the structural and policy demands that would flow from a less regulated and more competitive international postal market. The growth of competition, the impact of technology, and the need to streamline structures and decision-making in order to improve the ability of the UPU to respond collectively to the changing dynamics of the global economy were the key influences on the 1994 Seoul Congress to endorse the significant reforms then proposed, particularly those addressing institutional and structural change and the redrafting of the UPU Acts.

Within the UPU membership there is continued recognition generally that postal administrations, now and in the future, will have to carry out their universal service obligations and maintain an adequate revenue base to fulfil these obligations in an increasingly commercialised and competitive environment. It is recognised generally that Governments have become progressively more sensitive to public demands for efficiency, service quality, and cost control and are increasingly giving consideration to deregulation, contractual relations with private service providers, and expanding competition as a means to improve the response to such public demands (while maintaining universal obligations). The UPU has sought to reflect these concerns through its reform agenda while sharpening its focus on service quality, commercial and technological developments, and operational issues.

Through a continuing program of restructure, the UPU has established a more integrated and operations-oriented management and decision making process. It has clarified the distinction between organisational roles and responsibilities, better focusing the UPU organs and permitting greater decentralisation of work, increased accountability and more streamlined decision-making.

In this context major reform initiatives endorsed at the 1999 Beijing Congress were:

- the redrafting of the UPU Convention and Postal Financial Services Acts;

- continued restructuring and reform of the principal organs of the UPU;
- introduction of the “Universal Service”;
- formalisation of relations with the World Trade Organization (WTO) and further revision of the UPU Convention’s Terminal Dues Provisions;
- agreement on the issue of recovery of arrears of mandatory contributions to the UPU; and
- adoption of the ‘Beijing Postal Strategy’.

Redraft of the UPU Acts

The UP Convention contains the common rules applicable throughout the international postal service and provisions concerning letter-post and parcel post services. It is binding on all member countries by virtue of Article 22(3) of the Constitution. The Final Protocol to the Convention reflects agreed amendments and lists reservations and declarations made by member States of the UPU. Prior to the 1999 Beijing Congress there were four optional regulatory Agreements - the Postal Parcels Agreement which regulated the postal parcel service and the Money Orders Agreement, the Giro Agreement and the Cash-on-Delivery (COD) Agreement which regulated postal payment services.

The UPU’s 1999 Beijing Congress recast the above documents reflecting a continuation of work of the 1989 Washington Congress and the 1994 Seoul Congress. This was guided by: the principle that the UP Convention and the UPU Agreements should contain only those provisions that are primarily intergovernmental in nature or which are so fundamental that they would require approval by the UPU Congress; the need to place all other provisions within the pertinent Regulations and the need to modernise and simplify language and terms to achieve clarity, simplicity and flexibility.

The 1999 Beijing Congress agreed to combine the provisions of the UP Convention and the Postal Parcels Agreement, with the Detailed Regulations concerning letters and parcels respectively dealt with in two separate sets of Regulations – the Letter Post Regulations and the Postal Parcels Regulations. In the same spirit of simplification and modernisation of the UPU instruments, Congress decided to abolish the Cash-on-Delivery (COD) Agreement with some of its provisions included in the Convention and the remainder included under the umbrella of the Postal Payment Services Agreement and its Regulations. The provisions of the Money Orders Agreement and the Giro Agreement were also amalgamated into the Postal Payment Services Agreement in order to simplify procedures applicable to postal financial exchanges. The Agreement is only binding on member States that become a party to it. Australia is not a party to the Postal Payment Services Agreement.

The revised UP Convention has the following structure:

- Part I contains the rules applicable in common throughout the international postal service. It covers letter post, postal parcels and the postal financial services;
- Part II contains the rules applicable only to letter post and postal parcels and is divided into five chapters: provision of services, liability, provisions specific to letter post, provisions specific to postal parcels and EMS (Express Mail Service); and
- Part III contains transitional and final provisions.

Australia had strong concerns in respect of the incorporation of the provisions of the Postal Parcels Agreement into the UP Convention believing that it would have the effect of extending the “Universal Service Obligation” (USO) of the Convention (Article 1) to the postal parcels service which would impact negatively on Australia’s domestic Community Service Obligations (CSO) - the traditional requirement of providing universal and equitable service at a uniform price - by increasing the threshold at which it is applied thereby having a potentially detrimental effect upon the revenue base of Australia Post. In addition, the incorporation of the provisions of the former

Postal Parcels Agreement within the Convention made mandatory for all member States provisions of an Agreement which was previously optional.

Further impetus for the redraft of the UP Convention in particular, is found in the adoption of the notion of the “universal postal service” coupled with the expansion of the constituent elements comprising “Basic Services” at Article 10(1), to include ‘postal parcels’. The overall effect of this change is to extend the scope of the USO to include postal items up to an individual weight of 2 kilogrammes in general (against the current limit applied by Australia Post in relation to the CSO of 125 grams for letter-post items only).

Irrespective of the provisions of Article 22 of the Constitution, Article 8 of the Convention, Objective 1 of the Beijing Postal Strategy (and related articles and regulations), Australia lodged a reservation to Article IV(1) of the Final Protocol to the UP Convention because the extension of the USO principles to the CSO would be inconsistent with Australia’s domestic postal practice. In response to the two most recent enquiries into Australia Post in 1996 and 1998, the Government confirmed that Australia Post’s CSO should not be extended to include postal parcels. To do so would further erode Australia Post’s revenue base. Notwithstanding Australia’s reservation, other operators of postal services in Australia are not precluded from offering a postal service either in accordance with the Convention, or by any other means which are favourable to their customers.

Reasons for the UPU Restructure

It continues to be recognised generally by postal administrations that now and in the future it will be necessary to carry out their universal service obligations (USO) and maintain an adequate revenue base to fulfil these obligations in an increasingly commercialised and competitive environment. Governments of member States, including that of Australia, are progressively more sensitive to public demands for efficiency, service quality and cost control, and are increasingly giving consideration to deregulation, contractual relations with private service providers, and expanding competition as a means to improve the response to such public demands (while maintaining universal obligations). Against this backdrop the UPU has continued to strengthen its ability to identify and take into account developments with respect to governmental policies on postal issues, deregulation and competition, while sharpening its focus on service quality, commercial and technological developments, and operational issues.

Following the 1994 Seoul Congress the role and function of the CA and the POC continued to be the subject of review. In the interest of ensuring the UPU’s capacity to respond appropriately to the changing international postal environment it was agreed by the 1999 Beijing Congress that a High Level Group on the Future Development of the UPU should be established. The Group’s mandate is to consider the future mission, structure, constituency, financing and decision-making processes of the UPU. A special emphasis is directed to the development needs of postal services in developing countries and the need to more clearly define and distinguish between governance and operational roles and responsibilities of the International Bureau (IB), the CA and the POC in the context of the provision of international postal services.

As an adjunct to the High Level Group, an Advisory Group was established, comprising non-governmental organisations having an interest in the activities of the postal sector. The Group’s membership embraces users of international postal services, consumer associations and major customers, private operators and associations of postal employees. It will be able to review the agendas of meetings of Congress, the CA and the POC (and their respective Committees) and consider the Acts adopted by Congress, the plenary and committee documents of the CA and the POC and the texts of resolutions, decisions and Regulations adopted thereby. It will also have the power to provide written statements on agenda items of interest to the UPU and submit suggestions to the CA and POC.

Universal Service

Against the appreciation of significant and ongoing changes in the international postal market (and more generally the global economy) and the need for concomitant institutional reforms within the

UPU, the 1999 Beijing Congress adopted the notion of a “universal service” as the basis of the UPU’s single postal territory.

The adoption of the concept of ‘universal service’ reflects the belief that postal users and customers are entitled to quality basic postal services at all points in their territory at affordable prices. The pursuit of such an aim requires member countries to set quality standards for the services provided, taking into account the conditions in each country, and to monitor their application. The CA, in consultation with the POC, was instructed to draw up a memorandum which listed the universal postal service obligations incumbent upon member countries. Guidelines on how to set quality service standards applicable to the universal postal service were to be provided, and their implementation appraised (Resolution C18/1999). The concept of “universal postal service” is now defined in Articles 1(1) to 1(3) of the UP Convention

Terminal Dues, the World Trade Organization (WTO) and the General Agreement on Trade in Services (GATS)

Recognising the extent of the potential impact of developments in international law in respect of trade in services arising from the deliberations of the WTO, particularly in the context of the GATS, the UPU will seek to extend its cooperation with the WTO through the negotiation of a Memorandum of Understanding. Postal services are on the agenda of the current round of WTO services negotiations, and the UPU has recognised the need to participate actively from the outset while also continuing to monitor developments in order to ensure that postal interests are taken into account.

The need to address issues arising from GATS is highlighted in respect of certain provisions of the UP Convention, which address Terminal Dues, specifically, Articles 46 to 52. As a result of the 1999 Beijing Congress a new system of terminal dues was adopted to regulate the payments postal services for the delivery of inward foreign letter post. A key element in the adoption of new rates of payment is the differentiation between developing and industrialised countries (that will apply until 2005). In 2001 country specific rates for terminal dues will come into effect in approximately 30 countries classified as industrialised (of which Australia is one). Resolution C32/1999 provides a breakdown of countries differentiated as ‘industrialised’ or ‘developing’. These rates will initially be based on 60 per cent of the domestic priority letter tariff with certain ‘ceiling’ limitations. The ceiling will increase by an additional five per cent in 2002 and a further 15 per cent in 2003. The POC will set the rates for 2003 and 2004 based upon the relation between costs and tariffs in each country and will link these rates to quality of service performance.

From 2001 to the end of 2005, each industrialised country will be guaranteed a minimum “floor” rate that will represent a four per cent increase over current rates. The new approach will apply in relation to all mail flows between industrialised countries only, whereas in relation to flows between industrialised countries and developing countries and vice versa (and as between developing countries) the current pricing mechanism will be retained for the interim period, particularly in respect of traditional mail flows. To prevent unfair competition and dislocation of mail, industrialised countries may also apply the “floor rate” to bulk mail and mail representing abnormal growth in volume received from developing countries.

