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JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 12 March 2002

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JOINT COMMITTEE ON TREATIES

Monday, 13 May 2002

Members: Ms Julie Bishop *(Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Bartlett, Cooney, Ludwig, Mason, McGauran, Schacht and Tchen and Mr Adams, Mr Baldwin, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr King and Mr Bruce Scott

Senators and members in attendance: Senators Bartlett, Cooney, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Bartlett, Ms Julie Bishop, Mr Ciobo, Mr Martyn Evans, Mr Bruce Scott and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 12 March 2002

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Committee met at 9.05 a.m.

Pacific Agreement on Closer Economic Relations

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law Branch, Office of International Law, Attorney-General's Department

O'DOWD, Mr Tony, Acting Director, Economic Policy and Management Reform Section, South Pacific Branch, AusAID

DIRNBERGER, Mr Claus Peter, Executive Officer, Pacific Islands Branch, South Pacific, Middle East and Africa Division, Department of Foreign Affairs and Trade

FLETCHER, Mr Graham Hugh, Assistant Secretary, Pacific Regional Section, South Pacific, Middle East and Africa Division, Department of Foreign Affairs and Trade

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties. Today, as part of our ongoing review of Australia's international treaty obligations, the committee will review 13 treaties tabled in parliament on 12 March 2002. I understand that some of the witnesses from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us for the entire day's hearing, with witnesses from other departments joining us for discussion of the specific treaties for which they are responsible. Hopefully, we will be moving fairly quickly through the treaties. With people coming and going, I apologise for any disruption.

To begin our hearings, we will take evidence concerning the Pacific Agreement on Closer Economic Relations. I welcome the representatives from the Department of Foreign Affairs and Trade, AusAID and the Attorney-General's Department. Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Does anyone wish to make some introductory remarks before we proceed to questions? You can take it that we have read the treaty and the national interest analysis.

Mr Fletcher—Yes. If you do not mind, I will make a short statement about the background to this treaty. There are two points of context: firstly, the Pacific Islands Forum, which began in 1971, from the outset wanted to develop a free trade arrangement within its membership; secondly, Australia and New Zealand have since the late seventies given duty free access to exports from Pacific island countries. That is known as the SPARTECA agreement—the South Pacific Regional Trade and Economic Cooperation Agreement—and it has been in force for some time now. So, at present, exports from Pacific countries enter Australia and New Zealand duty free.

The forum's interest in developing a free trade agreement gathered momentum a couple of years ago, and in 1999 the forum meeting agreed that steps be taken to negotiate a treaty for free trade between members. It only envisaged this including the island states, not Australia and New Zealand. The Pacific Islands Forum has 16 members altogether: 14 island countries and Australia and New Zealand. At that time there were two reasons for us wanting to be involved in some way in this arrangement. The first was political. We did not want the island countries, using the forum label, developing a free trade agreement between themselves which ignored Australia and New Zealand. For reasons of state we thought, 'We're members of the forum; we deserve to be included in some way.'

Secondly, a practical or economic interest of ours was to ensure that, whatever trade liberalisation occurred between the island countries, if it were extended to other states such as the United States, Japan or the EU, it did not disadvantage our trading position. During the course of negotiations the position was developed that there would be two agreements, which would be linked. One is a free trade agreement between the Pacific countries, the island states—and that is called the PICTA, the Pacific Island Countries Trade Agreement. At the same time, the agreement that we are discussing today was developed, the Pacific Agreement on Closer Economic Relations, which is, if you like, an umbrella agreement. The essential point of it for us is that in the event of a free trade agreement being negotiated between the Pacific islands countries and external countries, such as the EU, the United States, or someone else, we would also have an opportunity to negotiate with them equivalent or similar arrangements so that our trading access to the region—which is already substantial but which is predicated on them having completely free access into our markets—would be protected. That is the guts of this arrangement. It is a defensive mechanism. We expect there will be discussions between the EU and the Pacific island states beginning in September this year and, if that leads to Pacific countries offering developed markets in Europe better access into their markets than we currently enjoy, we will have the opportunity to engage in discussions and, hopefully, to arrive at some arrangement that delivers benefits to us also.

At the same time, we have agreed that, in the event that Australia enters free trade agreements with other countries, we would also discuss with Pacific states the opportunity to improve their market access. Many of them rely heavily on the duty preferences that they are given from Australia and other countries and they see trade liberalisation generally as disadvantaging the preference advantage that they have. From their point of view they want to be able to discuss with us possible improvements in the event that we are extending the free trade arrangements we already have with other countries. That is all I would like to say at the moment but I am perfectly happy to develop in detail points of interest.

CHAIR—Thank you, Mr Fletcher. I would like a little more clarification on the relationship between PACER and PICTA. I take it that negotiations for PICTA will continue but, in the event that another country is able to develop negotiations more quickly with the Pacific Islands Forum, it would trigger another round of negotiations. Is that the way it works? Or will PICTA sit back and wait to see what conditions are negotiated with another forum?

Mr Fletcher—The state of play is that both agreements were signed last year at the forum meeting in Nauru and they are open for signature at the moment and ratification. One agreement needs seven ratifications to enter into force; the other needs eight.

CHAIR—Which one needs seven?

Mr Fletcher—PICTA needs seven and PACER needs eight. If the ratification number is not achieved within a certain time period, they will enter into force anyway—and I think it is eight years. Within eight years both agreements will be in force. If the Pacific island countries begin negotiations, we will then begin discussions with them.

CHAIR—But PICTA could just sit there and then it would be a matter of a trigger occurring if the Pacific Islands Forum countries were to start negotiating with, say, the EU.

Mr Fletcher—Yes; that is correct. If they did not ever enter into free trade arrangement discussions with another entity, then these agreements would not mean a lot.

CHAIR—So PICTA will not proceed either. In other words, the trigger has to be PACER.

Mr Fletcher—PICTA will exist in its own right between the island countries.

CHAIR—Including Australia and New Zealand?

Mr Fletcher—No; just between the 14 island countries. That has been signed and, within eight years, will be in force.

CHAIR—So unless the trigger occurs, which is the entering into negotiations with another forum, such as the EU—

Mr Fletcher—Yes. We expect that will start in September. The EU is quite keen to have discussions with them.

CHAIR—This is my last question. I note that four countries have ratified the agreement. Is there any reason for the others not having done so at this stage?

Mr Fletcher—Ratification takes time. A number of the small states have a lot of things on their parliaments' agendas. So in fact getting four within several months is actually quite good. And it is now five, I am advised.

CHAIR—Who is the fifth?

Mr Fletcher—Tonga.

Senator BARTLETT—Why is it that no regulation impact statement was required?

Mr Fletcher—For this treaty?

Senator BARTLETT—Yes.

Mr Fletcher—Because the impact on Australia domestically is so limited; it changes nothing for Australia at the moment. It is a matter of 'in case something happens, then something else would happen'.

Senator BARTLETT—I think you said towards the end of your opening statement that the Pacific island countries do not see trade liberalisation as being in their interests, broadly speaking. Is that what you said?

Mr Fletcher—They feel that the movement towards lower trade barriers worldwide deprives them of some of their advantages economically. Fiji, for instance, has exported a lot of garments into Australia, and we have relatively high tariffs on textiles, clothing and footwear. Duty free access for them gives them a benefit which China does not have. As tariffs go down, they lose that margin of benefit.

Senator BARTLETT—So why is this in their interest? Why would the PACER be in their interest?

Mr Fletcher—To a certain extent, they are passive observers of what is happening in the WTO and elsewhere. They are not able to stop the movement towards freer trade worldwide, and they want to achieve as much as they possibly can through close relationships with their major partners like Australia and New Zealand. They agree also that it is better for their own economies to lower barriers, and that is why they have moved to negotiate the PICTA. This is being launched from within the forum countries. It is not something where someone else has told them, 'You've got to develop free trade agreements.' They have decided they want to do it themselves.

Senator BARTLETT—The PICTA, as I understand it, is an internal free trade agreement within the 14 island countries.

Mr Fletcher—Yes; and there are a number of exemptions to that which individual countries have put up: 'We will liberalise trade in such and such but not something else.'

Senator BARTLETT—Who initiated the PACER? Who was driving it? Was it Australia and New Zealand?

Mr Fletcher—We as forum members said, 'If you're going to have a free trade agreement between yourselves, that's all very well, but we don't want to be left completely on the sidelines.' At one stage, they were talking about just having an agreement between themselves, and we said, 'That's fine but, if you do a deal with someone else, we want to be in on it.' We are offering them our best deal; we want them to include us in their best deal.

Senator BARTLETT—So the PICTA in isolation would just be the 14 countries in their own self-contained free trade agreement, and the purpose of the PACER is that, if that bloc of 14 then wants to do a free trade deal with Japan or whomever, we are not automatically in it but they have to at least talk to us.

Mr Fletcher—Yes.

Senator BARTLETT—We have someone here from AusAID, I noted. Does this have any impact in terms of our aid relationship with Pacific island countries?

Mr O'Dowd—The actual PICTA would not, I do not think, unless the countries concerned actually requested assistance of us in the form of studies of one kind or another to assess impacts or something. At this stage, there is very little of that. Most of the aid impact would be through the forum secretariat, which we fund, and they run a number of these studies. Sometimes they ask us for assistance, but at this stage we have not had anything.

Senator BARTLETT—In terms of the linkage with this particular agreement we are looking at today, does AusAID provide some funding for some sort of secretariat to oversee all this trade stuff amongst the Pacific island countries?

Mr O'Dowd—We have had a program of $3 million a year for the last three years. We have a triennial agreement—which is, incidentally, due for renegotiation this year. We provide $3 million a year to the forum secretariat. They have three divisions within the secretariat, including the trade and investment division. The trade and investment division basically has an oversight role. In the negotiations we have had with them we have agreed that substantial amounts of the funds that have been going into this area should be earmarked for those purposes.

Senator BARTLETT—Is there any enforcement mechanism within this, if the Pacific island countries start developing a free trade agreement with Japan or somewhere and then tell us to go away when we talk to them?

Mr Fletcher—No; and we do not think that is necessary.

Senator BARTLETT—The 'trigger'—if I can use that word—appears to be the forum island countries seeking to negotiate a free trade agreement with another country with a GDP higher than the lowest GDP of a developed forum member. The developed forum members are Australia and New Zealand?

Mr Fletcher—New Zealand at the present has a lower GDP than us; yes. That definition was arrived at in finding a definition of a richer country than us. In the course of time the GDP of countries like South Korea or Singapore may change relative to New Zealand. I am not sure where they are at the moment relative to each other. The idea was that a country better of than Australia or New Zealand should not get a better deal with the island countries than we currently enjoy, given that the two of us already offer them free trade into our own markets.

Senator BARTLETT—So if it were a free trade agreement they were trying to negotiate with the Congo or somewhere, that would not trigger this?

Mr Fletcher—No.

Mr ADAMS—Can you tell us something about the impact of free trade on the economies of the island states? Has that been looked at?

Mr Fletcher—Yes. A number of studies were done over the past few years when people were thinking about moving towards a free trade agreement between the island countries. Each of the studies identified that there was not a great deal to be gained for the island countries; many of the economies are quite similar. If they were going to go down the path of trade liberalisation it was probably easier for them to do it among themselves than to do it to all comers; so that was one of the factors that led them to go down this track. There will be transitional costs, whatever type of arrangement they enter into. I think the studies showed that general liberalisation would yield the greatest benefits but also the greatest transitional costs. Therefore they have gone for a 'suck it and see', 'easy as we go' type of approach.

Mr ADAMS—That sounds like WTO rhetoric to me: 'There is going to be some pain but there is a great deal of pluses in it. But we have not been able to define the pluses yet.' We are still waiting for that from the WTO, as well. I will just ask about the tariffs that presently apply. Does each country have its own tariff regime?

Mr Fletcher—Yes.

Mr ADAMS—Do they charge us tariffs on anything?

Mr Fletcher—Yes.

Mr ADAMS—They charge us, but we give them free entry—

Mr Fletcher—Yes.

Mr ADAMS—as a part of our goodwill to them, our aid and our relationship with them?

Mr Fletcher—Rather than giving aid, it is better to get them developing their own jobs.

Mr ADAMS—Yes.

Mr Fletcher—We do give them aid as well but, as part and parcel or our close relationships with them, we have offered them free trade for a long time.

Mr ADAMS—The FIC secretariat is a body?

Mr Fletcher—Yes.

Mr ADAMS—They meet regularly, annually, don't they?

Mr Fletcher—The forum countries meet at head of government level every year, and there are a number of other ministerial meetings subsidiary to that. The secretariat sits in Suva all the time and prepares—

Mr ADAMS—In Suva?

Mr Fletcher—Yes.

Mr ADAMS—Thank you very much.

CHAIR—Could you explain to us the rationale for the point that Senator Bartlett made about GDP and developing countries? If the FICs begin negotiations for a free trade agreement with other developing countries, they are required to consult with Australia and New Zealand but, if they are negotiating with other developing countries or lesser developed countries or non-forum countries, they do not have to contact Australia and New Zealand in relation to that. Can you explain that?

Mr Fletcher—The rationale for the difference between those external players was to say that if the island countries wanted to negotiate reciprocal arrangements with other developing countries who were poorer than Australia and New Zealand—such as the Congo—that would not bother us too much; but if they were to do that with a country that we regarded as a competitor then it would bother us.

CHAIR—And the criterion is GDP?

Mr Fletcher—Yes. With countries like the Belgian Congo there is one extra point.

Mr Dirnberger—There is one exception to the rule, such that we would not negotiate if forum island countries negotiated with a developing country or a least developed country, and that is in case the forum island countries negotiate as a group. If all the 14 forum island countries negotiate with the Congo, then those forum island countries would be under an obligation to offer us consultations with a view to negotiating a free trade agreement.

CHAIR—Why is that?

Mr Dirnberger—If forum island countries negotiate as a group, much higher trade is involved, and we have got more to lose vis-a-vis other countries, if they all negotiate as a group—in other words, if all those 14 countries do that. If they do it individually, fine: most probably we have not got a problem with that.

CHAIR—What if they do it in groups of two or three or five or 10?

Mr Dirnberger—That would not come under that exception. They would have to do that as a group, as 14 countries, as a whole. If Samoa and the Cook Islands negotiate with the Congo, then they would not be under an obligation to consult with us. Only after they have negotiated the agreement with the Congo would they have to tell us they have negotiated and say, ‘Would you like to negotiate with us?’

CHAIR—What if not all 14 ratify this?

Mr Dirnberger—It is not to do with ratification; it has to do with entering into negotiations.

CHAIR—So it will not matter whether only seven of the forum island countries ratify this, for example: the trigger of all 14 collectively negotiating remains in place?

Mr Dirnberger—Yes; as long as the PACER itself has entered into force—in other words, as long as the seven have ratified.

CHAIR—From your analysis, do you think there is any downside in this agreement, for the forum island countries?

Mr Fletcher—No. We consider that trade liberalisation is in their interests and ours.

CHAIR—Are there any other features of this treaty that you believe should be brought to the attention of the committee?

Mr Fletcher—No; I think it is reasonably straightforward, although complicated in a couple of minor aspects that we have discussed.

CHAIR—As there are no other questions, we thank you, gentlemen, for your time this morning.

[9.34 a.m.]

Status of Australian Forces Agreement with the Kyrgyz Republic

CARR, Wing Commander Dean Stanley, SO1 Air Operations (AIROPS1), Strategic Command Division, Department of Defence

DIETRICH, Captain Edwin Stewart, Director of Joint Operations (DJOPS), Strategic Command Division, Department of Defence

MIZEN, Ms Nicola, Director, Europe, Middle East, South Asia, Rest of the World, Strategic and International Policy Division, Department of Defence

WISHART, Mr John Maxwell, Acting Director, Agreements, Defence Legal Service, Department of Defence

SPILLANE, Ms Shennia Maree, Executive Officer, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law Branch, Office of International Law, Attorney-General's Department

CHAIR—We will continue with the second treaty. I have called for witnesses from the Department of Defence, the Department of Foreign Affairs and Trade and the Attorney-General's Department to give evidence in relation to the agreement with the Kyrgyz Republic concerning the status of Australian forces in the Kyrgyz Republic.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would one of you like to make some introductory remarks and perhaps take us to the map, before we proceed to questions?

Mr Wishart—I will make a few introductory comments, Ms Mizen will speak to some general policy and then Captain Dietrich will take you through the map. The necessity for this agreement arose out of the deployment of our forces to Kyrgystan. It is Australian policy to enter into SOFA foresight provisions for any deployment of Australian Defence Force personnel overseas. In this case, the Kyrgyz Republic also required a status of forces agreement to be entered into before they would permit the deployment to take place. The nature of the deployment at this time is to supply air-to-air refuelling services to US and to French aircraft operating out of Manas International Airport.

I do not propose to go through all the contents of the national interest analysis, as it provides sufficient coverage, I understand. However, this agreement has, as I have said, been negotiated pursuant to normal Australian policy to ensure that our personnel have appropriate protection while overseas. Status of forces agreements are an internationally recognised means of providing for a country's military forces when visiting a host country. Australian policy is directed to seeking appropriate status of forces coverage for Australian defence personnel deployed overseas. We believe this agreement does that. I will now hand over to Ms Mizen to speak briefly.

Ms Mizen—As you will be aware, following the terrorist attacks of 11 September the government committed to providing all necessary assistance to support the US response to the attacks and also made a commitment to work with the US to combat international terrorism. As an alliance partner, the government decided, in consultation with the United States, that article IV of the ANZUS Treaty applied to the terrorist attacks on the United States. The government's responses included steps to strengthen our domestic counter-terrorism response, financial measures to freeze the funds of terrorist groups, humanitarian aid to Afghanistan and the contribution of military force elements to the US-led coalition operations against terrorism.

The ADF elements that have deployed in support of the coalition operations include a special forces detachment; a naval task group, comprising one amphibious command ship and two frigates; four F18 aircraft; and two tanker aircraft to provide air-to-air refuelling, currently deployed to Manas air base, Kyrgystan.

Defence 2000: Our Future Defence Force, or the 2000 white paper, identifies the US as Australia's single most important strategic relationship, supporting our defence capability and regional security as well as providing mutual undertakings to support each other in time of need. The white paper reflects that our undertakings to support the US are as important as those of the US to support Australia, given our strong interest in sustaining a strong US security presence in the Asia-Pacific region.

In a joint statement, released the day before the attacks, to commemorate the 50th anniversary of ANZUS, the US President and the Prime Minister reaffirmed the strength and vitality of the bilateral relationship between the United States and Australia and expressed their conviction that the alliance had been a pillar of stability in the Asia-Pacific region and had made an essential contribution to global peace and security over the past half century. The white paper and the joint statement both reflect the continued relevance of the alliance, both to Australia's security posture and to the security of our region. Australia's contributions to the US-led operations against terrorism are the embodiment of our undertaking as an alliance partner and support the benefits that we receive as an alliance partner.

Central Asia has not usually been recognised as being of strong relevance to Australia's security interests. However, in support of the US-led coalition operations against terrorism, Australia has agreed to deploy the 707 contingent, including the commitment of force elements to Kyrgyzstan to provide air-to-air refuelling services for coalition aircraft. The government of the Kyrgyz Republic advised that the status of forces agreement was a precondition to the ADF deployment and, indeed, was a requirement of all coalition members wishing to operate out of Kyrgyzstan.

Capt. Dietrich—Madam Chair, before I start, I have some smaller maps which will save the committee time. As indicated in the national interest analysis, the treaty with the Kyrgyz Republic is sought to formally establish conditions for the RAAF detachment operating at Manas airfield in Kyrgzstan. Manas airfield is indicated on that small map that you were provided with—as you can see, it is right at the top northern end of Kyrgzstan. Our detachment there consists of two RAAF 707 air-to-air refuelling aircraft and about 70 personnel. Also at Manas airfield is a single RAAF officer, performing the duties of the operations group commander at the coalition airfield headquarters. He is a separate part of the force that is there with the 707s but will also be subject to the SOFA.

Mr ADAMS—What rank is he?

Capt. Dietrich—He is a group captain in the Air Force. The air-to-air refuelling detachment represents Australia's contribution to the coalition air campaign for the war against terrorism in Afghanistan—although, for completeness, it should be noted that Australia has also provided FA18 fighters for the air defence of Diego Garcia. The air-to-air refuelling tanker aircraft extend the endurance of the fighter aircraft that are providing close air support to the ground forces in Afghanistan. Our aircraft are operating in very challenging weather conditions but have performed well so far. The conditions at the airfield are primitive, to say the least—the personnel were initially in tents. Despite these austere conditions, our airmen and airwomen are doing well and their morale is high as they take on the challenge of conducting real combat support operations in what is a very complex and unfamiliar environment for the RAAF.

The Australian tanker aircraft that are operating out of Manas are fitted with what are called drogue refuelling systems and have provided fuel to French Mirage 2000 fighters and to US Marine Corps FA18 fighters, which are similar to the F18s flown by the RAAF. The photos provided show you the drogue refuelling taking place with our aircraft, and there are individual photos of the French Mirage 2000 and the US Marine Corps F18s. The first 707 aircraft arrived at Manas on 27 March this year and the second aircraft arrived on 26 April. It is planned that this deployment will be for approximately six months duration, with the aircraft and detachment rotating out around September or October this year. We expect that the single ops group commander, who is also at Manas, will come out at about the same time. Exact timings are a matter of negotiation with the US and other coalition partners. That completes my statement.

CHAIR—Thank you. You said that the deployment is for six months duration. And in another six months?

Capt. Dietrich—At this stage the government does not intend to replace those aircraft. They will return to Australia. At that stage we will be reviewing how the campaign against terrorism is proceeding, and the government will decide where it wants to go from there.

CHAIR—Mr Wishart, what is the life of this agreement?

Mr Wishart—The agreement is initially in force for a year and then it just carries on; so it will be able to cover any future deployments that we make.

CHAIR—What do you mean by 'it just carries on'?

Mr Wishart—It just continues in force.

CHAIR—And it does not need any further action by either party?

Mr Wishart—No.

CHAIR—So it continues in force indefinitely?

Mr Wishart—Yes.

CHAIR—You have said that the terms of the agreement are consistent with terms that we typically seek in an operational status of forces agreement. Is there anything different about this agreement, anything unique—anything you should bring to the attention of the committee?

Mr Wishart—Not in that sense. There is nothing unique: as I said, the terms are those that we would normally seek. It is not as comprehensive as some of the SOFAs that we have entered into, simply by the nature of the deployment.

Mr WILKIE—I understand that the ADF personnel would be subject to Australian criminal jurisdiction. What other kinds of privileges and immunities would be acceded to Australian defence personnel under the terms of the agreement?

Mr Wishart—As the NIA outlines, they are there as administrative and technical staff under the Vienna Convention on Diplomatic Relations, so they are not liable to any form of arrest or detention. The Kyrgyz Republic treat them with due respect and take all appropriate steps to prevent any attack on their personal freedom or dignity. They are immune from criminal jurisdiction, as you have pointed out. They have certain immunities from civil jurisdiction. There is an exemption from most taxes, particularly taxes on their personal salaries. They are not liable for compulsory military service in the Kyrgyz Republic, and also there is exemption from certain customary—

Mr WILKIE—I was actually thinking of areas other than those covered in the national interest analysis.

Mr Wishart—No; the document is complete in itself.

Mr ADAMS—The defence act?

Mr Wishart—Yes, they remain subject to the Defence Force Discipline Act at all times.

Senator BARTLETT—Without, obviously, in any way suggesting that it is likely, what happens if Australian personnel breach local law in some way?

Mr Wishart—It depends on the nature of the breach. If it is a criminal matter, then we would have jurisdiction. If it is a civil matter, then primary jurisdiction would probably lie with the Kyrgyz Republic.

Mr ADAMS—What does that mean? If we smash up a bar and pinch the till, is that criminal—stealing, thieving?

Mr Wishart—Unfortunately, I am not all that familiar with Kyrgyz law. I would assume, if it were anything like Australian law, that would be criminal.

Mr ADAMS—So a traffic offence is civil?

Mr Wishart—A traffic offence in Australian law is civil. Again, I am not aware of what the Kyrgyz law is.

CHAIR—Mr Trindade, do you have a comment as a legal expert?

Mr Trindade—I think it is possible it could be criminal in some jurisdictions. In the United States, a lot of road traffic offences are criminal offences. I understand the agreement intends to apply similar privileges and immunities to those enjoyed by administrative and technical staff in diplomatic missions overseas. In those situations, there are provisions for waiver of immunity in minor traffic offences and matters of that kind. In fact, it is quite common for the government to waive the immunity of administrative and technical staff at foreign missions to allow them to appear before local courts and to be fined for traffic offences and things like that.

Mr ADAMS—But you do not know if this is the case under this treaty?

Mr Trindade—If it is the same level of privileges and immunities as applies to administrative and technical staff then it would involve the same issues about the ability to waive immunity.

Mr ADAMS—Are you going to find that out and let us know?

Mr Trindade—I certainly can.

Senator BARTLETT—From what you are saying, we already have air force personnel deployed; so is this agreement retrospective to cover them from when they are deployed?

Mr Wishart—Pursuant to the terms of agreement, it is actually in effect as an arrangement, pending entry into force, so that both sides are observing the terms of the agreement as a non-legally-binding arrangement at this time.

Senator BARTLETT—So it does not specifically link just to activities relating to Afghanistan or the aspect of the war on terrorism in Afghanistan; it could be strategically useful—for example, if there were a conflict in Iraq, which is being talked about. Could this be the case?

Mr Wishart—The agreement's phrase is 'in connection with cooperative efforts in response to terrorism, humanitarian assistance and other agreed activities', so it is not specifically linked to current operations in Afghanistan.

Senator BARTLETT—So it could be extended or used, if it were felt to be appropriate, if Australia were to get involved in any activity in Iraq, for example?

Mr Wishart—There are two aspects there: it would have to be, as you said, appropriate but it would also have to be at the agreement of the Kyrgyz Republic.

Senator BARTLETT—They would have to agree to what we are using?

Mr Wishart—Yes. Just because the SOFA is in effect does not mean that we can just go there—

Senator BARTLETT—We do not have open rein to just drop in and go and bomb people from wherever we like?

Mr Wishart—No.

Senator BARTLETT—Not that these are bombers anyway, are they?

Mr Wishart—No.

Capt. Dietrich —We could operate elsewhere if there were a need, but that would be with the agreement of the Kyrgyzs. To clarify: we are not providing combat aircraft—the tankers are combat support.

Senator BARTLETT—I noticed that in her opening comments Ms Mizen talked a bit about ANZUS and things like that. Has this got anything to do with ANZUS?

Ms Mizen—It has in the sense that the 707s are part of the government's commitment to supporting the US coalition operations against terrorism and that is their primary reason for deploying to Kyrgyzstan. At the very highest level of policy, the government invoked the ANZUS Treaty as a demonstration of its commitment to supporting the US, and these force elements are the tangible embodiment of that commitment.

Senator BARTLETT—This question is probably slightly off tangent, so I do not want to go into it too far: does ANZUS apply to Australia and the US cooperating to attack other countries in the Middle East? I thought it was for regional protection.

Ms Mizen—The way that ANZUS applies is that we recognised that the attacks on the US mainland, metropolitan territory on 11 September constituted an attack on Australia by the terms of the ANZUS Treaty. In response to that, we have committed force elements. The invocation of ANZUS and the fact that we have deployed to Kyrgyzstan are not directly linked; however, they are linked in that this is how we have gone about embodying our policy response.

Senator BARTLETT—With any of these sorts of things, the other question I normally ask is: what is the problem if we do not agree to it? Given that we are already in there anyway, what would be the outcome if we did not adopt this?

Mr Wishart—The Kyrgyz Republic have already advised us that they have completed all their internal procedures to bring it into force. If we do not now enter it into force, the ultimate would be that they ask us to leave.

Senator BARTLETT—That sounds straightforward. I have a final question. In terms of the criminal jurisdiction, it says in the national interest analysis and presumably in the treaty itself:

Australian personnel shall not be surrendered or transferred to an international tribunal, other entity or state without the express consent of the Australian Government.

Is that consistent with the agreements we are looking to enter into under the International Criminal Court statute? Does anyone know?

Ms Spillane—Yes, it is. To provide some background as to why that provision is in there: when the Kyrgyz Republic asked all the coalition partners to enter into an agreement, there was a standard agreement to ensure that all coalition partners would have a similarly worded set of conditions, status of forces, for their deployment in the Kyrgyz Republic. Some of the coalition partners—in particular, the United States—wanted a provision like that in there. We were satisfied that that issue was looked at, and we are satisfied that that provision is entirely consistent with the Rome Statute of the International Criminal Court. Other coalition partners who are already parties to the Rome statute have also signed on to a status of forces agreement in similar terms.

CHAIR—How would you enforce that provision?

Ms Spillane—Australia would take jurisdiction over any person who committed criminal acts. That and how Australia chooses to exercise its jurisdiction are already provided for in the SOFA.

CHAIR—If they surrendered or were transferred without consent, is there any provision for that?

Ms Spillane—That is the point of putting the provision in the status of forces agreement.

CHAIR—The US's concern has been across the board, not just with this. I understand that the US has agreed to this.

Ms Spillane—Yes.

CHAIR—The US has a similar status of forces agreement. How would you go about enforcing that provision?

Ms Spillane—You would enforce it by signing an agreement with the government of the Kyrgyz Republic whereby they would undertake not to hand over without consent. That is the point of having the provision in there.

Capt. Dietrich—From a practical military point of view, if you thought that one of your servicemen was involved in some kind of offence where there would be serious consequences

and that there was going to be an argument over where he ended up, you would probably get him out of the country as soon as possible, and then negotiate whether or not you were going to hand him over.

CHAIR—From here?

Capt. Dietrich—Yes. Then, if it turned to custard and they threw us out, our serviceman would not be facing a death penalty in Kyrgyz.

Senator BARTLETT—Do they have the death penalty there?

Capt. Dietrich—I am not sure.

CHAIR—You would not want to find out.

Mr WILKIE—Obviously this agreement covers the use of their bases but, given that we have a refuelling aircraft, does it also cover whether we have a separate agreement with another country for the use of that aircraft in refuelling, using their airspace? If you have a refuelling aircraft, you have to refuel the aircraft somewhere. Do they refuel over Afghanistan, or do we have a neutral country where they do that?

Capt. Dietrich—They are refuelling generally over Afghanistan. We have overflight agreements either agreed to or in the process of being agreed to with a number of other countries in the region which give us that flexibility.

Mr Wishart—I will just clarify that. Those agreements involve diplomatic clearances. These are clearances obtained through the Department of Foreign Affairs and Trade from the authorities of the host country, if you like—that is, the country that has the air rights. We just have a right to fly through the country.

Capt. Dietrich—Yes. It is the standard flight diplomatic clearance process.

Mr ADAMS—What other treaties do we have with this republic?

Ms Spillane—I cannot tell you off the top of my head. We can look into that and let you know.

Mr ADAMS—Do you know how long this republic has existed?

Ms Spillane—Since the demise of the Soviet Union. I could not give you an exact date, but it would date from 1991.

Mr ADAMS—What sort of government is it? Does a democratic government exist there? A parliament?

Ms Spillane—I believe they are a democratically elected government. Again, I do not have the full details, but we can give you some information on that.

Mr ADAMS—That would be good. I take it that we are refuelling US planes?