Australia has not overtly agreed to the revised provisions of the Convention reserving its position to only apply them to the extent that they are consistent with the WTO/GATS Agreement. Australia is of the view that the differentiation between industrialised and developing countries is contrary to the ‘Most Favoured Nation’ (MFN) obligation under the GATS to accord any Member “treatment no less favourable than it accords to like services and service suppliers of any other country” (Article II.1, GATS). Australia is of the view that the favourable treatment of developing countries under the revised Terminal Dues provisions of the Convention (Article 44), may not be GATS compliant as they provide for discriminatory pricing for the delivery of international mail based upon the development level of the country of origin and the country of destination. Australia also believes that the revised provisions pose a threat to Australia Post’s revenue base given current pricing regimes (eg projections by Australia Post for 2003 indicate a revenue shortfall of approximately \$A10 million may result).

It was largely at the behest of Australia that the revised terminal dues regime was deemed transitional (Article 47(3)), in view of the perceived requirement for consistency between GATS and the UPU Acts. The UPU resolved to establish two Task Forces (one within the CA and the other within the POC) to monitor developments in international trade law, to examine the question of obligations arising from GATS and the apparent conflict of interest between mandatory provisions of the UPU Acts and GATS provisions, to develop alternative costing methodologies and to keep UPU members abreast of issues of concern. An MFN-consistent outcome for Australia would see a reduction in costs payable to industrialised country postal services and a \$A2 million development levy for developing country postal services.

Recovery of Arrears of Mandatory Contributions

In the context of the reform of budgetary processes resulting from the 1994 Seoul Congress, the 1999 Beijing Congress endorsed the introduction of a system of automatic sanctions against member countries in arrears of mandatory contributions to the UPU. The level of arrears that can trigger sanctions is reached when the arrears of mandatory contributions, excluding interest, are equal to or exceed the amount of contributions owed by a member country for the preceding financial two years (Article 125(9)).

A member country in arrears may avoid sanctions by either agreeing to assign irrecoverably in favour of the UPU all or part of a credit owed to it by other member countries until such time as the arrears owed are paid in full or, if such assignment is not possible, conclude a debt-rescheduling agreement with the UPU (not to extend over more than ten years). However, if a member country in arrears refuses to settle arrears as provided for, automatic sanctions will apply (Article 126(1)). The sanctions will comprise the withdrawal of its right to vote at meetings of UPU bodies and making it ineligible for election to the CA or the POC. Once the arrears are settled the sanctions are to be lifted (Article 126(2)).

Australia welcomed the adoption of the sanctions provisions indicating its belief that contributions to the United Nations and its Specialised Agencies should be paid in full and on time. Australia is not in arrears.

Adoption of the Beijing Postal Strategy

The need to adopt a proactive stance in relation to developments in the global economy, and taking into consideration the impact that continuing market liberalisation will have on the effectiveness and economic viability of universal postal services in future years, underpinned the adoption of the Beijing Postal Strategy (BPS). BPS provides the UPU with a strategic planning blueprint that is designed to underpin the universal postal service for the period 2000-2004 and is composed of two complementary and interdependent elements as follows.

Part I

Action by Governments – five-year programs running until the next UPU Congress, but subject to review from time to time. They invite Governments, postal administrations and Restricted Unions to implement strategies with a view to attaining the objectives of the BPS.

Action by Postal Administrations and Restricted Unions

Part II

Action by permanent bodies of the Union – an evolving plan designed to be updated continuously in accordance with the activities of the CA, the POC and the IB, and directed to the achievement of BPS objectives and the effective implementation of Congress decisions.

The primary thematic objectives embraced by the BPS are as follows:

universality of postal services – ensuring the provision of a universal postal service, allowing customers to send and receive goods and messages from any point in the world to any other point;

quality of service in the international postal network – strengthening the quality of the international postal network, providing customers with reliable, secure and efficient postal services;

economic viability of the international postal network – increasing the cost-effectiveness of the international postal network, providing customers with affordable postal services;

postal market and products – responding effectively, through improved market knowledge and product development, to the needs and expectations of postal service customers;

postal reform and development – enabling, through the process of postal reform and development, postal customers to draw maximum benefit from technological, economic and regulatory changes in the postal environment; and cooperation and interaction among stakeholders – strengthening and broadening cooperation and interaction among the stakeholders of the postal industry.

While the BPS does not constitute a document of binding treaty status it provides member States with a strategic framework within which domestic postal services can be reviewed and developed, particularly in the context of both market and product development. It also provides member States with a strategic vision of the future international postal service and the basis for strengthening their respective market positions, domestically and internationally.

UPU Organisation

The overall organisational structure of the UPU is set out in Chapter III of the Constitution. Article 13 of the Constitution makes provision for a Congress, a Council of Administration (CA) a Postal Operations Council (POC) and an International Bureau (IB) as the UPU's principal bodies.

The Congress

Article 14 of the Constitution provides that the Congress (comprising representatives of all UPU member countries) is the supreme authority of the UPU. The Congress meets not later than five years after the Acts of the previous Congress unless exceptional circumstances justify the convening of an extraordinary Congress. Article 106 of the General Regulations stipulates that each Congress shall apply the Rules of Procedure of Congresses, which are annexed to the General Regulations.

A fundamental task of the Congress is to revise or supplement the Acts of the UPU. Revisions or supplements to the Acts are done by way of 'Proposals' brought before the Congress in accordance with the procedures detailed at Articles 14 and 15 of the Rules of Procedure of Congresses.

The Council of Administration

The Council of Administration (CA) was given its current nomenclature as part of the restructuring of the UPU undertaken at the 1994 Seoul Congress, replacing the Executive Council (EC) – Articles 13 and 17 of the Constitution and Article 102 of the General Regulations refer. The CA consists of 41 members elected by Congress on the basis of equitable geographic distribution with appointed representatives being competent in postal matters (Articles 102(1), 102(3) and 102(4) of the General Regulations refer).

Postal Operations Council

The Postal Operations Council (POC) has its origins in the Consultative Council for Postal Studies (CCPS) established by the 1969 Tokyo Congress – Articles 13 and 18 of the Constitution and Articles 104 and 105 of the General Regulations refer. The CCPS was remade into the POC as part of the structural reform process undertaken at the Seoul Congress, the aim being to give emphasis to operational and commercial issues. The POC consists of 40 members elected by Congress on the basis of qualified geographical distribution (Articles 104(1) and 104(2) of the General Regulations refer).

The International Bureau

The International Bureau (IB) is the only permanent body of the UPU and is headquartered in Berne, Switzerland (Article 20 of the Constitution refers). It serves as an instrument of liaison, information, and consultation for postal administrations of member States providing the full range of secretariat and administrative functions for the UPU, the CA and the POC. The full range of functions of the IB is described at Chapter II, Articles 109 to 119 of the General Regulations.

Obligations

The primary obligations imposed on Australia as a member of the UPU are the requirement to abide by the Acts, giving due recognition to its jurisdiction and, as a consequence, provide postal services in accord with established international norms, particularly in respect of services standards and charging regimes as between member States. Australia is also required to contribute annually to the UPU as set out in Article 126 of the General Regulations of the UPU. Section 28 of the *Australian Postal Corporations Act 1989* gives recognition to these obligations by requiring Australia Post to perform its functions in a way consistent with Australia's obligations under any Convention Australia is a Party to.

Amendments to the Acts of the UPU, which resulted from deliberations of the 1999 Beijing Congress, do not substantively change those primary obligations.

Substantive additional obligations imposed by the Acts of the 1999 Beijing Congress are as follows.

- i.) Universal Service – Article 1, UP Convention: Article 1(1) requires Australia to “ensure that all users/customers enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices” and Article 1(2) requires that the provision of such services and their scope should be enshrined in national postal legislation. Article 1(3) requires such that services and attendant quality standards shall be achieved.

Australia is generally supportive of the concept of providing a “universal postal service” and requires Australia Post to provide postal services in accordance with the provisions of the *Australian Postal Corporations Act 1989*, directions of the responsible Minister and regulations made pursuant to the Act. Such services are to be provided within and outside Australia to determined standards and are reflective of the theme of universality prescribed by the Convention.

- ii.) Postal Security – Article 9, UP Convention: Article 9 requires the adoption of a “proactive security strategy at all levels of postal operations” and to “propose to legislatures ... specific laws, regulations and measures to improve the quality and security of worldwide postal services.”

Australia agrees in principle with the development of a more secure universal mail service and has maintained a keen interest in mail security issues both inside and outside Australia. Australia Post liaises with appropriate law enforcement and security agencies within Australia in the interest of seeking to develop the most appropriate and secure mail service.

- iii.) Basic Services – Article 10, UP Convention: The amendment of Article 10, undertaken as a result of the amalgamation of the provisions of the Postal Parcels Agreement with the UP Convention, extends the notion of “basic services” to include postal parcels in addition to letter-post items.

In the Australian context “basic services” are comparable to the “community service obligations” (CSO) prescribed by Section 27 of the *Australian Postal Corporation Act 1989*. Section 27 requires Australia Post to make “the letter service available at a single uniform rate of postage for the carriage within Australia, by ordinary post, of letters that are standard postal articles”. However, Section 27 does not address postal parcels.

Australia does not agree with the inclusion of postal parcels within the definition of “basic services” and lodged a reservation in relation to the application of Article 10(1) to this effect (Article IV(1), Final Protocol, UP Convention). It is the view of Australia Post that inclusion of postal parcels within the scope of the “community service obligations” would not be fiscally responsible. The magnitude of the increased weight threshold for a ‘standard postal article’ in the Australian context (increasing from 250 grams to 2 kilogrammes by virtue of the provisions of Article 10(4) would make the CSO no longer viable in view of the magnitude of the cost implications.

iv.) Terminal Dues– Articles 48 to 51 of the UP Convention:

While Australia is in agreement with the underlying desire of the UPU to reform Terminal Dues provisions it does not agree with the revised provisions endorsed by the 1999 Beijing Congress. Australia believes that a uniform pricing system should be adopted which more accurately reflects the real costs and is of the view that the transitional provisions embodied within the provisions may be inconsistent with the requirements of the GATS. Australia lodged a reservation stating that it would “apply the Acts and Regulations adopted ... in full compliance with its rights and obligations under the World Trade Organization Agreement, and in particular the General Agreement on Trade in Services” (Article III, Sixth Additional Protocol). Forecasts of the fiscal implications of the revised Terminal Provisions by Australia Post would indicate a revenue shortfall of approximately \$A10 million.

In relation to the provisions of Articles 49(1.3) and 51(1.3) Australia lodged a further reservation to the effect that notwithstanding reservations made by any other member State in respect thereof Australia Post would “not collect a signature for registered items for which the additional payment in respect of delivery has not been made” (Article XXIV(3), Final Protocol, UP Convention). Australia Post is of the view, that irrespective of its attempts to offset costs associated with the requirements imposed through new revenue streams, the changes will have a net cost increasing effect of between \$A2 million and \$A3 million.

There were approximately 175 textual changes to the UPU Acts resulting from the deliberations of the 1999 Beijing Congress. Seminal amendments, which may impact upon Australia’s obligations, are as follows.

Constitution

Article 22(3)

The Article was amended to make reference to the Letter Post Regulations and Postal Parcels Regulations now associated with the Universal Postal Convention and their binding effect on all member countries. The Regulations comprise all the rules that are no longer submitted to Congress. They are no longer limited to implementing the Convention, but also supplement it. Both Article 22(3) and 22(4) have been supplemented to take account of the incorporation into the Convention of the fundamental provisions governing the postal parcels service (Article I(3), Sixth Additional Protocol).

Article 22(4) - amended to refer to the Regulations associated with the Agreements of the UPU instead of the term ‘Detailed Regulations’ used in the 1994 Seoul Texts (Article I(4), Sixth Additional Protocol).

Article 22(5) - as for Article 22(4), but does not include the reference to postal parcels (Article 1(5), Sixth Additional Protocol).

Article 25(2) – amended as a consequence of the decision to replace the term “Detailed Regulations” by “Regulations” (Article II(2), Sixth Additional Protocol).

Article 29(3) – the purpose of the inserted paragraph was to reflect the decision to simplify the process of amending regulations, thereby changing the requirement for such amendments to be considered and passed by Congress. The previous obligation to formally submit to the Congress

proposals concerning the Regulations was abolished on the basis that it no longer appeared justified to submit proposals concerning the Regulations - they comprised provisions that were not intergovernmental in nature and did not require Congress approval.

In the past, proposals concerning the Regulations were submitted to the Congress that would then refer them to the POC. Under the revised arrangements, Congress retains the option of giving guidelines to the POC, on the proposal of a member country. The POC has the general obligation (Constitution - Article 22 (5)) of taking into consideration the decisions made by Congress when it draws up the Regulations. In addition, it was argued that this measure would appreciably reduce the number of proposals to be distributed for the Congress and would help to lower costs accordingly.

The new paragraph also contains a requirement that proposals concerning the Regulations submitted direct to the POC must first be sent to the postal administrations of member countries. This has been included in order to specify the need to give postal administrations prior notification of the proposals (Article III(3), Sixth Additional Protocol).

UPU General Regulations

Article 101(5) - The last sentence of the 1994 Seoul General Regulations was deleted thereby removing the requirement for the host country of a Congress to notify the decisions taken by that Congress to all the Governments of UPU member countries. The requirement was transferred to the Director-General of the UPU (see Article 110(2.2)).

Article 102(9) was amended to reflect the adoption of Resolution C60/1999 that created a single strategic planning working party for both the POC and the CA. The previous provisions specified "the Chairman of the Strategic Planning Working Party of the Council of Administration" as a member of the CA Management Committee. The words "of the Council of Administration" have been moved so that the text now refers only to the "Chairman of the Strategic Planning Working Party".

Article 102(6.13) - The addition of this paragraph enables the CA to authorise the movement of countries from one UPU geographical grouping of countries to another, taking into account the views expressed by the countries which are members of the geographical groups concerned.

Article 102(6.15) from the 1994 Seoul General Regulations was deleted by the 1999 Beijing Congress. The deleted provisions gave the CA the function of appointing or promoting officials to the grade of Assistant Director-General (grade D2).

Article 102(6.17) - The insertion adds to the functions of the CA the approval of (and where appropriate observations on) the Financial Operating Report prepared by the UPU's International Bureau.

Article 102(6.22) 1994 Seoul General Regulations was deleted by the 1999 Beijing Congress. The deleted provisions gave the CA the authority to approve the recommendations of POC for the amendment, between two Congresses and in accordance with the procedure laid down in the Universal Postal Convention, of the postage charges for letter-post items. In the Beijing Acts the guideline charges mentioned in Article 9(2) of the 1994 Seoul Convention were transferred to the Letter-Post Regulations. As the POC has the authority to draw up the Regulations, there was no longer any reason to limit its authority to amend them between Congresses.

Article 102(6.30) -- The Article was deleted from the 1994 Seoul text thereby reducing the functions of the CA in respect of its power to decide whether minutes of meetings of a Committee of Congress should be replaced by reports. This is as a result of the decision by the 1999 Beijing Congress to replace minutes of Congress Committee meetings by reports of proceedings. (Rules of Procedure of Congresses, Articles 23(1), 23(2) and 23(5)).

Article 102(9) - Amendments to this paragraph reflect the decision of the 1996 meeting of the CA to delegate its authority to approve the annual report on the work of the UPU to its Management

Committee. The CA considered it advisable to mention this task specifically in the paragraph concerning its Management Committee.

Article 103 – inserts the words “subject to the sanctions provided for in Article 126”. The amendment reflects the system of automatic sanctions put in place for recovery of arrears of member’s mandatory contributions to the UPU. The provisions provides that in the course of Congress debates each country shall be entitled to one vote, but subject to automatic sanctions, which can withdraw a member’s right to vote.

Article 104.2 – Amended to require at least one third of the members of the POC to be renewed at each Congress (the General Regulations as amended by the 1994 Seoul Congress required half the members to be renewed). The variation was made to reduce the incidence of anomalies in the election process, where some countries which received fewer votes than others could nevertheless be elected to the POC by virtue of the requirement to renew half of the POC membership.

Article 104(8) was also amended to reflect the adoption of Resolution C60/1999 that created a single strategic planning working party for both the POC and the CA. Previously this paragraph specified “the Chairman of the Strategic Planning Working Party of the Postal Operations Council” as a member of the POC Management Committee. The words “of the Postal Operations Council” have been moved so that the text now refers only to the “Chairman of the Strategic Planning Working Party”.

Article 104(9.5) of the 1994 Seoul General Regulations was deleted by the 1999 Beijing Congress. The deleted provisions gave the POC the authority to revise and amend between two Congresses, in accordance with the procedure laid down in the UP Convention, and subject to CA approval, the postage charges for letter-post items. In the Beijing Congress text, the guideline charges referred to at Article 9(2) of the Seoul Convention were transferred to the Letter-Post Regulations. As the POC has the authority to draw up the Regulations, there was no longer any reason to limit its authority to amend them between Congresses

Article 104(9.9) – Amendments to this Article change the role of the POC in relation to the UPU’s strategic planning process by specifying that the POC’s role is to examine the draft UPU Strategic Plan instead of developing it as in the 1994 Seoul Text. The amendments allocate the role of drawing up the draft strategic plan to the UPU’s International Bureau and specify that the Strategic Planning Working Party should assist in the annual revision of the strategic plan.

Article 104(11) - According to the 1994 Seoul Congress text, the POC, at its last session before Congress, prepared for submission to Congress the draft basic work programme of the next Council. The amendments require the POC to develop its draft basic work programme at its first session after Congress, so that it can take into account the Strategic Plan approved by Congress, and the Programme and Budget for the year following the Congress approved by the CA. The amendments also specify that the draft basic work programme prepared by the POC should be on the basis of the UPU Strategic Plan adopted by the Congress.

Article 110(1) – A provision was inserted which seeks to provide the basis for greater diversity in regional representation in appointments to the positions of Assistant Director-General in the UPU’s International Bureau.

Article 110(2.2) – The provisions were added to specify that it is the duty of the UPU’s Director-General to notify decisions taken by Congress to all Governments of UPU member countries. Previously, the host country of the Congress in question (see Article 101(5)) undertook this function.

Article 125(9) further provides that a member country that has accumulated arrears of mandatory contributions as described above may agree to assign irrevocably in favour of the Union all or part of the credits owed to it by other member countries, in accordance with arrangements laid down by the Council of Administration. The conditions of this assignment of credit are to be determined by agreement reached between the member country, its debtors/creditors and the Union.

Article 125(10) requires a member country that cannot make such an assignment of credit, to conclude a schedule for the amortisation of its arrears. Other than in exceptional circumstances, recovery of arrears of mandatory contributions owed to the Union may not extend over more than 10 years (Article 125(11)).

Article 126 – Automatic Sanctions - In order to halt the growth in arrears of mandatory contributions by member countries to the UPU Budget, and clear up accumulated arrears of contributions, the 1999 Beijing Congress approved the introduction of a system of automatic sanctions from 2001 onwards. The level of arrears that can trigger automatic sanctions is reached when a member country's arrears of mandatory contributions, not including interest, are equal to or more than the amount of that member's contributions for the preceding two financial years - Article 125(9).