Capt. Dietrich—US and French.

Mr ADAMS—And we have no combat aircraft, no F18s, there?

Capt. Dietrich—Our F18s are at Diego Garcia.

Mr ADAMS—Would this agreement be used in other actions outside Afghanistan, with the same arrangements? Would our refuelling planes refuel other planes that were attacking or targeting action other than in Afghanistan?

Capt. Dietrich—Conceivably, yes. But, as Mr Wishart pointed out, an element of the Kyrgyz agreement is that, if we bring our planes to operate out of their base, they have a right to know what we are doing, and they have the option of asking us not to and asking us to leave.

Mr ADAMS—Is that part of the detail of the treaty—that they know what we are doing? If we change operational procedure, they have a right to say, 'No, we do not agree with that. Our support for this treaty, the use for the base et cetera has changed.'

Mr Wishart—As the host nation, they always have the right to know what we are doing. At the moment we are there, with their knowledge, for operations in Afghanistan as part of the international war against terrorism. If that were to change, we would have to consult with the Kyrgyz Republic.

Mr ADAMS—Thank you. Ms Mizen, you said 'benefits gained to us'. I take it you were talking about ANZUS in that context?

Ms Mizen—At the level of the broader, bilateral defence relationship we have with the United States, yes.

Mr ADAMS—Thank you.

CHAIR—Finally, I am sure this is a standard clause, but on the point about the Australian government paying, in accordance with Australian law, fair and reasonable compensation in the settlement of meritorious claims, do you ever come into dispute with the other party when the Australian government determines what is fair and reasonable? How is that resolved?

Mr Wishart—It is resolved by negotiation. There are a number of different ways that a SOFA handles settlement claims. A frequent one is a 75 to 25 percent split where the host nation, if it has responsibility for resolution of claims, is liable for 25 per cent. In this case, we have been able to negotiate so that claims will be dealt with under Australian law, and we will deal with them on a fair and reasonable basis. If the Kyrgyz Republic does not believe it is fair or reasonable, they have a right to negotiate.

CHAIR—So there are different standard clauses?

Mr Wishart—Yes, it depends on the nature of the SOFA. That is the clause used in this SOFA.

CHAIR—How are they determined? It just says, 'as determined by the Australian government'. How is that actually done?

Mr Wishart—It will depend on the nature of the claim. If it goes before a court then, of course, the court determines it. If it is under the level that would go to court, it would be determined in a fair and reasonable way.

CHAIR—The court proceedings would be in Australia—

Mr Wishart—Yes.

CHAIR—with potentially a national from the Kyrgyz Republic? No?

Mr Wishart—I am not sure. I understand there are procedures whereby witnesses can make statements in their home territories and they can be admitted to our court, but I will defer to our colleague from the Attorney-General's Department.

Mr ADAMS—You get into who pays for witnesses and so on—it is complex.

CHAIR—Nobody has anything further to add in relation to how that clause is actually enforced?

Mr Atwood—What we have heard is the approach that would be adopted in the sense that, if a third party in Kyrgystan suffered injury to their property, for example, as a result of a stray bullet or a bomb—and it was a claim against the Australian government—that claim would be determined by an Australian court, according to the usual processes and procedures.

CHAIR—It is interesting that you would be assessing a claim back here for something that occurred over there. I am thinking of the taking of evidence and the like.

Mr Wishart—It is our normal policy in these types of agreements to ensure that there is some control over how claims are handled and settled. We do not want to put ourselves in a position where we have open liability. As my colleague Ms Spillane has said, this was a standard or generic SOFA presented to all the parties, and that was the clause that was in the original treaty. As it was in our interest, we kept it in.

CHAIR—How many parties have entered into similar agreements?

Wing Cmdr Carr—I have a list of countries that are operating there. I could not tell you whether all have entered into SOFAs, but I would say it is most likely that they have.

Mr Wishart—The Kyrgyz Republic made it a requirement for all countries to have entered into a SOFA before those countries actually deployed. Which are the countries?

Wing Cmdr Carr—France, the United States, Norway, Spain. Britain is not there yet.

CHAIR—They are not physically there yet, or they have not signed the agreement yet?

Wing Cmdr Carr—They are not physically there. We have Spain, France, Norway and the US.

Mr Wishart—Of course, we are not in a position to say whether those treaties are in force yet. They might well be.

Mr ADAMS—There is a lot of diplomacy.

Mr WILKIE—This is the first one to come before the committee. Are we likely to get more of these agreements coming before us?

Mr Wishart—There are negotiations currently going on with Kuwait, but it will depend on the nature of the government's future commitments. These agreements tend to arise in a hurry, because they cover an operational aspect. That really is in the government's purview. At this time we have no advance warning of what their future deployments will be.

CHAIR—We currently have, apparently, a number of these agreements in the Pacific. Is this the only one outside the Pacific area, generally speaking? I am just looking at the national interest analysis, paragraph 10.

Mr Wishart—This is the only one which you would say is outside our region. The others are with the United States, Papua New Guinea, Singapore and Malaysia. And there is one which has been signed in New Zealand which has already been before this committee; we are just waiting for New Zealand to complete its domestic procedures to bring it into force. This is certainly the first agreement of this type that we have negotiated with a country outside our region.

Mr ADAMS—Thank you for the pictures—very handy.

Capt. Dietrich—I can provide some other information that Mr Adams was seeking before about the Kyrgyz Republic. It gained its independence on 31 August 1991. It is a republic. The head of government is the Prime Minister. It has a cabinet, which consists of ministers appointed by the President on the recommendation of the Prime Minister. It holds elections for a president elected by a popular vote for a five-year term. The elections were last held on 29 October 2000 and are due in November or December of 2005. The Prime Minister is appointed by the President. Does that cover your inquiry?

Mr ADAMS—Great democracy.

CHAIR—Thank you for your time, ladies and gentlemen, and for coming in a little early. We appreciate it. Do we keep the pictures?

Capt. Dietrich—You may if you wish.

CHAIR—Thank you. We will move on to the next treaty if the relevant witnesses are present. We are running about 20 minutes early.

[10.07 a.m.]

Amendments to the Agreement Establishing a System for the Development of Joint Food Standards

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law Branch, Office of International Law, Attorney-General's Department

FLINT, Ms Michele, Acting Director, Food Policy, Department of Health and Ageing

SMITH, Ms Carolyn, Acting Assistant Secretary, Preventive Services and Food Policy Branch, Department of Health and Ageing

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—I call witnesses from the Department of Health and Ageing to give evidence relating to the exchange of letters with New Zealand amending the Agreement Establishing a System for the Development of Joint Food Standards. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do either of you want to make some introductory remarks before we proceed to questions?

Ms C. Smith—Yes, please. Good morning, committee members and interested members of the public. On 5 July 1996, the Agreement between the Government of Australia and the Government of New Zealand Establishing A System for the Development of Joint Food Standards entered into force. The agreement created a trans-Tasman market for food products based on mutual recognition, with the food standards of both countries to be harmonised over time and a common set of food standards to be developed. Australia and New Zealand entered the agreement as part of the their commitment to a closer economic relationship and to reduce unnecessary barriers to trade, to adopt a joint system for the development and promulgation of food standards, to provide for the timely development and adoption of food standards appropriate for both member states and to facilitate the sharing of information on matters relating to food.

Since the commencement of the agreement, two events have occurred that necessitate changes to the agreement. These are the development by the Council of Australian Governments Senior Officials Working Group on Food Regulation of a package of food regulatory reforms that were agreed to by all Australian states and territories under the intergovernmental Food Regulation Agreement 2000, and a review of the effectiveness of the Australia New Zealand food standards system established by the agreement. The amended agreement will be known as the Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System.

The amendments did not go to the scope of the agreement; that is, to the types of food standards that are to be jointly developed and adopted in accordance with the Australia New Zealand Food Standards system established by the agreement. They also do not affect the arrangement whereby Australia and New Zealand will each adopt the joint Food Standards Code developed under the Australia New Zealand Food Standards system as the sole code of each country. On 27 September 2001 Dr Wooldridge, the former Minister for Health and Family Services, initiated an exchange of letters with New Zealand, setting out the changes to the Australia New Zealand Food Standards Treaty. New Zealand signed the reciprocal letter on 21 October 2001.

The commencement of the amendments to the agreement will also be the trigger for the commencement of the Australia New Zealand Food Authority Amendment Act 2001, otherwise known as the ANZFA Amendment Act. Commencement of the ANZFA Amendment Act will give full effect to the reforms that were agreed to under the COAG Food Regulation Agreement 2000. The key aspects are establishing a new statutory authority, Food Standards Australia New Zealand, to replace the Australia New Zealand Food Authority; and establishing a new standards development process that reflects the agreed role of the future Australia New Zealand Food Regulation Ministerial Council.

A central theme in negotiating treaty amendments between Australia and New Zealand was that there be no diminution of New Zealand's influence in the governance of the food regulation system. Specific amendments related to this include that: New Zealand will be entitled to directly nominate three members to the board of FSANZ; any future amendments to the treaty, the ANZFA or FSANZ acts or the Food Regulation Agreement 2000 must also maintain New Zealand's level of influence in the system; Australia must consult with, and use its best endeavours to reach agreement with, New Zealand on the development of any future amendments to relevant Australian legislation, with a similar obligation on New Zealand; New Zealand will be entitled to be represented on any committee established by the Food Regulation Ministerial Council or standing committee; and the Food Regulation Ministerial Council will be required to request FSANZ to review a food standard if the New Zealand minister notifies the council that New Zealand has concerns regarding such matters as health, safety, trade, environmental or cultural factors.

In summary, the proposed amendments reflect the new method of development and approval of food standards to be adopted in Australia and New Zealand; incorporate all changes to the agreement that were recommended by the review of the agreement; specify some changes made at the request of New Zealand that ensure that its role in the changing arrangements is not diminished; make some minor changes that clarify the procedure whereby Australia and New Zealand will adopt the new joint code that was adopted by the Ministerial Council in November 2000; recognise nonregulatory measures, such as guidelines and codes of practice, as part of the Australia New Zealand Food Standards system that is established by the agreement; make provisions to ensure that Australia and New Zealand consult regarding future amendments to the ANZFA Act or its successor and the New Zealand Food Act; and acknowledge that Australia and New Zealand need only adopt food standards developed under the system without undue delay rather than on the same date. These treaty amendments are a critical step in moving to full implementation of the COAG food regulatory reforms. The amendments also demonstrate the continuing close relationship between Australia and New Zealand in this important area of regulatory activity.

CHAIR—I take it that if the agreement is not amended in the way specified there are a number of consequences. These include, firstly, Australia not being able to proceed to implement the new COAG arrangements. Secondly, the Australia government would not be meeting its obligation to New Zealand in relation to adopting food standards in accordance with the new food regulatory system. Thirdly, the Commonwealth would not be acting in accordance with COAG, who are of the understanding that New Zealand will adopt food standards developed jointly with Australia. Fourthly, the recommendations of the review of the agreement would not be addressed. Are they the four consequences?

Ms C. Smith—That is correct.

CHAIR—What were the main findings of the review, and are you satisfied that the recommendations address the issues raised in the review?

Ms C. Smith—The review was done in 1999, when the system had only been in operation for around three years, so it did concentrate on operational effectiveness rather than being a more fundamental review. The sorts of issues that were raised have been implemented in the current set of amendments. The treaty as drafted concentrated on changes only to standards. It is recognised that in a food standards system you might want to have codes of practice and guidelines to underpin the standards, and that had not been reflected in the treaty; so that is one amendment that has been included.

Mr ADAMS—Can you say that again, please?

Ms C. Smith—The food standards code is the legal mechanism by which those obligations are imposed on the food industry, but sometimes those legal requirements are backed up by codes of practice that give detail to the industry on how they can comply with the regulations. The treaty, as it was drafted, only talked about common food standards; it did not talk about cooperation in the subsidiary documents, such as codes of practice.

Mr ADAMS—So we do not get down to fire blight—importing apples into Australia from New Zealand?

Ms C. Smith—Fire blight is actually a quarantine issue, not a food standards issue.

Mr ADAMS—And they are not touched by this treaty at all?

Ms C. Smith—No.

CHAIR—Are there any other findings of the review that are being addressed in the proposed amendments?

Ms C. Smith—There were other recommendations relating to the need for consultation to occur, regarding both the Food Act in New Zealand and the Australia New Zealand Food Authority Act in Australia. There were also some technical issues that had been appreciated about the joint food standards code and how it would actually take legal effect. When the treaty was signed in 1995, that was before the code had actually been developed and agreed. When ministers actually agreed to the code, they recognised that there needed to be transitional

provisions—that you could not just have the old code disappearing overnight and the new code taking effect, but you actually needed to have a period where both could operate together. The way the treaty was drafted did not recognise that there would be that transitional arrangement. So there were quite mechanical changes in that area.

CHAIR—Were these recommendations that would have led to the amendment of the agreement in any event, or is it only the imperative of the other three outcomes that has led to the amendments following on from the review?

Ms C. Smith—When the review was concluded, the COAG process was already going through its processes, and they realised that changes to the treaty would be required for that purpose. So it was decided that any changes recommended as a result of the review would be implemented at that time.

Mr WILKIE—Do the proposed amendments offer any negative impacts on food industry businesses, such as the cheese industry?

Ms C. Smith—The changes do not alter the fundamentals of the system that we have with New Zealand. We have a system where we have agreed to have a joint food standards code for both countries, and both Australian and New Zealand stakeholders have full participation in the system. FSANZ, as it will be known, has a very inclusive process—two rounds of stakeholder comment—and none of those fundamentals are changed by these amendments.

Mr WILKIE—Out of curiosity, who actually enforces the regulations on the industry?

Ms C. Smith—They are enforced by the states and territories.

Mr WILKIE—What if there is a regulation that is not being met across Australia: is it Australia's responsibility to actually deal with that business?

Ms C. Smith—Enforcement activity tends to be taken by the state in which the business is located—it is sort of a home state rule. If there are cases across the country of flagrant breaches, there are mechanisms by which all the enforcement officials get together and discuss what sort of coordinated action can be taken.

Mr WILKIE—Would that include food labelling?

Ms C. Smith—Yes, it does. There is a new committee under the reforms called the Development and Implementation Subcommittee. That is trying to drive a more strategic and coordinated approach to enforcement.

Mr WILKIE—What action could they take, though? I have had an instance where someone has not been complying with their labelling, but no action has been taken against them because it has been too difficult. At least that is the argument that has been put to me.

Ms C. Smith—The first port of call is actually to go and talk to their state or territory enforcement officials.

Mr ADAMS—Who does that: a federal government body?

Ms C. Smith—No, it is not a federal government body. It is a state government body—the department of health in each state and territory.

Mr ADAMS—But, if they are not operating and that state's department just does not see a need to become involved in it, what happens then?

Ms C. Smith—I suppose you can draw it to the attention of the relevant minister but, ultimately, it is the jurisdiction of the state and territory governments and they decide what enforcement action will be taken.

Mr ADAMS—And what contribution have they had to this treaty?

Ms C. Smith—This treaty is implementing the COAG reforms, and the states and territories were key parts of that process.

Mr ADAMS—So the officials from the states have all been part of the consultation process of establishing this treaty?

Ms C. Smith—Yes.

Mr ADAMS—So they all have a commitment to it?

Ms C. Smith—Yes. COAG agreed to the package of reforms in November 2000 and we are hoping to get to full implementation on 1 July.

Mr ADAMS—Have you done any public relations in relation to this, telling the public that this is occurring, that we are harmonising our food regulations with New Zealand?

Ms C. Smith—The Australia and New Zealand Food Authority does quite a lot of communication and publication. They have a regular newsletter. They hold forums with all their stakeholder groups. The department of health has also been putting material up on the web site and communicating with stakeholder groups.

Mr ADAMS—But not the general public.