Article 126(1) provides that a member country unable to make the assignment of credit provided for in Article 125(9) and which does not agree to an amortisation schedule in accordance with Article 125(10), will have automatic sanctions imposed on it with immediate effect. These consist of withdrawing its right to vote at UPU Congresses and at meetings of the Council of Administration and the Postal Operations Council, and making it ineligible for election to the two Councils.

Article 126(2) provides that the automatic sanctions will be lifted as a matter of course and with immediate effect as soon as the member country in question has paid its arrears of mandatory contributions to the Union or has agreed to submit to a schedule for amortisation of the arrears.

Universal Postal Convention

Article 1

The insertion of Article 1 reflected the adoption by the UPU's Executive Council (Resolution CE4/1994) of a requirement to set out the mission of the UPU in simple modern terms while at the same time incorporating the notion of 'universal postal service' (introduced by the CA with Resolution CA10/1998 which replaced CE4/1994).

Member countries are required to support the notion of a "single postal territory" through ensuring that all customers are accorded access to a "universal postal service" through the provision of "quality basic services ... at affordable prices" throughout their respective territories. UPU member countries are required to define, in their national postal legislation, the extent of postal services offered. The new article was proposed in order to guarantee people's right to communication and to confirm the UPU's role as a guarantor of the human right of the peoples to communication.

Member countries are required also to set quality standards for postal services provided, taking into consideration subjective conditions and to monitor their application. In this context the 1999 Beijing Congress instructed the CA, in consultation with the POC, to draft a memorandum listing the universal postal service obligations incumbent upon member countries and to provide guidelines on how to set quality of service standards applicable to the universal postal service (and to appraise their implementation).

The new provisions will not impact upon Australia Post's existing Community Service Obligations and Customer Charter (but see Article 10 below) because *Australian Postal Corporations Act 1989* addresses service standards.

Article 8(2.1) – Exemptions from postal charges

Amendments to this Article expand the previous definition and specify the means of transmission of letter post items relating to the postal service which are exempt from postal charges thereby making the text more comprehensive.

Article 9 – Postal Security

Seoul Congress Resolution CE35/1994 called on postal administrations to enhance security and integrity of international mails in recognition of the continuing need to safeguard the quality of postal services and the extent of the vulnerability of the international postal system to criminal acts such as theft, assault on postal administration employees, fraud, traffic in drugs and pornography. Resolution C7/1999 of the Beijing Congress reconstituted the UPU Postal Security Action Group and instructed the CA, the POC and the IB to ensure that appropriate measures are taken in the postal security field by providing adequate human and financial resources to implement security related activities.

The provisions of Article 9 reflect the stated concerns over security and the need to ensure the integrity of the postal market. As a consequence Article 9(1) requires postal administrations to “adopt and implement a proactive security strategy at all levels of postal operations to maintain and enhance customer confidence in the postal services in order to ensure a competitive edge in the market”.

Article 10 – Basic Services

With the incorporation of the provisions of the 1994 Seoul Postal Parcels Agreement within the UP Convention the constituent elements of ‘basic services’ was expanded to include postal parcels (in addition to letter post items). As a result, the parcel service was made obligatory for the first time on all member countries. In the Australian context the obligation to include postal parcels would impact negatively on Australia Post’s Community Service Obligations as addressed above.

Article 10(1) requires postal administrations to also provide for the acceptance, handling, conveyance and delivery of postal parcels either as set down in the Convention or, in the case of outward parcels and after bilateral agreement, by any other means which is more advantageous to its customers. In essence, while inward (or import) postal parcel services were made obligatory, the 1999 Beijing Congress sought to maintain the optional nature of operating the outward (or export) UPU parcels service under the provisions of the Convention, allowing postal services the discretion to find alternative approaches (in terms of price, quality of service and customs formalities) to provide outward postal services for their customers.

By Article 10(6) the maximum weight, above which the exchange of individual parcels between UPU member administrations becomes optional, was increased by the 1999 Congress from 10kg to 20kg. The upper weight limit for a parcel exchanged on an optional basis between administrations was also raised from 31.5kg to 50kg.

However, Australia did not agree with the new provisions and lodged a reservation under the Final Protocol in the following terms:

Prot Article IV(1) - Basic Services - “Notwithstanding the provisions of Article 10 of the Convention, Australia does not agree to the extension of basic services to include postal parcels.”

Article 12(4) - Changes the term “Detailed Regulations” to “Letter Post Regulations” reflecting the decision to incorporate certain elements of the 1994 Postal Parcels Agreements within the Convention and to redraft the previous Detailed Regulations as two separate sets of regulations in respect of both postal letter items and postal parcels.

Article 15 – Insured Items

Article 15(2) was amended to provide for the limit of the insured value of an insured item in a UPU member’s internal postal service to be applicable only if it is equal to or higher than the amount of indemnity set for the loss of a registered item or of a parcel weighing 1kg. In the 1994 Seoul

Convention text (Article 18(2), the limit of insured value in a member's internal service was applicable if it was less than an amount of 4000SDR.

The amendment also requires that the maximum amount of insured value be notified in SDR to the member countries of the UPU. This change was made as some countries notified the maximum insured value applicable to insured items in their national currency. It was argued that it was a very laborious task to determine equivalents in SDR. In addition, in the previous system, it was necessary to continually check the exchange rates of national currencies that may be subject to fluctuations.

(The currency value of the SDR is determined daily by the International Monetary Fund by summing the values in U.S. dollars, based on market exchange rates, of a basket of four major currencies - the euro, Japanese yen, pound sterling, and the U.S. dollar. The valuation basket was last modified on an interim basis on January 1, 1999 to take account of the introduction of the euro. The SDR valuation basket is normally reviewed every five years. The next scheduled review will take place in 2000, with any revisions in the valuation basket taking effect on January 1, 2001. Its value in September 2000 was U.S.\$1.00=SDR 0.764668)

Article 15(7) - The provisions inserted at Article 15(7) empowered postal administrations with the right to provide their customers with an insured items service in accordance with specifications other than those defined in Article 15 in the interest of market flexibility.

The UPU insured items service is regarded by customers as unnecessarily complicated to use and the special handling of such items in the postal operations services makes it unprofitable to operate; security problems with the UPU service, in particular with high-value contents being insured at only a fraction of the actual value and with customers using private insurance companies to insure the real value were factors considered in the context of the provisions inserted.

Article 25 (5) prohibits generally the entry of "coins, bank notes, currency notes or securities of any kind payable to bearer, travellers' cheques, platinum, gold or silver ... precious stones, jewels or other valuable articles" in uninsured letter or parcel post items. In the context of allowed exceptions Australia lodged two reservations in the following terms (which reflects domestic postal practice in relation to both letter post items and parcel post):

- Article XII(8), Final Protocol to the UP Convention regarding Prohibitions (letter post) - "The Postal administration of Australia does not accept postal items of any kind containing bullion or bank notes. In addition, it does not accept registered items for delivery in Australia, or items in transit *à découvert* (without cover), containing valuables such as jewellery, precious metals, precious or semi-precious stones, securities, coins, or any form of negotiable financial instrument. It declines all liability for items posted which are not in compliance with this reservation."
- Article XIII(9), Final Protocol to the UP Convention regarding Prohibitions (postal parcels) - "The postal administration of Australia does not accept postal items of any kind containing bullion or bank notes."

Article 26 – Radioactive Materials

Article 26 makes provision for the first time for the transmission of radioactive material between member countries within the universal postal territory. Such transmission is subject to bilateral agreement between postal administrations which have "declared their willingness to admit them either reciprocally or in one direction" and may only be posted by duly authorised senders.

Articles 47 to 52 – Terminal Dues

Resolution C32 of the 1994 Seoul Congress instructed the CA and the POC to continue the study of the terminal dues issue with a view to ensuring that postal administrations of destination receive equitable remuneration for handling foreign-origin mail. The revised interim provisions reflect the work of Working Party 1.1 established by the POC in 1995 which comprised representation from 21 member countries including Australia. WP1.1 issued a document entitled "The need for change", which was adopted by the POC in 1998 and covered the following fields:

- a) the current system;
- b) analysis of the world postal market;
- c) needs of different groups within the UPU;
- d) regulatory issues/benchmarking with other large organisations; and
- e) the way ahead.

At the same time the POC adopted the following criteria (agreed on by WP1.1) to be used for assessing any change in the terminal dues system. It was determined that the future terminal dues system must:

- i.) support the universal service;
- ii.) cover costs;
- iii.) be easy to implement;
- iv.) be commercially viable;
- v.) encourage improvement in service quality; and
- vi.) maintain revenues for developing countries given constant volumes.

The interim provisions adopted by the 1999 Beijing Congress reflect the deliberations of a number of regional round tables organised by seven of the eight Restricted Unions which culminated in a POC organised UPU Round Table held in Geneva in February 1999 (attended by 120 member postal administrations (including Australia), the seven restricted Unions and a number of international organisations).

As a result, the POC decided to adopt separate provisions for terminal dues depending on the type of mail flow concerned:

- industrialised countries to industrialised countries;
- developing countries to industrialised countries;
- industrialised countries to developing countries; and
- developing countries to developing countries.

Against this backdrop the 1999 Beijing Congress adopted a list of industrialised countries and developing countries for application of the provisions of the terminal dues systems reflected in the provisions cited. The lists were based upon the criteria adopted by the 1994 Seoul Congress, in their turn based upon the classification used by the United Nations Development Programme. Adoption of Congress Proposal 20.44.2 underpins the new system and states that postal administrations are classified by their level of development.

The revised provisions succeeded at vote however their adoption was not without controversy, particularly from the point of view of Australia which raised the issue of their being incompatible with the provisions of the GATS. The differentiation as between “developed” and “developing” countries was considered to be contrary to the MFN provisions of GATS and hence, the notions of trade liberalisation embodied by the WTO. Also, Australia is of the view that a pricing mechanism based upon a percentage of non-market tested prices of industrialised countries provides no assurance of cost control or price competitiveness and does not reflect a more market oriented approach.