Ms C. Smith—ANZFA's process, as I said before, is very open. There are two rounds of public comment. The new joint code was developed over a period of several years, and I am aware that they received submissions from a wide range of groups including members of the general public.

Mr ADAMS—Consumer groups in Australia, public health associations?

Ms C. Smith—Yes.

Mr WILKIE—I think we talked about the cheese industry—no impact there or limited impact. What about Tasmanian salmon? Are they affected by this agreement?

Ms C. Smith—I think the issues to do with Tasmanian salmon have also been a quarantine issue.

Mr WILKIE—Okay. Thank you.

Mr ADAMS—Did COAG look at the opportunity for improving the health of Australians and New Zealanders when this agreement was put together?

Ms C. Smith—When the COAG agreement was put together, improving public health and safety was a key objective of the reforms. One issue that is actually not covered by this treaty but is covered by the COAG reforms is that for the first time primary production standards will be brought within the responsibility of ANZFA or FSANZ. That is not covered under the treaty, because New Zealand has it own arrangements for primary production standards.

Mr ADAMS—That is the standard of their dairy—who is looking after the quality of the milk when it comes from the cow into the vat and what temperature it is kept at before it gets to the processing plant: I thought that would be a pretty major public health issue.

Ms C. Smith—Dairy standards, meat standards, or any other area of primary production will, once this model is fully implemented, be able to be developed in a national way by FSANZ, using their prescribed processes for consultation with stakeholders and opportunity for input.

Mr ADAMS—So they will set the standards?

Ms C. Smith—Yes.

Mr ADAMS—Then they will be enforced by state government departments?

Ms C. Smith—Yes.

Mr ADAMS—When we negotiate this out, we will not have dealt with the amount of fat or the amount of sugar that is consumed by New Zealanders or Australians. We will have dealt with the food standards, but we will not have dealt in any way with those two critical issues of public health.

Ms C. Smith—This agreement is about setting up the system. There is then the food standards code which sets out the detailed requirements that apply to food.

Mr ADAMS—That is right. Do I need to talk to somebody who has actually established the code?

Ms C. Smith—Probably.

Mr ADAMS—Is that what you are telling me?

Ms C. Smith—Yes.

Mr ADAMS—So we need to have them here when we discuss this.

Ms C. Smith—The joint food standards code was agreed to by ministers at the end of 2000, and it contained quite important requirements relating to nutrition labelling. For the first time, all foods will be required to have a nutrition information panel which indicates the fat content, the sugar content et cetera.

Mr ADAMS—I am interested in that but I have not got very much detail in relation to it, and so I am seeking more detail along those lines.

Ms C. Smith—We could take that on notice and get some material for you.

Mr ADAMS—That would be very good.

Ms Flint—One of the main things to remember is that the treaty and the food standards codes look at the elements of safety rather than dictate or set out dietary guidelines. Not only do they provide people with safe food but they also provide consumers with information so that they can make informed choices for themselves.

Mr ADAMS—You sound like somebody from industry, but you are from the Australian department of health. There is a golden opportunity here for us to set some standards which would improve the general health of Australians, and I do not know whether that is achieved. The ministers may set that. The role of this committee in the House of Representatives and the Senate is to see if this treaty is in the public interest of Australia. That is all I am trying to achieve. The ministers can lay down a direction in which they have gone—and we have reached that stage—but I have not got enough information yet to satisfy me that this treaty is in the public interest of the country. Can you comment at all on the changing of cleanliness regulations?

Ms C. Smith—We need to remember that this is an amendment of a current treaty.

CHAIR—The agreement is already in place.

Ms C. Smith—We already have an arrangement where we have joint food standards with New Zealand. ANZFA developed a joint code over many years, and that was agreed to by ministers at the end of 2000. It contains many important protections for consumers. It has the nutritional labelling that I talked about before, and it has enhanced allergen labelling so that people who are sensitive to particular components will be able to identify them on the label. So I think the code is a huge step forward for both countries. These treaty amendments are making some changes to the system but they do not alter the fundamentals of the code that has been developed.

Mr ADAMS—Can you provide us with the model label?

Ms C. Smith—I will get some more information from the Australian New Zealand Food Authority on the type of information that will be on the label and provide it to the committee.

Mr ADAMS—I am also interested in looking at that detail in the code, if it is possible.

Ms C. Smith—We can provide you with a copy of the code.

Mr ADAMS—Thank you. I have two final questions. There are still some agreements which have not been reached between the two countries. We have not set firm time lines on those. They are still in negotiation.

Ms C. Smith—Do you mean the time lines for the joint code coming into full effect?

Mr ADAMS—Yes, that is one. I thought there were also some groups within the food industry—the stakeholders—still negotiating between themselves to get some position.

Ms C. Smith—When ministers agreed to the joint code in November 2000, they realised that there had to be a transition period. In Australia the industry can comply with either the old Australian code or the new joint code. It has been agreed that we should aim for the date 20 December 2002—at the end of this year—as the period when the old regulations will be repealed and the joint code will become the sole code in both countries.

Mr ADAMS—Are we on time for that?

Ms C. Smith—Yes.

Mr ADAMS—Will this harmonise all the standards between New Zealand and Australia? Will all standards be the same?

Ms C. Smith—It is important to recognise that the treaty, in its current form and in its amended form, has a scope. It does not cover all spheres of food activity. I mentioned before that primary production standards, for example, are outside the scope of the treaty. Within scope, the new joint code provides for harmonised standards in most areas of activity; but there remain a few issues where agreement has yet to be reached—for example, country of origin labelling and dietary supplements—and they will continue to be worked on over the transition period. There are probably half a dozen areas and I can provide those to you.

Mr ADAMS—They are critical ones. Thank you; I look forward to getting it.

CHAIR—It sounds as if it is in the national interest, doesn't it?

Mr ADAMS—It sure does.

Mr BRUCE SCOTT—I wanted to tease this question out a little more. Are there any negative impacts on, for instance, our cheese industry or perhaps some of the new emerging bush foods—some native food lines that are starting to find a place on the consumer plate? Are there any negative impacts on our wild game meats, our cottage industry cheeses, and things

like that? I probably have an all-encompassing question here: are there any negative impacts on some of those areas? Has there been any consultation with some of these organisations that are starting to build small businesses in rural communities out of native foods?

Ms C. Smith—I think we need to make a distinction between these treaty amendments, which are just altering the current arrangement we have with New Zealand—they go to structural arrangements and decision-making processes—and the details of regulations that apply to individual foods.

Mr BRUCE SCOTT—You do not see that there will be any negative impact on them?

Ms C. Smith—No, I do not. If those industries have concerns or issues that they want to raise about particular regulations, the ANZFA process—which will be adopted by the new statutory authority, Food Standards Australia New Zealand—remains a very open process where stakeholders have ample opportunity to put their views forward.

Mr BRUCE SCOTT—We were talking about regulations, and I know that there is quite a lot of interest, now, in some of our native foods. For instance, limes growing on trees are being harvested and processed and are selling here in Australia through restaurants; and markets are being sought overseas. You don't think that a regulation, which may apply in New Zealand but has not applied here in the past, would prevent the further development of this industry?

Ms C. Smith—I see the further development of that industry as in no way being affected by these treaty amendments.

Mr BRUCE SCOTT—Are there regulations, such as health standards, in relation to smoked types of cheese or cheeses, which some cottage industries are developing, that use unpasteurised milk?

Ms C. Smith—I am not able to comment on the details of the regulation applying to cheeses. We can get more information for you.

Mr ADAMS—I am concerned that, by setting up a regime that costs a considerable amount before you even begin, regulations will harm those smaller emerging industries that Mr Scott is talking about, and that therefore big industry will have advantages over regions and areas that are emerging. This is a great opportunity for big industry to utilise regulations for their own benefits. That is why I want to look at the detail. We will have a look at that and I guess Mr Scott will have a look at that as well.

Mr BRUCE SCOTT—That is what I was getting to. I think there are many cottage industries—if I can call them that, although they might not want to be termed that—that are emerging. Anyone who saw *Landline* yesterday would have seen the utilisation of many bush tuckers in this Year of the Outback. They have been very successfully launched, they have been publicised by a national broadcaster and they are being accepted by chefs in many parts of Australia as something that we have not tapped into and that particularly give a regional focus.

These are cottage type industries; they are not multinationals. They are small people. I would not like to think that we were going to sign up for something that is an agreement in terms of

standards that prevent the further development of some of these industries, where the multinational will be the winner. A small person trying to get a leg in the door with a product could be disadvantaged and even discouraged from starting, so I would like to look at these examples.

CHAIR—I think the point is that we already have an agreement in place. The question is: are the amendments going to have any negative impact as opposed to the agreement?

Ms C. Smith—The amendment does not alter the fundamentals of the system we already have in place with New Zealand.

CHAIR—So your question, Bruce, is really whether or not the agreement itself has that negative impact, rather than the amendments that we are dealing with today.

Mr BRUCE SCOTT—We might have to go back to the agreement. I think we need to look at that.

CHAIR—Are there any other questions?

Mr BRUCE SCOTT—Does it cover native foods, such as wild game meats? New Zealand would have deer and we have deer. We also have kangaroo, wild boar and a whole host of native wild game foods. I would like to see how they were catered for in the general agreement originally and in the amendments to it, and whether there is any regulation that might impose a burden on these industries.

CHAIR—Ms Smith, did you say that you were aware or that you would have to check to see what is covered?

Ms C. Smith—I will have to check, but I think it is important to clarify that this agreement and the amended agreement relate to the structure of the system and the decision making process. The details of individual regulations are contained in the food standards code, and there is a separate process that ANZFA and its successor go through to regulate the individual foods.

Mr ADAMS—So what are you saying—that we cannot ask questions about that? Is that what your answer is?

Ms C. Smith—No, I am happy to provide—

CHAIR—No, she did not say that, Mr Adams. Go on, Ms Smith.

Ms C. Smith—I am certainly happy to provide further information; I can go and get further information for you. But the details of individual regulations are not the subject of this agreement or the amendments.

CHAIR—That is clear to me.

Senator BARTLETT—Noting that you just said that, I am still interested in what the structure that these amendments relate to oversees in terms of the joint food standards. Does it relate to things like standardisation of labelling as well, standards in terms of allowable residue of pesticides or whatever, limits on certain additives and that sort of stuff? Is it meant to ensure that, whatever those labelling or other standards are, they are uniform across both countries?

Ms C. Smith—Yes, the agreement has a commitment to harmonise standards in areas within scope, and labelling is certainly within scope. One of the areas you mentioned—maximum residue limits—is not. New Zealand has its own arrangements for maximum residue limits, largely because those regulations tend to reflect the agricultural conditions in each country.

Senator BARTLETT—So if we want to increase or decrease allowable residues—I remember there was something about cadmium in peanuts a few years back—we do not have to get agreement between both countries to do that?

Ms C. Smith—No, Australia has it own processes through ANZFA—soon to become FSANZ—and the national registration authority.

Senator BARTLETT—I remember getting inquiries a year or two back about allowable amounts of caffeine in soft drinks and stuff.

Ms C. Smith—No, caffeine is within scope. New Zealand participates in ministerial council decisions on recommendations of the Australia New Zealand Food Authority on that matter.

Senator BARTLETT—But they still do not necessarily have to be uniform?

Ms C. Smith—No, they do.

Senator BARTLETT—So the allowable caffeine levels are now uniform?

Ms C. Smith—The ministerial council agreed to a new standard for energy drinks in July last year. Prior to that, they had not been uniform but now there is an agreed approach between the two countries.

Senator BARTLETT—Is this agreement and are these amendments linked in any way to some of the standards that have been put in place with labelling genetically modified foods?

Ms C. Smith—These amendments go to the structure of the system. They are updating the agreement so that it reflects the new bodies that are now being established—ANZFA is being replaced by a successor body, Food Standards Australia New Zealand; there is a new ministerial council arrangement; there is a new standing committee of senior officials. These amendments are ensuring that the agreement we have between Australia and New Zealand reflects the new structures that have been agreed to in Australia. Once those bodies are operational, they then look at issues such as GM labelling or any other form of labelling, but it is not actually the subject of this agreement. It is the responsibility of the bodies that are set up.

Senator BARTLETT—I have a couple of questions that I am sure are part of this—or I hope they are. I am taking them from the treaty wording. It probably goes back to one of the questions I was asking before. It gives both countries the right to request a ministerial council review and approve food standards on the grounds of exceptional health safety, third country trade and environmental and cultural factors—I think you mentioned that in your opening statement. I am just trying to think of an example where that might occur. Say we are wanting the ministerial council to review and approve food standards on environmental factors—GMOs or whatever—does that give either of us the right to request? It says then that the New Zealand minister retains a discretion to vary from an approved standard. Is it just the New Zealand minister who has that discretion to vary? We cannot vary?

Ms C. Smith—Under the COAG reforms, the new body, Food Standards Australia New Zealand, has powers to actually approve food standards and it notifies the ministerial council that it has approved the food standards. There are review processes built in that say that upon notification the ministerial council can request a review. The first review can be requested by any jurisdiction—so one out of the 10 can request a review. The second review has to be by a majority. There are specified grounds on which a review can be sought. What the amendments to this agreement do is give New Zealand additional rights of review, recognising that they are a sovereign country. If at the end of the day they are not satisfied that it is appropriate for New Zealand's circumstances, they can opt out.

Senator BARTLETT—In relation to that particular standard.

Ms C. Smith—But that option has not been exercised, and New Zealand has indicated great reluctance to exercise that right.

Senator BARTLETT—I note in the national interest analysis that, in terms of food products, anyway, we import more than we export, so New Zealand have a positive balance of trade in food. So I guess they are keen not to upset that. The other aspect I was curious about is that it states the terminology within is adopted to reflect the fact that article 11 of the agreement allows for the association of other parties to the agreement. Does that mean other countries are coming on board?

Ms C. Smith—Yes.

Senator BARTLETT—Is that a likelihood in the foreseeable future? Would they be Pacific countries?

Ms C. Smith—There are certainly no negotiations, or even preliminary discussions, under way to bring another country into this agreement.

Senator BARTLETT—I guess you are wanting to get this one working properly first before you do that.

CHAIR—Thank you very much for your time. Thank you for accommodating us and coming a little early. You will follow up those issues that Mr Scott and Mr Adams raised?

Ms C. Smith—Yes.

CHAIR—Thank you very much.

Ms C. Smith—Thank you.

[10.46 a.m.]

Protocol to the Double Taxation Agreement with the United States

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law Branch, Office of International Law, Attorney-General's Department

BRYANT, Mr David John, Executive Officer, Treaties Unit, Large Business and International, Australian Taxation Office

NAGLE, Mr John, Manager, International Tax Research Unit, Treasury

PICKERING, Mrs Ariane Robin, Assistant Commissioner, International, Large Business and International, Australian Taxation Office

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do any of you wish to make some introductory remarks before we proceed to questions?

Mrs Pickering—Yes, I would like to, if I may. I have some general comments about double tax agreements. The purpose of double tax agreements is to prevent double taxation and to prevent fiscal evasion. The main way in which double taxation is prevented is by distributing taxing rights between the treaty partner countries. Generally that means that there is an agreement to reduce source country taxation and there is a reciprocal agreement that the resident's country would relieve any double taxation that occurs, where both countries are permitted to tax under the treaty. The agreement is also intended to assist in preventing fiscal evasion, and exchange of information is the main way in which that is done.

The wider function that tax treaties are intended to perform is to facilitate trade and investment and movement of technology and personnel between the two countries. It is in this context that the protocol to the US agreement was negotiated. We already have in existence a treaty with the US which was negotiated in the seventies and was signed in about 1982. So we were looking at a renegotiated treaty which would reflect some of the changes that have taken place in the last couple of decades. They reflect things like changes to the economic environment, such as the fact that Australians are now investing much more freely abroad, and also changes in the tax system, such as the introduction of the capital gains tax.