At the Congress Australia achieved agreement to MFN availability for most industrialised countries and its efforts to amend the POC approach to make it WTO MFN consistent encouraged debate and a greater awareness of the unforeseen ramifications. Notwithstanding, there is some argument that there are provisions concerning the development status of countries within GATS which would allow the UPU approach to stand. Irrespective, the 1999 Beijing Congress agreed that

further work would be undertaken in the development of a workable terminal dues regime prior to the next Congress and that outcomes adopted were transitional. It was agreed also that relations between all members must be geared to adopting a system based upon each country's specific costs. Consequently, by 2002, the POC will have developed a transition plan addressing inter alia, the following factors:

- criteria to be used to determine the first developing countries concerned after the industrialised countries;
- percentage decrease or increase in remuneration per year; and
- procedures for passing from a weight-based system to a system based upon the number of items.

The main elements of the revised terminal dues provisions are as follows:

- i.) rates for mail flows between industrialised countries will be affected by a floor price and a capped price based upon actual items per kilogram rate (Article 48) which is designed to adjust over three years to 60 per cent of domestic 20 gram letter charges;
- ii.) rates from industrialised to developing countries will incur a surcharge of 7.5% on the current rate of 3.427SDR for a quality service fund (estimated by Australia Post to cost an additional \$A2 million - Article 50);
- iii.) developing country flows to each other will remain at 3,427 SDR (thereby providing major channels for arbitrage - Article 51); and
- iv.) payment of additional compensation of 0.5SDR per item for registered mail delivery and 1SDR per item for insured mail delivery.

As has been stated above, Australia (among others, including the United States) made a declaration on signature of the Sixth Protocol to the effect that it reserved its position to apply the revised dues provisions in accordance with its rights and obligations under GATS.

Article 63(1.5) – In recognition of the increasing flow of mail items of a paedophilic nature or of a pornographic nature using children, a provision was inserted in article 63 requiring member countries to adopt appropriate domestic legislation which would both prevent and punish the transmission of such postal items.

Australia has adequate domestic legislation to prevent and punish the transmission of such paedophilic or pornographic mails items (eg the customs act (cth) 1901).

Costs

Article 21(3) of the UPU Constitution states that “The expenses of the UPU, including where applicable the expenditure envisaged in paragraph 2 (Article 21(2)), shall be jointly borne by the member countries of the UPU. For this purpose, each member country shall choose the contribution class in which it intends to be included. The contribution classes shall be laid down in the General Regulations.” On this basis, Australia, Contribution Class – 20 Units, provides approximately \$A800,000 per annum to the UPU budget of approximately \$A36 million. This amount is paid by Australia Post. The proposed treaty action does not impose any additional contribution costs on Australia.

Other costs may be incurred by Australia Post as a result of implementing decisions made by the Congress eg the decision to obtain signatures on the delivery of parcels and all registered and insured items. Australia Post had advised that costs could increase in the vicinity of \$A2.5 million as a result (see Obligations above).

Article 125(1) fixed the annual expenditure relating to activities of bodies of the UPU as follows:

2000 - 36,680,816 Swiss francs (approx. \$A37,482,951)

2001/4 - 37,000,000 “ “ (approx. \$A37,809,115) annually

Future Protocols, Annexes, other legally binding instruments

The UPU Congress meets every five years. For Australia, any treaty status amendments arising from UPU Congress meetings will be subject to the required domestic treaty processes.

Implementation

No legislative measures are required for Australia to implement the obligations under the Sixth Additional Protocol to the Constitution of the UPU or other Acts of the UPU. Implementation is effected by way of administrative action by Australia Post, with portfolio supervision of the Commonwealth Department of Communications, Information Technology and the Arts.

The Australian Postal Corporation (Australia Post), as the designated postal administration for the purposes of the UPU Acts, has responsibility for implementing obligations which arise as a result changes made to the Acts. Implementation is undertaken by Australia Post, ensuring that its domestic and international mail services are in accord with the requirements of the UPU Acts and the *Australian Postal Corporation Act 1989*.

Section 14 of the Act requires Australia Post to “supply postal services within Australia and between Australia and places outside Australia.” Section 18 of the Act empowers Australia Post to supply postal services for Australia’s external territories and foreign countries and to supply any services other than postal services to or on behalf of the Commonwealth, the States and Territories and foreign countries. Section 28 of the Act states that Australia Post shall perform its functions in a way consistent with Australia's obligations under any Convention to which Australia is a Party and Section 32C requires Australia Post to carry and deliver within Australia letters received from a country outside Australia in compliance with charging regimes that would apply by virtue of the provisions of a Convention to which Australia is a Party (eg the Universal Postal Convention).

In light of its statutory obligations and the provisions of the UPU Acts to which Australia is a party, Australia Post seeks to ensure that the provision of Australian postal services and associated practises and procedures are in conformity with international postal standards. Accordingly, such administrative action considered necessary to reflect those standards is undertaken by Australia Post (in consultation with the Commonwealth Department of Communications, Information Technology and the Arts (DCITA) as necessary).

Consultation

The proposed treaty action was advised to the States and Territories through the Standing Committee on Treaties’ Schedule of Treaty Action – no comments have been received. DCITA undertook extensive consultation with Australia Post prior to Australia’s participation at the 1999 Congress. The peak Australian organisation for mail related industry groups, Major Mail Users of Australia Ltd, was also consulted. Australia Post supports ratification of the Acts.

Withdrawal or Denunciation

Article 12 of the UPU Constitution provides for the voluntary withdrawal of any member country from the UPU. Withdrawal is effected by means of a notice of denunciation of the Constitution given by the Government of the country concerned to the Director-General of the IB of the UPU and by him to the Governments of member countries. Withdrawal takes effect one year after the day on which the Director-General receives the notice of denunciation.

Contact Details

Enterprise and Postal Policy Section

Enterprise and Radiocommunications Branch

Department of Communications, Information Technology and the Arts

Protocol relating to the Madrid Agreement Concerning the International Registration of Marks, done at Madrid on 27 June 1989

NATIONAL INTEREST ANALYSIS

Date of Proposed Binding Treaty Action

It is proposed that under Article 14(1)(a) Australia accede to the Protocol by depositing an instrument of accession with the Director General of the World Intellectual Property Organization (WIPO) (Article 14(2) and (3)) as soon as practicable after 5 December 2000. Under Article 14(4) of the Protocol, the Protocol would enter into force for Australia three months after the date on which accession has been notified by the Director General. The Protocol entered into force generally on 1 April 1996.

It is proposed in accordance with Article 5(2)(d) that Australia will make a written declaration at the time of accession to the Protocol extending the time limit from one year to 18 months to refuse protection of a trade mark (based on examination or opposition) to the International Bureau ('the IB') (Article 5(2)(a) and (2)(b)).

Under Article 14(5) any State may, when depositing its instrument of accession to this Protocol, make a declaration denying protection to any Protocol registration that predates Australia's date of entry into force of the Protocol. Australia does not intend making such a declaration.

Date of Tabling of the Proposed Treaty Action

10 October 2000.

Reasons for Australia to take the Proposed Treaty Action

Securing access to export markets is considered a priority by many traders in goods and services. To obtain a competitive edge for business many traders are relying increasingly upon the use of trade marks. A trade mark is a sign used in the course of trade to distinguish goods or services. Thus, effective trade mark protection forms a vital part of the strategy to promote goods and services in overseas markets. However, to obtain trade mark protection in another country can involve significant costs and administrative burdens to traders. A system which simplified procedures and reduced costs would offer benefits for Australian trade mark owners.

The Protocol under consideration forms part of an efficient and streamlined international trade mark registration system known as the 'Madrid System' and made under the auspices of the World Intellectual Property Organization. The Protocol is based upon the Madrid Agreement Concerning the International Registration of Marks of 14 April 1891. The Agreement was revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Nice on 15 June 1957, and at Stockholm on 14 July 1967. Countries may become Party to the Madrid Agreement or the Protocol or both. It is intended that Australia seek to accede only to the Protocol. The Protocol incorporates a number of modifications to address issues which have presented obstacles to Australia becoming a Party to that Agreement and participating in the Madrid System. The registration system established under the Protocol would offer significant

improvements over present arrangements for Australian trade mark owners seeking protection of marks in overseas markets.

The Protocol provides that a trade mark owner of a Contracting Party to the Protocol may secure protection of the mark in other Contracting Parties by filing an application for international registration with the International Bureau of the World Intellectual Property Organization. International registration would operate for ten years with an option for renewal for a further ten years. The Protocol provides also that the protection to be accorded to an internationally registered trade mark by other Contracting Parties is to be the same as if the mark had been registered by the Office of that Contracting Party.

Presently, in order to protect trade marks in overseas markets an Australian trade mark owner must register and maintain trade mark protection in the trade mark office of each particular country where protection is required. This may involve filing multiple applications in foreign languages and the payment of significant government and legal fees. By contrast, if Australia were to become a Party to the Protocol, Australian trade mark owners would be able to file single applications in Australia in English, and pay fees to the one office to obtain trade mark protection in other countries that are Parties to the Protocol. This procedure would reduce significantly the administrative burdens and costs associated with overseas registration for Australian trade mark owners.

As well as providing a simple mechanism to apply for and obtain international registration, the Protocol also has a number of advantages in the maintenance process. These include allowing for a single request to renew registration and record changes in ownership.

A number of Australia's leading trading partners already participate in the international registration system under the Protocol. Indeed, nine of Australia's top twenty trading partners are Parties to the Protocol. These include Japan, China, Singapore and a number of European Union countries. Others, including the United States and the Republic of Korea, are taking steps towards becoming Parties to the Protocol.

Australia is regarded as a leader on intellectual property (IP) issues in the region. Accession to the Protocol would further enhance Australia's international reputation in this regard and would encourage our regional trading partners who have not yet already done so, to consider accession to the Protocol.

Obligations

The 'Madrid System' of international trade mark registration is administered by the International Bureau of WIPO, which maintains the International Register and publishes the *WIPO Gazette of International Marks* (Article 11). In addition, certain administrative and intermediary functions and responsibilities are imposed upon the domestic trade mark offices of Contracting Parties to the Protocol, referred to in the Protocol as the 'Office of Origin'. In Australia's case, as the Office of Origin, these functions and responsibilities would be performed by the Australian Trade Marks Office within IP Australia.

The Protocol provides that applications for international registration may be made by individuals or legal entities that have the necessary connection to a Contracting Party to the Protocol (Article 2(1)). The necessary connection may be nationality, or domicile, or a real and effective industrial or commercial establishment in a Contracting Party (Article 2(1)(i)). In addition, applications for international registration may be made only where the trade mark has already been applied for (called 'basic application') or registered (called 'basic registration') with the Office of Origin of the Contracting Party to which the applicant has the necessary connection (Article 2(1)).

An international application must designate the Contracting Parties in which the trade mark is to be protected (Article 3bis). The applicant may designate any or all other Contracting Parties to the Protocol. An application for international registration must also be accompanied by the payment of fees set out in the Protocol (Article 8). Certain other requirements relating to the form of

applications, alteration of fees and administrative procedures are set out in Regulations concerning the implementation of the Protocol (Common Regulations Concerning the International Registration of Marks and the Protocol Relating to the Agreement).

The Office of Origin presents applications for international registration to the International Bureau (Article 2). The International Bureau checks that the application complies with the requirements of the Protocol and, provided there are no defects, records the mark in the International Register and publishes it in the *Gazette* (Article 3(4)). The International Bureau also notifies each Contracting Party in which protection has been requested.

Except in those cases where trade mark protection is refused (see below), designated Contracting Parties are required to provide the same protection to an internationally registered mark as they do to marks registered directly with their own trade mark office (Article 4). The Protocol also makes provision for the protection of a mark to be extended to Contracting Parties that were not covered by the original application for international registration, or were not Party to the Protocol at the time that an application for international registration was made (Article 3ter).

A Contracting Party is entitled to refuse protection of a trade mark (based on examination or opposition) by written notification to the International Bureau (Article 5). The time limit for a Party to refuse protection is 12 months, unless a Party has, at the time of becoming a Party to the Protocol, made a written declaration extending the time limit to 18 months (Article 5 (2)(a) and (2)(b)). It is proposed that Australia make such a declaration.

International registrations have effect for 10 years (Article 6(1)), and may be renewed for a further period of 10 years upon the payment of prescribed fees (Article 7(1)). For the first five years, international registration is dependent upon basic registration with the Office of Origin. If, within that period, the basic registration with the Office of Origin ceases to have effect, the international registration will no longer be protected (Article 6(3)). After the expiry of the five year period, the international registration becomes independent of the basic registration (Article 6(2)). In this respect, the Office of Origin is required to notify the International Bureau of facts and decisions relating to registration (Article 6(4)).

Upon becoming a Party to the Protocol, Australia would automatically become a member of the Madrid Union established under the Madrid Agreement (Article 1). Every member of the Madrid Union is a member of the Assembly (Article 10). The Assembly is responsible for the program and budget of the Madrid Union, including the adoption and modification of implementing Regulations (Article 10).

Costs

There are no direct foreseeable financial costs to the Commonwealth, the States and Territories, or Australian industry from taking the proposed treaty action.

Australia presently provides financial contributions to WIPO (approximately \$AUD 750, 000, the major proportion coming from the budget of IP Australia, a self-funding federal government organisation). Those contributions would not increase as a result of Australia becoming a Party to the Protocol.

Future Protocols, Annexes or other binding Instruments

The Protocol does not provide for the conclusion of future Protocols, Annexes or other legally binding instruments.

The Protocol sets out a procedure for the amendment of Articles 10, 11, 12 and 13 of the Protocol. These Articles refer to the WIPO Assembly relating to the Madrid Agreement, the International Bureau, finances of the Madrid Union and amendment of certain Articles of the Protocol. The Protocol provides that amendments may be adopted by a majority of the Contracting Parties

voting as members of the WIPO Assembly. Adopted amendments would enter into force one month after written notifications of acceptance have been received from three-quarters of the Contracting Parties who were members of the Assembly at the time of adoption. Accepted amendments are binding on all Parties to the Protocol (Article 13).

An international working group on the modification of regulations under the Protocol has been established. Any recommendations of the Working Group would be considered at future meetings of the WIPO Assembly.

Implementation

The *Trade marks Act 1995* ('the Act') provides for the registration of trade marks and sets out and protects rights deriving from registration.

Upon its commencement, the *Trade Marks Amendment (Madrid Protocol) Act 2000* will amend the Act to insert a new Part 17A that would enable regulations to be made to implement Australia's obligations under the Protocol.

New regulations will be required to be made under the amended Act prior to Australia taking the proposed treaty action.

Consultation

- The States and Territories were notified of the proposed treaty action through the Standing Committee on Treaties and, in addition, letters were sent to all State Governments and Federal Ministers with portfolio responsibility for IP.
- IP Australia held a series of public seminars on the Protocol in the capital cities in 1999. Representatives from WIPO and the national IP office of the United Kingdom attended some of these sessions and addressed procedural matters, the benefits and the economic impact of accession to the Madrid Protocol. Approximately 200 people representing business, the legal profession, patent and trade mark attorneys and government agencies attended these sessions.
- Meetings specific to the Protocol have been held with interest groups such as the Institute of Patent and Trade Mark Attorneys, AMPICTA (the Australian manufacturers' group representing intellectual property owners) and the topic has been discussed during public consultations on IP Australia's future service delivery.
- Public notices have been placed in the *Official Journal of Trade Marks* and on the Internet.
- Letters inviting submissions on the subject have been sent to major interest groups and clients.
- The issue was raised at the July 2000 New South Wales State Government Exporters' seminar on protecting IP internationally.

As a result of these consultative activities, strong support and interest has been received from a number of areas, including the State Governments of Victoria and Western Australia, and from the Australian Capital Territory.

Fifteen written submissions from business and professional groups, for example The Winemakers' Federation of Australia and AMPICTA, have been received addressing the issue of possible accession to the Protocol. Most of the submissions were in favour of Australia acceding as soon as possible so that users of the system would have access to the Protocol as soon as possible. They also believe that Australia could take a leading role in encouraging other countries in the region to join and thus provide greater benefits to trade.

While the submissions from the Institute of Patent and Trademarks Attorneys and the International Federation of Industrial Property Attorneys did not oppose the principles of the Madrid Protocol, they did raise concerns about the timing of accession and aspects of the legislative changes. The

concerns on timing related to the impact on workloads in the Trade Marks Office and possible pressures on the Trade Marks Register. Since these matters were raised there have been further discussions with representatives of the groups and initiatives undertaken to address their concerns. Initiatives have included an extensive recruitment exercise and business process improvements. The Trade Marks Office is committed to ongoing discussions with the groups on the subject.

Withdrawal or Denunciation

Any Party to the Protocol may, at the expiry of five years from the date upon which the Protocol entered into force with respect to that Party, denounce the Protocol by written notification to the Director General of WIPO. Denunciation takes effect one year after the day on which notice is received (Article 15).

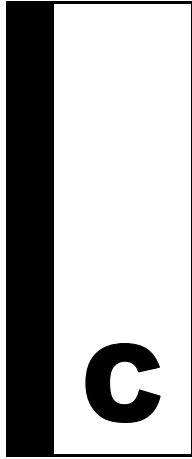
Article 15(5) of the Protocol provides where a trade mark is the subject of an international registration having effect in the denouncing State, the holder of the registration may then file an application within two years from the date on which the denunciation became effective for the registration of the same mark with the Office of the denouncing State.

This procedure would be available also to trade mark holders in cases where, because of the denunciation of the Protocol, the holder of an international registration is no longer entitled to file international applications for international registration having effect in States other than the denouncing State (Article 15(5)(b)).

In those cases, the Protocol provides that the mark shall be treated as if it had been filed on the date of its international registration and shall enjoy the same priority as it had under the international registration (Article 15(5)(a)).

Contact Details

External Relations
Corporate Strategy
IP Australia
Department of Industry, Science and Resources



Appendix C - Submissions

Double Tax Agreement with the Russian Federation

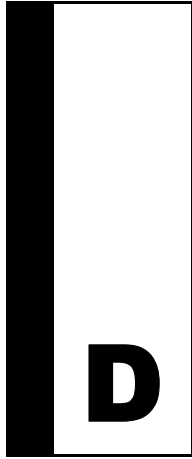
Submission No.	Organisation/Individual
1	Attorney-General's Department
2	Western Australian Government

Agreement with Egypt on Protecting the Welfare of Children

Submission No.	Organisation/Individual
1	Attorney-General's Department

Protocol concerning International Registration of Marks

Submission No.	Organisation/Individual
1	IP Australia
2	Western Australian Government
3	South Australian Government



Appendix D - Witnesses at Public Hearings

Monday, 30 October 2000, Canberra

Department of Foreign Affairs and Trade

Winfred Peppinck, Executive Director, Treaties Secretariat, Legal Branch

Attorney-General's Department

Rebecca Irwin, Legal Officer, Office of International Law

Double Tax Agreement with the Russian Federation

Australian Tax Office

Michael Lennard, Acting Assistant Commissioner, International Tax Division

Michael Nugent, A/g Executive Officer, Treaties Unit, International Tax Division

Monday, 6 November 2000, Canberra

Department of Foreign Affairs and Trade

Winfred Peppinck, Executive Director, Treaties Secretariat

Attorney General's Department

John Attwood, Principal Legal Officer, Office of International Law

Agreement between Australia and Egypt regarding Cooperation in the Protection of Children