The protocol that we have negotiated is unique in some ways in Australia's treaty practice. In many ways it is a sea change in that it much more clearly reflects the balance of investment both inwards and outwards—we now have much more output investment than we did at the time the previous treaties were negotiated. We see this as a major step in facilitating a competitive and

modern tax treaty network for businesses located in Australia who are operating abroad. We expect that it will significantly assist trade and investment flows between the two countries.

The main aspect of the US protocol is the reduction in rates of withholding tax, particularly in relation to US dividend withholding tax—that has long been a rub for Australian businesses who found that that was a significant impost on their business and a blocker to their repatriation of profits. Australian businesses considered that they were disadvantaged against businesses from other countries which had negotiated significantly lower dividend withholding tax rates. You will also see in the agreement reduced withholding tax on royalties and reduced withholding tax on interest paid to certain sectors.

Another key driver for this renegotiation was to ensure that we had protected Australia's capital gains tax and also to make sure that, where Australia does impose its capital gains tax, that tax is relieved in the US. That is certainly something that we have achieved in this protocol. We have also introduced some new rules that remove double taxation of capital gains in the case of departing residents and make sure that the foreign tax credit rules operate effectively for them.

There is a significant cost to this protocol, which is estimated to be around $190 million per annum. However, we see the main beneficiaries of the agreement as being Australian businesses, which, as I mentioned before, will be able to access some of these new competitive arrangements. Also, there will be an economic benefit to Australia by allowing freer investment into Australia by US businesses and to allow Australia to invest more freely overseas. Those kinds of benefits are very difficult to quantify, but we believe that, overall, the cost to revenue is outweighed by the cost to the economy.

CHAIR—Just picking up on that point, with a net yearly loss of revenue in the order of $A190 million, which is obviously substantial—I appreciate that it is difficult to quantify the benefits as they have been set out in the regulation impact statement—has any economic modelling been undertaken to quantify the expected benefits, particularly the offsetting revenue benefits that are set out in the regulation impact statement?

Mr Bryant—We did try to quantify some of the other benefits. It is very difficult, though, to try to make assumptions about what likely behaviours are going to be in response to the changes. It is much easier to quantify what the behaviours are going to be in relation to, say, reductions in rates of withholding tax on the revenue because that is a more direct impact. While we are able to more precisely determine what the revenue impact is from the reduction in withholding taxes, we can point to some qualitative benefits of why it is going to be important to businesses to reduce these rates of withholding tax. First of all, as Ariane mentioned, it will allow Australian businesses to compete on a more even footing with businesses from other countries that operate in the US. Most of those countries have rates of withholding tax of about five per cent in their agreements, and we have a 15 per cent rate.

CHAIR—What will ours be under this?

Mr Bryant—It will be nil if it is a subsidiary of an Australian public company or five per cent if there is a 10 per cent or greater interest in a US company, which we refer to as a direct investment. That puts Australian companies on a more level footing with their competitors from

other countries when operating in the US, which obviously is a very important market. Businesses for many years urged that the rate be reduced to allow them the same opportunities as those other countries. A review of business taxation was conducted a few years ago by John Ralph. It recommended that we endeavour to get those rates of withholding tax down, so that indicates the importance of doing that. It is difficult to work out exactly what is the return to Australian revenue or to the Australian community as a whole as a result of our businesses having greater access to the US market.

Other benefits can flow in terms of revenue. For instance, on repatriation of dividends from the US there would be no US tax paid. At the moment it is 15 per cent. We would exempt the dividends coming back. That would allow the Australian companies to use that capital here in Australia. They could distribute it to Australian residents or they could send it back offshore. It is difficult to make assumptions about what they are going to do. If we were to base the assumption on it going to be distributed to shareholders, we would say that under our imputation system we would tax the shareholders on the distributions because they would be paid from profits that have not been taxed in Australia. So we would claw back in Australia some of the tax from the withholding tax savings. If the capital were used here in Australia, there would be economic activity that would result in employment. That economic activity is acknowledged as being beneficial but it is very difficult to put a figure on just what the returns would be from that.

CHAIR—Are you able to assess the amount of money you are talking about in this regard? What pool of funds are you talking about?

Mr Bryant—It becomes far too difficult to do that because of not knowing just what the responses are going to be. We could put out a figure based upon everything going to shareholders—

CHAIR—Even before they make a decision as to what to do with it? What amount of money are we talking about?

Mr Bryant—You would have to make assumptions about how much is likely to be repatriated from the US in any given year, and there are other benefits as well. For instance, under the capital gains rules, even if the profits are not brought back from the US the markets are going to reflect that there is going to be less dividend withholding tax paid on distributions, which will result in an increased value of shares in Australian companies, and when there is a turnover of those shares there will be some capital gains tax benefits. We cannot establish precisely enough what those amounts are going to be to be able to meaningfully say what the amount would be like.

CHAIR—I take it that you have not done any economic modelling because it has too many imponderables.

Mr Bryant—We have consulted our revenue area in the Australian Taxation Office. We also have an area with some economists that do this type of thing. We have also consulted Treasury to try to get as much information as we could on what the impacts would be, but it is very difficult to quantify those things. We were unable to come up with a model that would give us those figures. My understanding is that many other countries have the same problem when

trying to quantify the impacts of tax treaties and are not able to give a precise figure on what the impact is going to be.

CHAIR—Are you able to work out the impact on US tax revenues as a result of the protocol?

Mr Bryant—We have not attempted to do that.

Mrs Pickering—They will clearly be affected by the fact that for dividend withholding tax particularly they do impose the 15 per cent withholding tax that they are currently entitled to under the treaty. So with the new protocol they will be reducing that withholding tax.

CHAIR—But we cannot assess by how much?

Mrs Pickering—We cannot assess by how much.

CHAIR—Is it necessary to take this further action? Why can’t we just rely on the existing tax treaty?

Mrs Pickering—We could, if we wanted to, just rely on the existing tax treaty and to a large extent the double taxation and the fiscal evasion would be dealt with under the existing treaty. However, this treaty in particular has been cited as one that is causing problems for Australian businesses particularly because of the dividend withholding tax issue.

CHAIR—That is the high US rate of dividend withholding tax?

Mrs Pickering—Yes, that is right. There is also the issue for us that the existing treaty does not deal with capital gains tax. It is our belief that we are nevertheless able to impose our capital gains tax because it is not dealt with by the treaty, so we would continue to impose our domestic capital gains tax regime. But that is an issue that is likely to be challenged in court. We would certainly have a good deal of revenue at risk if we had an adverse decision against us on that issue. So for us it is important that we clarify our taxing right and protect our taxing right. For taxpayers in particular it is also important that they are able to obtain credit for that tax in the US.

Mr WILKIE—We know we are losing $190 million, but we have no idea of what the potential benefit is going to be. I cannot understand why we are even entertaining it, given that we have no solid data to base our decision on. Who is putting forward that we should go ahead with this treaty? Has it come from the US or Australia?

Mrs Pickering—It was probably mainly driven by the business tax review and the recommendations of the Ralph committee, which was accepted by government, that we should be renegotiating our ageing treaties, particularly this one, to get the dividend withholding tax rates down.

Mr WILKIE—Do we know how many Australian businesses will be affected—in terms of investment in the US?

Mrs Pickering—My recollection is that it is about 70 Australian companies.

CHAIR—Have we consulted with those companies?

Mrs Pickering—Yes.

CHAIR—Is that set out somewhere?

Mr WILKIE—I have not seen it.

CHAIR—I was looking for where it had been set out that there was consultation with the businesses.

Mr WILKIE—Where I am coming from, I suppose, is that a limited number of Australian businesses are going to benefit and, of course, they are going to be happy because their bottom line is going to improve. However, if we are going to lose significant income—$190 million—then the people of Australia are actually subsidising those businesses. I cannot understand why we would do it unless we know we are going to be better off.

Mrs Pickering—When I refer to those 70 companies—and I am not sure exactly what the number is—those are the ones who will benefit principally from the reduced dividend withholding tax rates, but there are other benefits within the treaty; for example, the exemption of financial institutions from the interest withholding tax will reduce the cost of acquiring debt for Australian companies and reducing the royalty withholding tax will ensure that Australian companies have access to cheaper technology. The benefits are more widely spread than just those companies that will benefit from the dividend withholding tax. The Australian revenue, as we have mentioned, will benefit from ensuring that our capital gains tax regime is adequately protected, and that will be a benefit that will spread to everybody.

Mr ADAMS—You probably get that now.

Mrs Pickering—We get it at the moment, but there is a risk that we would not be able to continue to get it.

Mr ADAMS—So it could be more than $190 million? If we lose that court case on the capital gains tax, what is the loss to revenue then?

Mrs Pickering—Again, it is not something we can put a figure on, but we have seen live cases that have involved substantial amounts and some in excess of $190 million.

Mr ADAMS—So that is another $190 million?

Mrs Pickering—Mr Bryant, have I got the wrong figures?

Mr Bryant—I was about to say that it is not another $190 million. Those risks would continue if we were not to update the treaty. Our continuing exposure would be that these cases involving $190 million could be decided against us.

Mr ADAMS—Okay, so you are saying that this treaty does not have anything to do with the capital gains tax issue?

Mrs Pickering—Yes, it certainly does. It protects our taxing rights.

Mr ADAMS—I am sorry, I do not understand the evidence that you have given me, because Mr Bryant said that it did not and you are saying that it does. Can you clarify that for me?

Mrs Pickering—At the moment we have come across cases where we have been able to collect Australian tax, but there is a risk that, if a court decided against us on the capital gains tax issue to say that the existing treaty does cover capital gains and that under the existing treaty we are precluded from imposing our capital gains tax, we would have a significant risk of reduced revenue collections as a result. We do not have a case that has decided that at the moment.

Mr ADAMS—Are you sorting that out with this treaty?

Mrs Pickering—Yes.

Mr ADAMS—So, under this treaty, you will not have that problem?

Mrs Pickering—That is right.

Mr ADAMS—So that will disappear and we will still get revenue from the capital gains tax?

Mrs Pickering—Yes.

Mr WILKIE—I have a number of questions to do with investment in Australia by the US. We are already their second largest trading partner, and the United States has a significant commitment to Australia by way of investment. I cannot see how this agreement is going to increase that, given that not only do we have a low dollar but we also have very safe investment opportunities for the US. Obviously there will be a little extra money, but I cannot see that this agreement would encourage any further investment by the US in Australia. I can see Australian companies saying, 'We won't invest in Australia; we'll invest offshore,' because of the tax advantage. Have we looked at any modelling? How can we say that the US will increase investment in Australia if we have not actually looked at those issues?

Mrs Pickering—I am not sure that you can say that there are tax advantages in investing in the US, because the US will tax the Australian investment in the US and we will also tax that investment in the US. If it is an Australian resident investing in the US, we will tax the investment.

Mr WILKIE—One of the arguments is that there will be increased US investment in Australia if we go down this path.

Mrs Pickering—Yes, we would see this as attracting US investment, particularly as Australia is a financial centre because of the exemptions that are now incorporated into the withholding tax regime.

Mr Bryant—Two important objectives for us in updating the treaty were: firstly, to remove the risk of an adverse court decision on the capital gains tax, to protect our taxing rights; and, secondly, to provide Australian businesses with an opportunity to undertake activities in the US on a level playing field with companies from other countries. The benefit to Australia of that is that in many cases Australian businesses have exploited their opportunities here because they have certain know-how, expertise and products; if they saturate the local market, then it is a question of what do they then do with their investment. What they are good at is that particular activity. If you provide the opportunity for them to exploit that overseas, there are dividends in bringing their know-how and expertise to other locations. With the US being a big market, it is a very important thing for them to be able to do. What is the alternative for them? It is not necessarily true that they will invest in other Australian businesses. It is hard to tell what would happen; they might distribute it to shareholders. Who knows what they would do with their funds.

Mr WILKIE—I can appreciate the sentiment behind what you are saying, but we have no evidence to suggest that that is what is going to happen. However, we know that we are going to lose $190 million—that is where I am coming from.

Mr Bryant—That was one of the issues that we struggled with, as well. We also were uncomfortable that we cannot quantify these things, and we would like to be able to. Therefore, we have to be far more sure about what the knock-on benefits will be and whether they are, in magnitude, going to exceed the direct revenue costs. There are knock-on benefits to revenue, as I mentioned before, in terms of distributions to shareholders under the imputation system. They will not get their franked dividend exemptions, so we will be able to tax them on those distributions. There is a capital gains tax element, where we will get some knock-on benefits. Even less tax being paid on the amount will result in extra economic activity in Australia perhaps, and that could also return more revenue.

Mr WILKIE—The terms ‘perhaps’, ‘maybe’ and ‘we hope’ concern me a little bit; it seems as though it is a bit of a gamble in some ways, and it would be nice to know how much we are gambling with. Obviously, it is not the full $190 million, but there is a risk.

Mr Bryant—With the capital gains tax issue, we have that risk anyway. We have not factored that into the costing, because we have assumed that we are going to continue to collect that. You would have to factor that into what you think the overall cost is going to be, as well as the dividends in terms of increased economic activity.

Mr WILKIE—If we are going to factor it in, how much is it? I just want to see the data in front of us so that we know exactly what we are dealing with—or some model, some estimates, best guesstimates, based on information you have before you.

Mr Bryant—We have done what we can to consult people who have the expertise in that area and have access to that type of data to see how much they can assist us with this. We have been able to get a lot of information on the direct revenue costs, and that is as a result of our

efforts to get everything we can. It has not been possible to get firm figures on these knock-on benefits, these wider benefits, to the community, even though I can point to instances such as the Ralph review of business taxation, which said that it was a very important thing for Australia to do. It is a difficult position to be in, and that is why you have to be fairly sure that the benefits from those types of things are clearly going to outweigh the direct costs.

Mr ADAMS—So we are giving business a lot of opportunities to benefit, but we cannot qualify it in any way and we are costing the revenue $190 million. Is it a gamble? The Ralph committee may have said that it was some sort of a problem that business was not competing evenly in the United States with other countries, but I honestly would have expected some more data to say why this is a plus. It is hard to hit the button and cost us $190 million without knowing the pluses, which you really have not told us. Will the exemption of the US real estate investment trusts encourage those trusts to invest in Australia? I understand that there was a problem with the pension funds of America not investing in Australia because of something to do with our taxation regime. Does this sort that out?

Mrs Pickering—I think you are referring to a couple of issues. The real estate investment trust issue is one that we have dealt with in very close consultation with Australian businesses which invest in these real estate investment trusts. The issue there was that previously there was a limit of 15 per cent on US tax on those trusts.

Mr ADAMS—So there was only 15 per cent to pay in America, was there?

Mrs Pickering—Yes, for the distributions from those trusts. That will be dealt with under the new treaty, which allows the US to impose their domestic rate of tax on that. So it is actually an increase from the 15 per cent, but we have introduced certain safeguards to ensure that Australian listed property trusts are not disadvantaged by this. There is also grandfathering back to when we started negotiating to make sure that they are not adversely affected.

Mr ADAMS—So we reduce our tax while the US increase theirs; is that the proposition?

Mrs Pickering—It is not quite as simple as that. The real estate investment trusts are a particular form of investment where a group of investors—

Mr ADAMS—I understand what it is.

Mrs Pickering—The idea was that, instead of the US being limited to 15 per cent on that—which would be the dividend withholding tax rate—they are entitled to tax it as though it were a direct investment into real property, which would be taxed at their normal rates. This is something that we also feel very strongly about in Australia: to make sure that we maintain our taxing rights over real property.

Mr ADAMS—You did not quite answer me. We are talking about Australian capital investing in these real estate trusts in the United States. Is that what we are talking about in this area?