Attorney-General's Department

Stephen Bourke, Assistant Secretary, Family Law Branch

Matthew Osbourne, Family Law Branch, Civil Law Division

Department of Foreign Affairs and Trade

John Monfries, Director, Consular Policy Section

Fifth & Sixth Protocols to the Constitution of the Universal Postal Union

Communications, Information Technology and the Arts

Michael Carrick, Contractor, Enterprise and Radiocommunications Branch

Jane Hanna, Manager, Enterprise and Policy Section

John Neil, General Manager, Enterprise and Radiocommunications Branch

Australia Post

Christopher Grosser, Group Manager International

Protocol concerning International Registration of Marks

IP Australia

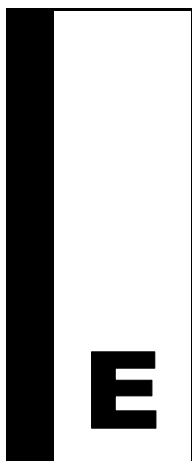
Barbara Bennett, Deputy Registrar of Trademarks

Susan Farquhar, Director External Relations, Corporate Strategy

Ross Wilson, Registrar of Trademarks

Department of Foreign Affairs and Trade

Tony Taubman, Director, WTO Intellectual Property Obligations and Enforcement Unit



Appendix E – Speech by the Deputy Commissioner of Taxation on Transfer Pricing

TRANSFER PRICING: Compliance Issues and Insights in the Context of Global Profit Allocation

**Jim Killaly, Deputy Commissioner (Large Business & International)
Australian Taxation Office
Address to the Institute of Criminology Conference on International Crime,
9 March 2000, Canberra.**

Introduction

Thank you for the opportunity to talk to you today about our compliance work in relation to the allocation of global profit by multinationals.

We have made major inroads in tackling this issue with the result that company tax has increased over the last three years by 30%, well above the 19% growth in Gross Domestic Product, and effective tax rates have also increased over that period. These calculations have been made using tax return data and do not allow for the additional direct revenue raised by audit adjustments, which is averaging around \$500 million per annum in additional collections, though we have some very significant cases in progress.

This has been achieved by taking systemic approaches to issues like transfer pricing and by developing interlinking strategies to improve the existing system. It has also come from a clear sense of purpose and measures that have assisted us in refining our focus.

Why did the Tax Office focus on transfer pricing?

In 1993 the Australian Taxation Office established the International Tax Division to establish a better organisational focus on globalisation. Our sense was that the rate of internationalisation of the Australian economy was accelerating. Estimates at the time were that 60% of world trade was being managed by multinational enterprises and that the great bulk of this was between related parties.

In the 1998 financial year, as far as Australia was concerned, the value of related party international transactions was \$76 billion, excluding loans. This comprises purchases and expenditure of \$45 billion and sales and other revenue of \$31 billion. Both these figures relate to the values on the Australian side of the cross-border dealings. The combined value of cross-border related party loans is around \$62 billion, being borrowings of \$37.5 billion and loans of \$24.5 billion.

Trends were also showing that while Australia was a net importer of capital, outflows were running at about 40% of inflows. We needed to ensure that cross-border activity was not tax driven and that, given the relative scarcity, our stock of capital was being efficiently allocated on the basis of genuine business and investment purposes.

International business was becoming more complex and integrated. Intangibles were playing a much more important role reflecting the shift from the industrial economy to the knowledge economy. Global design, production and marketing were becoming commonplace. Multinationals were managing globally around products, profitability, alliances, financing and taxation. These trends are intensifying today.

There was also a shift in the reward systems of key players. Tax managers increasingly were being rewarded for after tax rates of return rather than compliance with lodgment and payment requirements.

Transfer pricing was an area that had not received extensive scrutiny for many years. Broadly, transfer pricing relates to the setting of prices by multinationals for the goods and services that they supply to related parties. It also covers the structuring of transactions and financial relationships, and how innovation happens and is rewarded.

All the risk factors for significant underpayments of tax were there. The amounts involved were very significant and there was insufficient testing of taxpayers' attitudes, approaches and processes. Added to this the methodologies for determining the accuracy of the global profit allocation needed a rethink in the light of the developments in the way business was done. Taxpayers could get their transfer pricing wrong because they did not know how to develop and apply a methodology, or because they were intent on shifting profits to low tax or home jurisdictions. In extreme cases taxpayers were seeking to conceal income derivation or the nature of their dealings through tax haven entities which can also

serve as anonymous repositories for assets. Accordingly, transfer pricing and global profit shifting cannot be fully understood without analysing the systemic impact of tax havens and bank and commercial secrecy. In some cases the problem was not necessarily the avoidance of tax in an absolute sense, but the need to ensure that if tax comparable to the Australian rate was paid, it was paid in the right country. Limits on the availability of credits in some other countries for taxes paid in Australia (or anywhere else) and foreign imputation systems can sometimes create a preference for paying tax in the home country and hence can be a factor in misallocation of global profits.

The difficulties were not unique to Australia. There were many at the time who said transfer pricing could not be effectively addressed and that we were wasting our time. Had we taken that advice Australia would have been worse off to the tune of several hundreds of millions of dollars a year. On top of that Australian companies paying their tax would have been at a competitive disadvantage relative to those not paying their fair share.

The Health of the System Assessment – Our diagnosis of what elements of the system needed improvement

The need for clear objectives

In terms of what would constitute “success” for the International Tax Division, we developed a series of high level statements that lent themselves to quantitative or qualitative measurement. These were:

1. A fair sharing of taxing rights between countries, balancing the positions of capital importers and capital exporters, consistent with Australia’s Model Double Taxation Agreement.
2. A correct allocation of global profits, commensurate with Australia’s contribution of economic value add in the generation of the profits.
3. The effective management of tax policy competition from tax havens and concessional regimes of other countries in order to protect Australia’s revenue.
4. Australia’s views being reflected in the international forums that were establishing the international benchmarks and approaches.

Our objective in relation to transfer pricing was to obtain Australia’s fair share of tax based on the economic value added by Australia, measured according to the internationally accepted arm’s length standard. We publicised this at every opportunity as something of a mantra, in speeches, rulings and in discussions with industry, to the point where private sector attendees could recite it.

I should add, by way of clarification, that Australia’s contribution is not limited to what happens in Australia. For example, the use of Australian technology and knowhow overseas should generate a fair return.

The need to take a fresh look at the problem and to develop an analytical approach

Many countries had unsuccessfully tried to tackle the issues arising in transfer pricing. The only country doing any systematic analysis was the United States.

We commenced a dialogue with industry and the professional bodies to highlight our concerns and to work with them to develop solutions. This was very much a workshop process that examined methodologies and reviewed drafts of the public rulings the ATO was developing. This liaison is continuing today and has been supplemented with some industry specific forums.

Simultaneously we increased our risk assessment work on multinationals, using economic functional analysis to evaluate the returns they were making on their functions, assets and risks. This was accompanied by an increase in our audit activity, the initial focus being on long running cases that were stalled. The industries selected had shown low levels of taxation in Australia for several years, despite significant activity. This was extremely insightful in identifying the shortcomings in current methodologies and in the way both sides were attempting to apply them. It was also a very important step in mapping markets and the profit drivers within particular businesses so we could see the tax issues in their proper business context and identify the tax outcomes that did not gel with the economic and business reality. It also gave us an important reflex of the behaviour of the relevant multinationals and their advisers. They were very testing times.

At the same time we revised our tax return forms to ensure we identified cross border dealings between related parties. We also sought specific information as to whether the taxpayer had a methodology for establishing transfer pricing and whether they had documentation of this process.

Over the next few years the tax return data enabled us to develop more accurate risk profiles across the relevant taxpayer population.

There was also a need to explain the domestic provisions on transfer pricing and give practical guidance on their application. Tax Ruling TR94/14 was that exposition.

In parallel with this the ATO began to play a more active role at the OECD which was considering the review of its transfer pricing guidelines. We were later appointed to a nine-country drafting committee that produced the June 1995 revision of the OECD Guidelines. This in itself was a watershed for the OECD because major differences were reconciled on the basis of unanimously agreed principles set out by the then 27 member countries in the then five chapters of the guidelines.

In 1997 and 1998 respectively two further public rulings were issued (TR97/20 and TR98/11). The first explained how to select and apply a transfer pricing methodology and the second set out practical approaches to risk assessment and documentation. These were developed in conjunction with industry and the professional bodies. At the draft stage, and unsolicited, we tabled these rulings at the OECD for comment.

The rigorous process of development greatly assisted the acceptance of these rulings by industry and the professional bodies. Educational sessions by the major firms drew extensively from our rulings. It was instructive to see our risk assessment model becoming the benchmark for both sides. It was also instructive to see taxpayers and professionals aiming for a medium risk rating rather than a high or low risk rating.

Moving from confrontation to cooperation

From a very early stage we recognised the need to accommodate taxpayers who were having genuine difficulty in establishing correct transfer pricing and wanted our help.

We decided to embark on the world's first Advance Pricing Agreement with the United States in relation to a taxpayer in the electronics industry. There were several important learnings from this process. First, we found that the nature of the relationship with the taxpayer was markedly different. We were all working together to develop the right answer. The general adversarial atmosphere of auditing was gone.

Second, we were able to deal with the intricacies of a very complex and dynamic industry and model the taxpayer's business so all sides could reliably forecast the range of results likely to flow as long as the critical assumptions that we had identified and agreed held true. This put the tax authorities in the shoes of the taxpayer trying to do the transfer pricing real time in the face of the business issues confronting the taxpayer. Facing these difficulties destroyed a lot of the assumptions auditors had previously held about taxpayers' motives and showed that a different relationship was possible.

The ongoing maintenance of compliance is relatively easy with an Advance Pricing Agreement. Each year a short compliance report is filed, addressing the critical assumptions. If there have been no changes and the results are in the ranges foreshadowed, the taxpayer gets a clean bill of health and can get on with business.

Third, it brought home the importance of a future focus. Since then, in all of our auditing work, we have approached our task as one of transitioning our focus from the past to the present to the future. And our relationship from

confrontational to cooperative, noting that auditing is sometimes needed as the catalyst.