Mr Bryant—This provision relating to US real estate investment trusts is a provision that the US have insisted on in their recent treaties with other countries. It has become part of their treaty practice. It is an anti-avoidance rule. It applies where investors have a very significant

holding in the real estate investment trust. The purpose of these trusts is to hold real property and the concern of the US is that, without an anti-avoidance rule, Australian residents could, for instance, have a captive real estate trust, use that to hold real property in the US, and then be taxed only on the real property income at a rate of 15 per cent. The US has a policy of taxing real property income at higher rates—30 per cent for real property income at the moment. So it is an anti-avoidance rule to stop these captive REITs from occurring. The common Australian investor will still be able to have access to them.

Mr ADAMS—I understand now. What about the American pension funds investing in Australia? I understand a reason they did not invest in Australia was because of a taxation level.

Mr Nagle—I understand that is an issue with investments particularly into venture capital, I think. That is a separable issue from the double tax—

Mr ADAMS—It does not touch that? It does not sort that out at all?

Mr Nagle—It is not affected at all. There will be separate arrangements to encourage investments by nontaxable entities into venture capital in Australia.

Mr ADAMS—I am still not very convinced about giving up about $190 million and the gains that we are making on this. You have tried you said, Mr Bryant, but you have not been able to come up with any figures at all.

Mr Bryant—We have done the analysis to show qualitatively what the impact should be based on certain behaviours. I would also like to point out that other countries face the exact problem with their treaties. They are not able to quantify these benefits. It is not a question of us being different; it is something that is a problem for everyone.

CHAIR—What other countries have got a similar arrangement with the US, with whom we are seeking to compete?

Mrs Pickering—Most of the European countries have a five per cent dividend withholding tax rate. Ours is actually the best that the US have ever agreed to. They have only ever agreed to a zero withholding tax rate with the UK.

CHAIR—So our zero to five per cent is the best you could get.

Mrs Pickering—Our zero to five per cent is their best position.

Mr ADAMS—These are based on investment flows et cetera. There is a lot of American money in England and, I guess, vice versa.

CHAIR—I am just a little concerned about the lack of evidence—and I appreciate the difficulties. In the assessment it does set out on a number of occasions the concerns that Australian companies have raised about the lack of competitiveness and the widespread business concerns arising from the application of Australia's capital gains tax. Throughout there are comments like 'failure to deal with these issues would be a serious retrograde step' et cetera.

What evidence have you based that on? Has that been via the Ralph review or are there separate analyses, case studies, commentaries and business statements that enable you to come to that conclusion?

Mrs Pickering—Apart from the Ralph review, we have also consulted widely with our business sector through our Tax Treaties Advisory Panel and through direct consultation. The message has been consistent that this is a major issue for Australian business that needs to be dealt with. There have been any number of press reports which have reported this concern as well. It certainly has been a consistent message that we have been receiving over the last five years probably.

CHAIR—So we have got about 70 publicly listed Australian companies with investments in the US and about 200 publicly listed US companies with investments in Australia.

Mrs Pickering—Yes.

Mr WILKIE—Do we know the value of those investments? For instance, 70 countries have X dollars invested in companies in the US, but the 200 US companies must have a dollar value invested in Australia.

Mr Bryant—That is in the NIA; I think we have $90 billion worth of direct investment in the US as the latest figure.

Mr WILKIE—They are the largest foreign investor in Australia with $215 billion as opposed to—

CHAIR—And $90 billion is direct investment.

Mr Bryant—That $90 billion is Australian investment in the US.

Mr WILKIE—Yes, but their figure is $215 billion invested in us, isn't it? That is what I was saying before; I cannot see how they are going to stop increasing their investment in Australia given that they already like to invest here anyway. I cannot see, therefore, how it is going to encourage Australians to go and invest over in the United States.

Mr Bryant—I think it will help with investment here in Australia but it is more about providing opportunities for Australians to access the US market. The $90 billion that is quoted there is direct investment of the type that would benefit from this lower dividend arrangement—it is a significant amount. The other thing to note is that we already exempt franked dividends paid to US residents. That means most dividends going out of Australian companies to US persons are already exempt whereas the US is getting 15 per cent from us.

Senator COONEY—Just going through paragraphs 9, 10, 11 and 12 of the national interest analysis, the last sentence of paragraph 9 says:

While these departures involve a reduction in revenue the benefits are widely spread around the economy, with the most direct benefits accruing to business.

We are very confident about that, and I think you have been answering questions about that. The second sentence of paragraph 10 says:

For many years, major Australian companies have raised concerns about the lack of competitiveness of Australia's tax treaty with the US, especially the high level of US DWT permitted under the Convention.

I suppose you have been asked about this, but have we got any letters of complaint from Australian companies? Unless you have given it already, do you have any material on that?

Mrs Pickering—We certainly do have representations from a number of Australian companies.

Senator COONEY—Could you give us some copies of those letters?

Mrs Pickering—Yes.

CHAIR—I guess what Senator Cooney is getting at is what has been frustrating the other members of the committee, and that is that we do not have any evidence on which to base an assessment of the benefits. If you have anything that would enable us to better understand the benefits in the face of the net yearly revenue loss of $190 million, providing it would be much appreciated.

Senator COONEY—Thank you, Chair. Paragraph 11 then goes on to say 'indirect revenue benefits may arise from increased trade and investment between Australia and the US'. You have been using quite positive words until then and then paragraph 11 seems to introduce a bit of doubt about whether we will have increased trade and investment. You go on in the sentence to say that 'the protocol will also improve arrangements for taxing gains accrued on assets'—that it will do this. Then in paragraph 12 you say that 'it is difficult to determine the net benefit that would accrue from changes'. So whoever has done this has gone through the analysis and finished up in paragraph 12 by saying it is difficult to determine the net benefit from these changes. This gets back to what the chair was saying about a lack of evidence about what your real assessment of it all is.

To emphasise what I am saying, your next sentence says 'estimates of the expected growth in trade and investment tend to be speculative'. So we have gone through the analysis and then we end up with a statement that this is all pretty speculative anyhow. You do not seem to have any evidence but could you get those letters at least so that the committee can get some idea of what the tax department is working on?

CHAIR—Or even the assessment upon which the Ralph committee based its recommendation.

Mr WILKIE—Is this only one of a raft of measures that investors have raised as a concern in relation to their investment potential in the US? Do they believe that removing this barrier would lead to greater investment or is there a whole raft of other things that they want in place as well that would need to occur for them to actually invest?

Mrs Pickering—This was certainly the one that they pushed very strongly as being a blocker particularly to investment into the US and repatriation of the profits back from the US.

Senator COONEY—I wonder why words like ‘speculative’ and ‘may’ are used.

Mr Bryant—I am probably guilty for using those words.

CHAIR—Did you write this?

Mr Bryant—It is about making the conditions right for these things to happen, but whether or not they happen I cannot guarantee. So I just wanted to say that from the analysis it would appear that these consequences would flow from taking this action, but I cannot guarantee it.

Mr ADAMS—So that the committee can give this a tick, could you provide to us some examples of what the following sentence means:

RWT on royalties will be reduced from 10 percent to 5 percent making the cost of US technology and know-how more affordable to Australian business.

Mr Bryant—At the moment, Australian business under the treaty would be required to deduct 10 per cent withholding tax on royalties they paid to US residents. That is increasing the cost of know-how to those Australian businesses. If we reduce the rate of withholding tax to five per cent, there could be some reduction in the cost of that know-how to them, but it is difficult to say because it depends upon how it has been taxed in the US, what the profit margins are on it, so that might reduce US tax. It also depends upon how much of the benefit accrues to the person providing the royalty rather than to the Australian.

Mr ADAMS—When you say ‘know-how’, do you mean intellectual property?

Mr Bryant—That is an example, yes.

Mr ADAMS—But it might be a straight investment where a person does not have any input into the actual business operation. Won’t they still gain the benefit without the transfer of technology or intellectual property? We have no guarantee that we are growing our economy or gaining anything with this.

Mr Bryant—Under our domestic law, we normally seek to charge 30 per cent royalty withholding tax. So I guess that is an indication of our ideal position, that if there is something that is an input like that that we would like to charge withholding tax. Under our treaties, we generally reduce that to 10 per cent. I think that is in recognition that for Australia to get other objectives—if we want changes in the behaviour of another country in what they do to, say, withholding taxes—we have to give as well, in both countries’ interests, so that there is a win-win. In this case, it is also a package and, to get what we want on other factors, we might have to look at the entire package to work out—

Mr ADAMS—Can you tell me where the term ‘withholding tax’ comes from?

Mrs Pickering—It is where, instead of the person who is liable for the tax paying the tax, the person who is paying the tax to that person withholds it on behalf of the person to whom it is being paid. Further to your previous question about the benefits, it should also be borne in mind that, when we agree to reduce the treaty rates of withholding taxes on royalties, for example, it also means that the US are reducing their tax on that, which means that it would be easier for Australians to be able to exploit their intellectual property in the US as well—to ensure that they are subject to reduced withholding taxes over there.

CHAIR—Could I just wrap this up by saying that you would have gleaned from the concerns expressed in questions by committee members that we would like an evidence based case put to us in answer to the downside that will occur as a result of entry into this treaty—that is, the estimated loss of revenue of $A190 million per year—the elements that will be amended and a summary of the best evidence that you are able to come up with, whether it be from submissions to Ralph, submissions that you have received or any sort of analysis or economic modelling. I think that will go some way to alleviating the concerns of the committee. Would that be a project that you would agree to undertake.

Mrs Pickering—We can certainly do our best.

Mr WILKIE—If you can take a gamble, it would be good to see the form guide.

CHAIR—In regard to the timing of this, it says:

> It is proposed that Australia provide the instrument of ratification before the end of 2002. If the Protocol enters into force during the 2002 calendar year, it will have effect for taxes in Australia from 1 July 2003.

We understand that DFAT wants action before the end of June, so it sounds like there is an imperative here to get this under way as soon as possible.

Mrs Pickering—Some of them we would be readily able to provide to you—the submissions to Ralph and so forth. As for the economic modelling—

CHAIR—I am just asking for whatever you are able to do. If you are not able to do it—and you have indicated the difficulties—just tell us that that is just impossible to do, it would be misleading or a nonsense for you to try and do that sort of economic modelling. But if there is anything evidence based to support the case for this treaty then we would appreciate receiving it.

Senator COONEY—This might be a bit difficult, but when you are doing that could you give a weighting to the different elements that you are relying on? In other words, what weight do you give the increase in trade against the weight you give to the loss of taxation, and the comity between the nations and all that sort of stuff? Would that be possible when you are doing what the chair asks you to do?

Mr ADAMS—Also for the increase in dividends—the shareholders in those Australian companies that are going to get a tax break.

CHAIR—Is it clear what we are seeking? Whether or not you can provide it is another question.

Mrs Pickering—Yes.

CHAIR—Thank you very much. Thank you for your attendance here today. We appreciate the time. Thank you for coming early as well. I think that just about puts us back on track, so I will move to the agreement with the Netherlands.

[11.33 a.m.]

Agreement with the Netherlands on Mutual Administrative Assistance for the Application of Customs Law and for the Prevention, Investigation and Combating of Customs Offences

EDWARDS, Mr Murray, Director, International Section, Australian Customs Service

KYLE, Ms Sylvia Rita, Manager Bilateral, International Section, Australian Customs Service

SMITH, Ms Tonie Maree, Director, Intelligence Coordination, Australian Customs Service

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of the parliament. Would one of you, or all of you, like to make some introductory remarks before we proceed to questions?

Mr Edwards—The purpose of the agreement is to facilitate and provide the basis for administrative assistance between the two customs services of Australia and the Netherlands. It is about the exchange of information and intelligence to improve the administrative ability of both our customs services, to identify areas of high risk and to more effectively enforce customs legislation.

The agreement itself provides the legal and administrative framework which is necessary for the customs services to work together: to identify areas of high risk in the areas of the proper collection of customs duties and other taxes which are collected at the time of importation and exportation; to intercept prohibited imports, illegal drugs, endangered species and hazardous goods; and to facilitate the movement of legitimate trade.

Section 16 of the Customs Administration Act regulates the disclosure and the recording of protected information by Customs, and under that section we can only disclose information to an overseas agency when we have an agreement in place with that agency. We already have a number of mutual administrative assistance type arrangements of less than treaty status with other customs agencies in other countries—for example, Canada, Korea, the United Kingdom, the USA and Hong Kong—but, in this instance, the Australian government agreed to an instrument of treaty status, as the domestic legislation of the Netherlands requires that mutual administrative assistance be at treaty level.

The agreement was put together using a model based on one prepared by the World Customs Organisation for bilateral agreements on mutual administrative assistance matters. The agreement sets out that assistance be in accordance with national legislation and within the competence and the available resources of the customs administrations. That means that the parties are not required to comply with requests when the resources are unavailable or when the request is outside the scope of their customs legislation—the application of the agreement is

limited to customs law. It requires that each of the administrations provide information to the other on new customs law-enforcement techniques, trends, means and methods of committing customs offences, whether goods have been lawfully exported and about transactions which are suspected of being a customs offence. It also sets out some exemptions to those obligations based on the protection of public order, where essential interest or commercial secrets might be subject to the exchange of information, where the compliance and the obligation would not be reciprocated by the other country or where it would interfere with an ongoing investigation, prosecution or proceeding.

The agreement does not require any change to Australia's legislation or to administrative practices, does not impose any foreseeable additional financial expenditure on the part of Australia, and does not have any implications for legitimate trade or any direct impact on Australian industry; it is merely restricted to the sharing of information and intelligence and the internal workings of the customs services of Australia and the Netherlands

CHAIR—You say that this agreement has been negotiated at treaty level because of the domestic requirements of the Netherlands, that it is based on a World Customs Organisation model and that we have entered into mutual administrative assistance arrangements with a number of other countries. Are there any differences between the agreements with the other countries and this arrangement that is modelled on this World Customs Organisation agreement?

Mr Edwards—There would be some minor differences that might reflect particular issues associated with Australia and the bilateral relationship with another country, but essentially they are the same.

CHAIR—What are the mutual administrative assistance agreements modelled on?

Mr Edwards—They have been negotiated over time, so some have been in place for some time. All of our recent agreements are based on the WCO model, which is itself based on the experience of customs administrations prior to that. So it has been an ongoing and evolutionary process.

CHAIR—So, essentially—apart from the fact that one is a treaty and one is an arrangement—they contain the same elements?

Mr Edwards—Essentially they are the same, that is right.

Senator SCHACHT—Firstly, may I say that, after being a former Customs minister and having been to many customs hearings—

CHAIR—You will have many questions, then.

Senator SCHACHT—No, only a few, but I want to comment that it is the first time I have seen a majority of women represent the Customs department at a joint committee—and may it continue.

CHAIR—The way of the future, Senator.

Senator SCHACHT—Secondly, without guessing your ages too closely, it is the first time I have seen three people under the age of 40 representing Customs. Maybe there is cultural change going on in the Customs department that many ministers on both sides have argued for for many years.

I notice you have an administrative agreement with Canada, Korea, the United Kingdom, USA, Hong Kong, Indonesia, New Zealand and Japan. Was there any particular reason why you wanted to have a similar agreement with the Netherlands? Why the Netherlands—why not France, Norway, Russia, Brazil or Cuba?

Mr Edwards—I think there are a number of strategic reasons to engage ourselves more closely with the customs service of the Netherlands. Firstly, there is a range of Customs administrations in Europe, and I would regard the Netherlands administration as being at the better end of that. That is because they are motivated and driven by forces similar to our own, if you like. Trade is very important for the Netherlands as one of the main ports into Europe. Rotterdam is, I think, the fifth busiest container port in the world, certainly the largest container port in Europe. So there are very strong government incentives for them to facilitate trade.