To develop this a little further, once we realised the advantages of Advance Pricing Agreements we promoted them strongly. Initially we did not have much success. Taxpayers were unsure of the process and those with large exposures in respect of past years thought that the risk was too great. There have been three significant developments. The professional advisers started to market Advance Pricing Agreements. Further expansion of our audit program increased the risk of detection and taxpayers having been audited were more receptive to Advance Pricing Agreements. We marketed the product to the overseas parents with the result that many more companies have joined the program. After a very slow start we now have nearly 40 multinationals at various stages in the program and they are joining at an increasing rate.

A large part of the success was due to the clear guidelines we published, but more importantly the quality of the staff we allocated to this work. It was and still is essential to have people who are objective and open and who can build industry trust and respect.

I should add that an important side benefit of the Advance Pricing Agreement program was that it has and continues to increase our speed of learning.

The importance of systemic approaches at the case level

One of the early challenges was to achieve a breakthrough on trading companies. These entities had thousands of products from lumps of coal through to aeroplanes. They had many transactions in each product line. The traditional approach had been to identify benchmark products and determine a comparable uncontrolled price. This was the approach adopted by other fiscs in examining these multinationals. I suspect that if we had continued down that road we would still be wandering around in the factories and mines today with the issue still unresolved.

The breakthrough came when we adopted an economic value chain analysis. When we examined the Australian operations in their global business setting it became clear that the Australian operations were providing a marketing and distribution function. While nothing in transfer pricing is truly simple, this revelation made our job relatively easier, and more importantly, feasible. We were able to develop more appropriate analyses based on Berry ratios. A number of matters of principle arose in that analysis and we enlisted Dr Charles Berry himself to help us solve them. The solution was truly innovative and soundly based in theory and commercial reality, a world first.

Representations at the country level achieved acceptance of the methodology by the foreign fisc with the result that several trading companies are now at various stages of the Advance Pricing Agreement program.

An important element of success was understanding the cultural issues as they impacted on the strategic positioning by these multinationals and how their approaches were reflecting the national psyche of their home country.

Developing a “whole of client” perspective

One of the important insights we derived was that we had to develop a holistic picture of the multinational group and apply our risk assessment and compliance monitoring at that level.

In the early stages we sought to track the tax performance of the company that was dealing directly with the offshore affiliate. These entities are required to file a special schedule with their tax return (Schedule 25A). We publicised the fact that we would be using this schedule for our risk analysis. The initial feedback was that directors were taking this declaration very seriously and we were hoping for much higher integrity in reported incomes and expenses, the tax return being seen as an important leverage point.

Well it bore out the old adage that you get what you measure! But it may not be what you want! Our analysis showed us that the tax performance of companies filing this schedule increase noticeably over the next couple of years. If we had left the analysis there we may still have been in blissful ignorance! As we extended our frame of reference we noticed a corresponding downward trend in the tax performance of companies that did not have to file the schedule.

Now we link the analysis of transfer pricing and domestic tax performance.

The need for a wider skill set

The transfer pricing experience made us think differently about resources and skill sets. Historically transfer pricing was the domain of accountants and lawyers, on both the ATO side and in the private sector. It was our ability to couple these skills with economic analysis and modeling and industry expertise that facilitated the breakthrough. While we have a number of important consultancies with universities and research institutes we have also been able to create an economics stream within the ATO to sustain this work. (I would also add that the ATO is

blessed with a very good data set, the envy of many researchers and a concern for some taxpayers. More about this later.)

The flexible profit split matrix that was developed for an Advance Pricing Agreement in the electronics industry was another world first.

The need to consider the whole framework of the law and its practical application

The arbitrage opportunities presented by tax havens and other concessional regimes are an important structural driver in transfer pricing. An important counter measure is the Controlled Foreign Companies and Controlled Foreign Trusts legislation. The legislation applies to highly mobile passive income like interest, dividends and royalties, where the property giving rise to the income can easily be moved from country to country to get the lowest tax. These provisions prevent the holding of low taxed income offshore to indefinitely defer the assessment of Australian tax. In general terms, the beneficial owners of that income are deemed to have received it and the tax paid overseas is topped up to the Australian tax rate.

The current debates in the OECD and other forums in relation to harmful tax competition and bank and commercial secrecy are also part of the equation. It is clear that multilateral approaches are likely to be far more effective.

The focus of this work are the jurisdictions that use low tax regimes to distort investment in circumstances where those jurisdictions are not adding economic value and are shielding operations with a shroud of secrecy that prevents home jurisdictions from checking the legitimacy of those investments and operations. The OECD is intending to publish a list of havens around the middle of the year to facilitate coordinated counter measures by OECD member countries.

A small number of cases are currently under prosecution action.

Our learnings and the insights into compliance systems

Reflections on our experience with transfer pricing have provided some important insights into compliance more generally.

The need to understand the tax system as a human system

Our experience underlines the importance of systemic approaches. It also convinces us that we need to see the tax system as a behavioural model involving many stakeholders. These include- taxpayers, their advisers, the judiciary,

Government in its many policymaking roles, other countries (that may be aggressively competing or concerned merely to ensure they also get their fair share), ATO staff and the wider community. The behaviour of each of these stakeholder groups impacts on each of the other groups and hence the functioning of the tax system - for better or worse.

It has also clearly demonstrated that to be effective we need to not only identify the patterns and trends occurring within the system, but also the structural drivers and various world views that may be operating at deeper levels.

Insights into the meanings of compliance and their implications for behaviour

This analysis has given us insights that have enabled us to better understand what compliance really means, in all its various manifestations. It can range from the view that it means not being caught, right through to notions of maintaining the legitimacy, viability and functionality of the tax system that involve considerations of appropriateness of the rules. For example, is the rule capable of compliance? Does the rule get in the way of the legitimate operation of markets?

Multinationals take calculated risks and seek opportunities in periods of change

Large corporates will not usually disregard the law. Their strategy is to place themselves as close to the edge as possible. Legislation carries the inevitable shortcoming that it will not be able to cover every permutation. There are shades of grey and to that extent it is difficult to say what compliance is. However, it is clear that uncertainty is an opportunity to the well advised.

Multinationals have had to come to terms with the complex and dynamic markets in which they operate and have developed techniques for managing risk in that context. It is clear they are also applying a risk algorithm to efforts of compliance management by the ATO. To the extent that taxpayer and/or ATO systems and approaches to compliance are inadequate and do not neatly mesh, our experience is that the market takes up the slack and moves to the point of arbitrage until the misalignment is corrected.

We saw an example of this when we issued our risk assessment model for transfer pricing cases. We tabulated the characteristics of low, medium and high risk cases. By and large multinationals sought to position themselves within the medium risk category. Professional advisers were also advocating this outcome. Accordingly, we have had to adjust our audit strategies.

Another byproduct of dynamic environments is that multinationals have learned to look for the opportunities that present when change occurs. This is no less so

for taxation and it behoves us to be extremely watchful and responsive in the context of tax reform.

It is essential that we humanise the analysis and management of compliance

Some important questions have come into focus about whose behaviour is relevant in analysing compliance issues.

Taxpayer values in terms of how they see taxation are playing a major role. These could be values imparted by shareholders, directors or advisers. To the extent that multinationals see taxation as incidental to profitability and consistent with shareholder value then the compliance problems are lessened. (An example of this is company groups where a significant percentage of shareholders are relying on franked dividends.) Were corporates to assume a fuller citizenship role so much the better. To get to that point they have to make a clear connection between taxation and the benefits they derive. It is clear that we have to start spelling out that connection between tax payments and the benefits multinationals derive from the community. For example, the rule of law, appropriate regulation instilling investor and consumer confidence and preventing unfair competition, the protection of property, the provision of infrastructure, the facilitation of trade and investment, and so on. In that sense, and by tackling those who would seek to freeload on the community, we would be facilitators of good corporate citizenship.

We have sought to reflect these experiences in a compliance model. We have been greatly assisted in this regard by Professor John Braithwaite at the Australian National University. Our approaches to transfer pricing are an example of the tailored and professional responses playing out at the case level.

The importance of taxpayers feeling that they have had a fair go

One aspect of transfer pricing that needs further consideration is the issue of “secret comparables”. These are benchmarks that are available to the Tax Office through tax return data but are withheld to some extent from the taxpayer because the details relate to other taxpayers’ and questions of confidentiality of tax and business secrets arise. We have sought to address this problem by developing other methodologies based on economic analysis of the taxpayer’s profit channel components. However, it may be that the courts will have to develop a process that balances the competing rights.

In a similar vein, disputes between Australia and another tax administration present issues of fairness to the taxpayer. While it is important for the two countries to be able to speak openly with each other, it is essential to ensure that the process adequately protects the rights of the taxpayer, not only in justice being done but also in it being seen to be done.

We have had experiences in such inter-country discussions where the other country is essentially seeking taxation by negotiation – a type of horse-trading. Australia has resisted such approaches and insists on the application of the OECD-agreed approaches. We also seek to include the taxpayer as much as possible in the process.

Operating in real time is a critical objective

I would like to finish with an observation about time. We have come to see time and timing as a most valuable resource in compliance assurance work. Strategic intervention at the time events are unfolding produces greater compliance leverage than cleaning up afterwards. We have found that we are paying huge inefficiency dividends by having to go back and address past noncompliance. Our aim is to get current and stay current. This means, for example, that we will roll forward our transfer pricing cases to current year activities and keep risk cases under attention. It also means that we will provide assistance to new businesses starting up in Australia.

Conclusion

In summary, compliance assurance in relation to transfer pricing has proved to be a multifaceted exercise. Our success has been due to this realisation and our ability to keep the whole system in focus and to strike the appropriate balance between service and enforcement. The rest is relationship focus, persistence and an element of luck. I would, however, add that the more we practice our techniques and approaches the luckier we get!

Thank you again for the opportunity to address you today.