But at the same time, there is a recognition within the European Community that, once goods are in the community, they can travel anywhere. So they are also driven by the motivation to have effective trade controls on illicit trade. For those reasons they have become one of the more efficient administrations. In terms of their working methods and their approaches, it is good for us to be able to share our experiences with them.

On the issue of legitimate and illegitimate trade, there are a number of commentaries around which acknowledge that the Netherlands is one of the largest producers of synthetic drugs. For that reason it is probably good for us to be able to share—

Senator SCHACHT—Are they illegal producers of synthetic drugs?

Mr Edwards—That is correct.

Senator SCHACHT—I will come back to that in a moment. Will the Customs department from Australia—as a result of this treaty—establish additional peak personnel based in The Hague or Rotterdam? Will you have people permanently based there?

Mr Edwards—No. It is not our intention to do that.

Senator SCHACHT—You have no-one there already in the embassy—no liaison officer?

Mr Edwards—No. We have a post nearby in Brussels where we have two Customs officers stationed.

Senator SCHACHT—To deal with EU material?

Mr Edwards—Mostly because of the location of the World Customs Organisation in Brussels. But they are also responsible for working bilaterally with other customs administrations including the Netherlands, France, Germany and the United Kingdom mostly.

Senator SCHACHT—The exchange of information, therefore, will be from the Netherlands side direct to Australia and from Australia direct to the Netherlands—

Mr Edwards—Correct.

Senator SCHACHT—by secure electronic means, obviously.

Mr Edwards—Generally that is right, or through our post in Brussels.

Senator SCHACHT—Through the post with a diplomatic bag.

Mr Edwards—Yes.

Senator SCHACHT—Is it clearly defined what information will be excluded from being exchanged? Customs in Australia—and I will assert this and you will not be able to comment on it—does have access, when appropriate, to information coming out of other agencies—I will call them that. Do they understand that for a defence establishment agency, our own intelligence agency—separate from Customs—where we chose to, we will exclude exchange of information if it deals with something coming out of the Netherlands? Do they understand that information is specifically excluded?

Ms T. Smith—The scope of the agreement does set down that it is limited to customs related matters. We have a standing rule which we refer to as the 'third party rule' where, if we have received information from another agency or body, we will not disclose that information. It is a standing practice within the Australian Customs Service and a number of other agencies within the Commonwealth.

Mr ADAMS—The information or the intelligence that we give to the Netherlands' service is restricted by this treaty. What is the mutual obligation there?

Ms T. Smith—It is restricted to the information which is held by the Australian Customs Service, which in general terms within the community would be referred to as customs information, so it does not extend into other areas. There is scope within the agreement and the other agreements that we have to request other agencies for information on behalf of the Netherlands, but there is actually a stated requirement that we must clearly indicate why we are seeking this information so there is no misunderstanding where an agency thinks they are giving it to us when in fact it is for the Netherlands customs administration.

Senator SCHACHT—What if they make a request to you or you make a request to them or, putting it around the other way, proactively you pick up information. You are connected to Interpol, I think; is the Dutch customs service connected to Interpol?

Ms T. Smith—Yes, I am sure they would have relationships through Interpol.

Senator SCHACHT—There are other agencies outside Defence, loosely called the ‘spook’ organisations—ASIS, ASIO and so on. Where do you draw the line when an ASIS agent finds out that there is a major people-smuggling racket coming out of Rotterdam? You pick up—because you have a connection; we are doing the same work in Australia—that there is a connection back into the Netherlands and there are people there into people-smuggling, which is a big problem in Europe. Do you proactively say, ‘This is an area of customs breach; therefore we will let them know whom they ought to have a good look at’?

Ms T. Smith—In such circumstances, we would have to be very mindful of the arrangements already in place. For example, there are a number of other groups that would have established liaison channels with overseas agencies in regard to people-smuggling, so it would not be a case where we would jeopardise an ongoing investigation or standing arrangements. The agreement actually refers to that.

Senator SCHACHT—You say Rotterdam is the biggest European container port. Is one of the major areas exchanging information—you having access to their information and them having access to our information—about the shipment of containers between both countries and what is in those containers?

Ms T. Smith—Certainly in the past we have had exchanges of information in relation to particular suspect containers that are of interest to both administrations, either way. We are also quite keen to exchange the technology that helps Customs to be more successful in its interdiction efforts, and Rotterdam has a wealth of knowledge with regard to container interceptions.

Senator SCHACHT—I presume they would have very good skills—Dutch efficiency!—but in Australian law, under the Constitution of Australia, so many of the enforcement powers of the federal government beyond Customs are based on Customs’ powers. When we deal with the terrorism bill coming up soon, the biggest area of empowering the federal government to do certain things will be variations of the Customs powers. If our Dutch friends say, ‘We understand there is an Australian citizen who is connected to a Dutch illegal smuggling racket,’ can they ask you to use your powers—which are limited, but still there—to tap the phone to find out that evidence?

Ms T. Smith—The Australian Customs Service does not actually do such things.

Senator SCHACHT—But you could refer it on to the Federal Police. If you want to tap the phone, you have the power to go to the Federal Police and get a judicial warrant, blah, blah, blah. There are protections in there. I want to know if under this agreement a foreign country can, with all the good motives in the world, make a request to the Australian customs department to put it into our enforcement system that the phone of a citizen of Australia be tapped because they are into major drug running and could be trying to put drugs into Australia.

Ms T. Smith—While phone tapping is something that Customs does not do, it is a function of other agencies.

Senator SCHACHT—You are not going to do it, because you have access into the system that does it.

Ms T. Smith—It would only occur if it were a lawful activity here in Australia, and certainly this treaty is not aimed at exploiting Australian citizens' privacy rights.

Senator SCHACHT—It is possible that an agency, such as Dutch Customs, could find out that they can put a request in. We might say no, obviously, but they can put the request in. I want to make it quite clear: can we can say no to that request?

Ms T. Smith—Absolutely.

Senator SCHACHT—I want to go back to the other issue of drugs. The Dutch have a different attitude than we do in Australia on a number of areas in relation to the decriminalisation of drugs et cetera. Whether that is good, bad or ugly is another judgment. What they allow legally in the Netherlands, you would get jailed for in Australia. How do you differentiate between the activities on drug issues between what they do legally in Holland and what we say is illegal in Australia? For example, in the exchange of information, a person in Holland may be connected with a drug activity that is legal in Holland, whereas it is illegal in Australia. You cannot go to a coffee shop in Sydney and sit down have a cup of coffee and eat hashish biscuits, as you can in Holland. You ought to be warned! What I am saying is that there is a difference in drug issues.

Ms T. Smith—Absolutely; there is. If Australia, with its tighter controls over 'recreational drug use'—if we use that term with regard to the Netherlands—were actually to make a request to the Netherlands for something which was not an offence in their country, they would be quite entitled to basically come back and say that they were not going to give us that information because of the laws in their country, just as we would be able to do the same thing with other administrations.

Senator SCHACHT—That is the same in the area of what some people call pornography. The Dutch have a much more liberal attitude to the production and distribution of pornography than most other countries in the world, including Australia. There are suggestions that some of the worldwide pornography networks are based out of Holland as a result. If we requested that what we call illegal pornography not get a classification by the Office of Film and Literature Classification and they said that it was legal in Holland, they would have the right to say, 'We are not going to give you information about who is legally producing that in Holland and distributing it.' Is that right?

Ms T. Smith—Yes. They would have the right to do that. I am aware of only one instance out of 17 over the last three years where we have requested information in relation to something that would be a criminal matter here in Australia, and the Netherlands authorities have only supplied limited information because of those concerns.

Senator SCHACHT—Is that right? There has already been a knock-back?

Ms T. Smith—That was a part of one request out of 17, to my knowledge.

CHAIR—On the basis that the activity was legal in the Netherlands, they cooperated but only to a limited extent. Is that what you are saying?

Ms T. Smith—That is right.

Senator SCHACHT—Was that a drug or a pornography matter?

Ms T. Smith—That was a drug matter.

Mr ADAMS—In the protocols of this treaty, those issues have not been laid down? You have not endeavoured to codify that in some way?

Ms T. Smith—The spirit of the treaty makes it quite clear that the administrations each have that right to satisfy their own legal obligations. Within the spirit of the treaty, that is quite apparent. It is actually worded that 'the administrations have the ability to not comply with the request'.

Senator LUDWIG—Have we reciprocated? Have we been asked for information and provided only a limited response?

Ms T. Smith—No. If I were quite blunt, I would say that the Netherlands have supplied Australia with far more information than we have been asked to supply to them.

Senator SCHACHT—In general, without in any way affecting an operational outcome or accidentally tipping criminals off, can you give us in more detail a description of what they have supplied us with?

Ms T. Smith—Certainly they have supplied us with information relating to interdiction methods and successful technologies in the container area. They have supplied us with more detailed information in relation to drug offenders who have been apprehended here in Australia. They have assisted us with industry matters, where there is potential for injury to Australian industry.

Senator SCHACHT—Do you mean injury under tariff or dumping arrangements?

Ms T. Smith—Yes; that type of thing. They have assisted us with probity inquiries, whether in relation to contracted employees or people working within the industry in the customs environment.

CHAIR—Senator Schacht, have you many more questions? I have a list of others who also want to ask questions.

Senator SCHACHT—I have one more.

CHAIR—Just finish that question, perhaps.

Senator SCHACHT—If all that cooperation is happening anyway, why do we need the treaty? It seems to be pretty good without it. Is this just bureaucratic formality and making it look nice?

Mr Edwards—It is probably more than that. There are probably several things that would support moving towards a treaty. One is that we have been able to share information thus far with the Netherlands, but in most instances it has been Australia seeking information from the Netherlands rather than the Netherlands seeking it from us. A treaty would enable that to happen in a more structured, formal way so that each of the parties would be able to understand what its obligations are and do that through a more formalised mechanism. There is scope at the moment, under the Customs Administration Act, to enable a short, one-off agreement for particular instances, or else for an ongoing section 16 agreement, but it is essentially limited. This agreement allows us to expand that. It also strengthens the relationship between us and Dutch customs. It identifies that another area of importance is to talk about methods and the ways of doing business.

Senator SCHACHT—Can you take this on notice: with what other countries are you thinking of negotiating, and with what countries do you have a target to reach a similar agreement on a similar customs arrangement? I do not want you to answer it now; take it on notice.

Mr Edwards—Is that at treaty level?

Senator SCHACHT—What countries are you developing the mutual agreements with, and where do you need to have a treaty because of the domestic situation in the country?

Mr Edwards—We will provide you with a list of those countries with which we already have agreements and those which are—

Senator SCHACHT—But they are in the note already, aren't they?

Mr Edwards—They are examples. There are more, and others that are under contemplation.

Mr ADAMS—Most of my questions have been dealt with. Do we tend to have these treaties with countries we trade more with, or are there other specific reasons that we have the treaties? I understand the reason we have this one with the Netherlands is their expertise, the size of the port et cetera. We evidently trust them, as well. What about other areas where we have a lot of trade? Is there any stimulation from that to look at what is coming in?

Mr Edwards—The history of the agreements we have shows that they are often where there is a large amount of trade, but that is not always the case. Strategic reasons for the location of the other country or issues of criminality, for example, might also motivate us to move towards an agreement.

Mr ADAMS—Are these skills in manipulating the containers for the movement of illicit goods a high art? Have the Netherlands been very good at finding this? Do they have good expertise in this area that we want to tap into? Do we share information on that?

Mr Edwards—Yes. That is about working methods, for example, so it really covers the whole range of Customs activity, not only the physical movement of goods but also the Customs processes and procedures that they might have in place—for example, risk management and risk assessment targeting techniques—and the area of technology. For example, in the Rotterdam

port they have installed a fixed container X-ray. In the process of developing our X-ray technology, we visited that port several times to see what they were putting in place, how they were going to use it and how they were going to manage the logistics of putting the containers through them.

Mr ADAMS—How far away are we from that sort of technology?

Mr Edwards—I think we are well on track. In fact, I think that there is already container X-ray technology in contemplation for the Australian Customs Service, and there is some mobile technology which is going to be installed in various parts of Australia later this year.

Mr ADAMS—That could be in the budget, couldn't it—protecting our borders?

Mr Edwards—It could be.

Senator SCHACHT—I am sure Customs made a big bid; they are a very proactive department.

CHAIR—You do not have long to wait to find out.

Mr MARTYN EVANS—I wish to briefly look at two areas. We were talking earlier, in response to Senator Schacht's question, about issues which may be raised by the Dutch administration. I notice that article 12—and Senator Ludwig referred to this as well—states:

> If the requested administration does not have the information requested, it shall initiate inquiries to obtain that information in accordance with its national legal and administrative provisions.

As Senator Schacht was saying, we have a legal process in this country to obtain information through other agencies in those ways. Article 12 seems to impose an obligation on us to actually pursue those mechanisms with other agencies beyond the Customs power itself. So if the provision exists under our law for the AFP to intercept computer communications or whatever, article 12 seems to imply that we will do that. Is there a subsequent ability to refuse later? The implication from your earlier responses was that it is by agreement, but article 12 is fairly pre-emptive on that.

Ms T. Smith—The spirit of the treaty is certainly leaning towards cooperation and assisting each administration in meeting their requirements. From memory and without going through the document—I could not quote exactly where it appears—there is definitely the option where, if it does not accord with your legal obligations within your country, you have no obligation to continue with that matter. There is also the check and balance where, when you approach another administration, it is to be quite clear on whose behalf you are approaching them.

Mr MARTYN EVANS—But the treaty does oblige us to follow our domestic processes, if those exist, on request.

Ms Kyle—As we have said before, this agreement is based on the World Customs Organisation model. It does not completely suit our Customs laws, so this article is one that we would have some difficulty in putting into place. As we know, there is an article—I think it is

2.2—which says that it is restricted to our Customs laws. So it is one that we could not put in place because of Customs limitations with our laws.

Mr MARTYN EVANS—So are you saying that that clause will not be operative?

Mr Edwards—I do not know that that is entirely the case. One example where that might exist is where there is some information in relation to a Customs offence or a Customs law, and we might request from the Dutch or the Dutch might request from us additional information in relation to the same request. So rather than breadth of information it might be depth of information that it is seeking. So there are probably circumstances where it could apply.

Senator SCHACHT—How do you opt out of it? If you say to the Dutch, 'Sorry, our law doesn't allow it,' or, 'We don't think it is in our national interest,' do they then say, 'You have breached the treaty'?

Mr MARTYN EVANS—Our law clearly does allow for a range of these things. Article 12 is about triggering our domestic process which allows investigations by other agencies to occur. My only concern is that our conversation earlier had been very much on a permissive basis—that the treaty is about cooperation. I fully understand and support that—I think it is a very reasonable basis for it—but article 12 seems to imply to me that it is fairly mandatory that if we have a request and we have a domestic legal process—which we certainly do in almost every conceivable scenario—we are then obliged to trigger that domestic process. The Attorney-General would be required to seek a phone-tapping warrant, for example, because it says they 'shall initiate' the domestic processes.

Mr Edwards—That is the wording, but it is probably also governed by some other provisions which exist in the agreement, one of which is set out in the scope of the agreement at article 2, paragraph 2:

All assistance under this Agreement shall be performed in accordance with the legislation of the requested State and within the competence and available resources of the requested administration.

So that might provide some limitations or breaks on that. The other provision is chapter X, which sets out some exemptions for information that can be provided. So, yes, whilst those words are there it is probably also well governed by other provisions within the agreement.

Mr MARTYN EVANS—And by custom and practice, I assume—they know what they can ask and we know what we can answer.

Ms T. Smith—Experience certainly feeds into that process.

Mr MARTYN EVANS—It just seems to me that the treaty goes a little bit further than the explanation.

Senator SCHACHT—As a question on notice: in respect of this treaty—and the information should not be published but provided to the committee in confidence—have you ever accepted a request from Dutch customs which would lead to the Attorney-General seeking a phone tap, and has that been granted?

Ms T. Smith—Would you like a time period set on that as to how far we should go back?

Senator SCHACHT—Five years, to be even-handed.

Ms T. Smith—Yes.

Senator SCHACHT—I have not been the Customs minister for six years, so that gets me off the hook.

Mr MARTYN EVANS—I have one more brief question on an entirely different aspect. Given the integration of European administrations and customs law under the European Community treaties, to what extent are we now dealing with the Dutch customs administration and to what extent is that really a proxy for European-wide customs administration? Given the current and projected legal environment in Europe, is this really a treaty with the Dutch or is it really a treaty with Europe? How do you actually deal with that blurred line on a practical basis?

Mr Edwards—It is a good question, because there is certainly an issue of mixed competence with the responsibility of customs administrations in Europe as to where the domestic administration starts and finishes and where the European Community takes over. There is a particular article in the agreement—at 14.3 under chapter IX—about the confidentiality of information, which says that:

> The disclosure of information to the European Commission or any of the customs administrations of the European Union's Member States under the obligations of ... this Agreement shall be notified to the Australian Customs Service in advance.

So on that basis, depending upon what was being sought and the nature of the information, we could possibly be able to refuse the provision of information.

CHAIR—It kind of anticipates it.

Mr MARTYN EVANS—Yes, because I suspect that will ultimately merge. Given the free movement of goods and services within the European Community, I suspect there is a sort of inevitability about a European customs service.

Mr Edwards—There is a trend in that direction, but its speed and ultimate destination are hard to predict.

Mr MARTYN EVANS—Thank you.

CHAIR—Last question, Senator Schacht.

Senator SCHACHT—Would you also take it around the other way? Have you ever put a question to the Dutch authorities that would have implied that they would have had to do something like a phone tap? Would you just take that on notice?

Ms T. Smith—That is the Australian Customs Service?

Senator SCHACHT—Yes. Have you put a request in to the Dutch for information, and what was the result? That will be an in confidence answer. My last question really is something that you tweaked my memory about and that is always the most explosive in Australian industry's antidumping cases. Does this treaty mean that, if we have an antidumping case against a Dutch company for dumping into Australia, we can require the Dutch customs service to help us get the evidence? Conversely, if they have antidumping laws in Holland, which I am not sure of, but I suspect they do—most countries do—against an Australian company dumping, are we required to help them in getting the information together to prove injury?

Mr Edwards—I would not think so. Firstly, the Dutch administration does not have responsibility for antidumping matters, whereas the Australian Customs Service does. Secondly, this agreement is focused towards customs offences and customs working methods, whereas—

Senator SCHACHT—Where is this—

Mr Edwards—This is antidumping commercial inquiries.

Senator SCHACHT—But dumping is illegal in Australia.

Mr Edwards—No, it is not.

Senator SCHACHT—But if someone is found guilty of dumping they suffer a penalty. They may not be jailed. Some people in industry in Australia say someone who dumps ought to go to jail, but you cannot actually get them overseas. But you suffer penalties.

Mr Edwards—It is companies bringing stuff in.

Senator SCHACHT—Yes, bringing stuff in and dumping it in Australia. I am speaking about if you are found guilty of dumping. Mr Fraser from the old Customs Anti-Dumping Authority used to give me great lectures about this.

Mr Edwards—It is a commercial remedy. It is an additional duty in order to remove the injury which is caused by that dumping.

Senator SCHACHT—But it can be a substantial amount of money.

Mr Edwards—It can be, yes.

Senator SCHACHT—So you are saying that antidumping issues are excluded from this arrangement?

Mr Edwards—I would say that it would be very unlikely that an antidumping issue would be pursued under this agreement.

Senator SCHACHT—No, not pursued: seeking of information. When the authority is going out and doing a test to get the information, it has to go in country to find out the pricing arrangements and then come back and say that, when the production costs in Holland are

compared with those in Australia, clearly the product was dumped to get rid of it and it was injurious to the Australian marketplace. What I want to just get clear is this. We cannot ask the Dutch customs authority and, through them, whoever does it in Holland and vice versa. We do do it in Customs. They cannot ask us to take a case against BHP for supposedly dumping steel into Holland.

Mr Edwards—Firstly, the way the agreement works, we cannot really ask the Dutch to do any inquiries that we are not entitled to do ourselves. When I was saying before that we as an administration, the Australian Customs Service, have responsibility for trade remedies, the Dutch Customs do not; they are the responsibility of the European Commission. It is unlikely that they would have the type of data we are seeking. One area where it might come into effect would be, say, for circumvention of antidumping duties. That would be a possibility. In the initiation and investigation of whether dumping measures should be put in place, I would say that this is not the type of remedy to be used for that.

Senator SCHACHT—And, using BHP just as an example—I have no knowledge of BHP dumping steel into Holland—you are telling me that they cannot ask us, with our skill in Australia, to go and check prices at which BHP is selling steel in Australia and then supply it to them on their authority for their own case.

Mr Edwards—No. As I said, the Dutch Customs do not have responsibility for those investigations, so the request would not come from Dutch Customs; it would come from the European Community.

Senator SCHACHT—Okay, it could come from the industry department or the finance department or whatever to their Customs department and the ministers agree. The customs minister says to his officers, 'Send the request to Australia.' I think you have given me an 85 per cent assurance, but I have to say it will be a political issue if BHP finds out that you were providing the evidence, that you were going down and collecting the information to tell the Dutch, who then take a case against us and prove it—with those big penalties. I will ask you to double-check that and take that on notice. You may care to check with our antidumping authority and provide the information to the committee.

Mr ADAMS—Your record is not too good in that area.

Senator SCHACHT—As I say, antidumping is a really hot issue.

CHAIR—Witnesses, is that a matter you can take on board and then come back to us on?

Mr Edwards—We can take it on board.

Senator SCHACHT—I would just like you to double-check that so we are absolutely clear on this.

Mr Edwards—Let us also be clear about the nature of the question that we are going to answer. What you want to find out is whether this agreement could be used for the investigation of antidumping allegations against Australian companies—

Senator SCHACHT—Where we assist in collecting information—

CHAIR—and the gathering of evidence.

Senator SCHACHT—Conversely, can we use it to ask the Dutch whether—

Mr ADAMS—Well, if it works for one it will work for the other.

Senator SCHACHT—Even though they do not have antidumping in the Customs department, it is a government department. Conversely, could we use it to provide information about a Dutch company dumping in Australia?

CHAIR—If there were a request for information, they could not pass it on to the European Commission because they would have to tell us first under the terms of this treaty, but I take your point. Thank you, officers, for your time today. We appreciate your coming along to give us evidence. There are a couple of matters that you will come back to us on.

[12.17 p.m.]

Agreement with France on the Employment of Dependants of Agents of Official Missions

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law Branch, Office of International Law, Attorney-General's Department

MILTON, Mr Ben, Acting Director, Administrative and Domestic Law Section, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

SMITH, Mr Paul Manaccan, Director, Protocol Branch, Department of Foreign Affairs and Trade

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—I welcome witnesses from the Department of Foreign Affairs and Trade to give evidence relating to the agreement with France on the employment of dependants of agents of official missions. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions on this agreement?

Mr Milton—Yes. As this committee may be aware, this agreement forms part of a series of bilateral employment arrangements that Australia has concluded with countries in which the Australian government has a diplomatic or consular presence. The purpose of a bilateral employment arrangement is to allow the dependants of Australian diplomatic and consular personnel to engage in paid employment while posted in another country and, on a reciprocal basis, to enable dependants of diplomatic and consular officials posted to Australia to engage in paid employment. This agreement will apply to the dependants of diplomatic personnel at the Australian Embassy in Paris, the Australian Permanent Mission to the OECD in Paris and the Australian Consulate-General in Noumea, New Caledonia. For France it will apply in practice to employees of the French Embassy in Canberra and the Consulate-General in Sydney.

Such agreements are important to Australia for a number of reasons. Firstly, they assist the government in recruiting and retaining high-quality employees with families to serve abroad. Dual-income families are now an accepted part of Australian life and many spouses have established careers. The financial commitments facing families today often do not allow for a spouse to cease working. The lack of opportunity for spouses and dependants of diplomatic and consular personnel to engage in paid employment whilst overseas therefore acts as a disincentive for officers with families to serve abroad or for their families to join them whilst on a posting.

While bilateral employment agreements do not guarantee employment for dependants, they at least allow for that possibility, and they enable Australian government agencies represented abroad to deliver on their broader commitment to providing family friendly work environments. In addition, the arrangements assist in ensuring that foreign officials posted to Australia are also of the highest quality. We generally prefer the arrangements to take the form of an instrument of less than treaty status. However, a small number of countries, including France, require that the arrangement be of treaty status. We currently have about 19 less than treaty status, bilateral employment arrangements. There are four bilateral employment treaties—France will make the fifth.

Negotiations for employment arrangements are based on a standard Australian text. This agreement broadly follows that text, but because it is legally binding it uses more formal language and in a number of areas provides greater detail. There are several small substantive differences as well. The first is that the agreement provides slightly less flexible definitions of ‘family member’ and ‘paid employment’ than we would normally see. France required this in order to comply with its local law and terminology. Another difference is that, under the agreement, customs privileges provided for spouses under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations will cease to have effect as soon as authorisation is given for the employment. There are also additional new provisions on financial transfers, residence permits and geographic coverage. We consider that these differences do not weaken the treaty in any way and, after 14 years of negotiation, we are happy with what it provides.

CHAIR—Fourteen years! I have a couple of questions on definitions. What is the definition of ‘spouse’? I am looking at article 2, which just says ‘the spouse’. Does that include de facto?

Mr Milton—Under French law at the moment, their terminology ‘spouse’ does not include de facto spouses, but in the future as French law and terminology progresses then that should be available.

CHAIR—I assume it does not include same sex couples, then.

Mr Milton—No, it does not include same sex couples either.

CHAIR—So this is the French definition?

Mr Milton—This is the French definition, yes. Our definition is much broader. Our definition, basically, in our standard agreement, would suggest that any person whom we accept as forming part of the family of a diplomat posted to Australia would fall under the terms of an arrangement, and that would include de facto spouses, same sex spouses and children who are of working age.

CHAIR—Under 18?

Mr Milton—No.

CHAIR—Any dependent children?

Mr Milton—Any dependent children. We have specific criteria.

CHAIR—But they will not be dependent if they have a job.

Mr Milton—I understand it is up to 22 years of age or 25 if they are in full-time employment.

CHAIR—Does this agreement come into play whether it is part-time employment—one day a week, half a day a week—or full-time, as long as there is remuneration?

Mr Milton—Yes; so long as there is remuneration based on a contract between the dependent spouse and the person that they are working for or working with. It will take into consideration, for example, music lessons provided by the spouse or, if the spouse works in a company or an organisation, that type of employment as well.

CHAIR—What sort of numbers are we talking about in France? The national interest analysis says basically we are talking about a small number of officials in each country: how many in France?

Mr Milton—I understand that we have about 15 Australian personnel serving over there—

CHAIR—Who would fall into this category?

Mr Milton—Yes; who at this stage would fall into this category. As I said earlier, they are also at our consulate general in Noumea.

Mr WILKIE—How many French officials would be here in the same position?

Mr Smith—There are a total of 17 who would be covered by that agreement in their embassy in Canberra and another nine in the consulate general in Sydney.

Mr WILKIE—Would these people pay local taxes as part of the agreement?

Mr Milton—Yes. As part of the agreement, the tax is payable in the country in which the work is carried out. So French employees here would pay Australian tax and Australians in France would pay French tax.

Mr WILKIE—If there are possible disputes over the application of diplomatic immunity, how would they be resolved?

Mr Milton—The treaty provides that diplomatic immunity in terms of civil and administrative immunity is waived as soon as authorisation is granted and that immunity from execution in terms of civil and administrative immunity is waived as well. In terms of criminal immunity, where it would apply to a criminal offence carried out in the terms of employment—and there may be some limited functions like that—the treaty provides that the sending country shall waive the immunity, (a), if it is requested and, (b), if it is in accordance with its essential interests.

Mr WILKIE—You mentioned there are four countries that have treaties. France is one; who are the other three?

Mr Milton—As I recall we have Spain, which was the most recent, the Netherlands, and Chile. I am not sure of the other one.

Mr WILKIE—Okay. That makes four. In your analysis of the situation, given there have been a few little amendments here and there in this particular proposed treaty, do you believe it is benefiting both countries equally, or one more than the other?

Mr Milton—In essence it benefits both countries equally, because both countries are allowed to have their dependants employed in the other country. It is based on reciprocity, and so the definitions that France, for example, applies to 'spouse' would also apply here in Australia. As I said, over a period of 14 years it has been hammered out so that there is a definite compromise there and we all benefit from the treaty.

Mr WILKIE—You have said that is usually done by a memorandum of understanding: why a treaty? What is the argument?

Mr Milton—We generally prefer that they be done by a memorandum of understanding, because under Australian law the migration regulations allow spouses and dependants of diplomats to work in paid employment; so for us it does not really require a treaty. But in some countries their domestic legal regime requires it. In France I understand that it could have been an arrangement if it had been between the department of foreign affairs in Australia and the department of foreign affairs in Paris, but that in France it requires the cooperation of a number of government agencies to allow for Australians to work over there; and the only way that they could get that cooperation was to have a binding treaty on their country.

CHAIR—In terms of professional qualifications, how would the qualifications of a French doctor or lawyer dependent upon a diplomat spouse be handled? Obviously there would be further requirements for them to meet before they could practice in Australia?

Mr Milton—That is right. The treaty essentially allows for such people to work; the next question is whether they meet the local requirements for that work. In the case of a doctor or a lawyer, they would have to comply with all the requirements that Australian doctors and lawyers comply with—or the requirements, for example, that normal foreign workers would comply with when they come to Australia.

CHAIR—I do not know much about medicine, but in the case of a lawyer they would need, therefore, to be admitted to practice in the state in which they were seeking to practice.

Mr Milton—That is exactly right.

CHAIR—So they might have to undertake further studies, which means that they might have to get admitted to university, to a law school here.

Mr Milton—That is exactly right. They would have to get admitted to a law school and possibly do their articles.

CHAIR—They would probably have gone home by that stage.

Mr Milton—Exactly; that takes longer than three years. But if they have the necessary qualifications and they meet all the regulations with respect to such professions—and there might be a case where they would—then this treaty allows for them to be employed.

CHAIR—It is unlikely to be many of the professions, isn't it? Given the time that perhaps most diplomats spend in Australia it is unlikely to be law, medicine, accounting, or engineering. We are talking about nonprofessional work, in the main, aren't we? By that I mean work outside the professions.

Mr Milton—Yes, exactly. It is probably not the best of circumstances, and that is the position where you pull up your life and go overseas and go to a new place for a limited period of time, but it does allow for work in any of the professions as long as you meet those criteria.

CHAIR—Do you see the increasing number of women diplomats as an ongoing problem, in terms of male spouses and male dependants?

Mr Milton—It equally is an ongoing problem with female spouses and dependants, who also have careers nowadays.

CHAIR—Sure; but there are obviously some different issues here as well. Do you think this is going to be an increasing problem, given that there are many professional couples whom one would like to see being available to serve in the diplomatic corps?

Mr Milton—Indeed it is, and that is why we enter into such arrangements. They might not provide for the employment of choice of the dependant, but at least they allow for some employment. That is as good as we can do, given the circumstances.

CHAIR—Is there anything further we could do, apart from having separate arrangements with the professional qualifying bodies? I cannot see that happening.

Mr Trindade—It is quite common for people to practise in international law firms or international agencies without practising local law, and so I think in the case of employment—

CHAIR—So you could work for Baker and McKenzie, for example?

Mr Trindade—Yes, that is right; but not work as a local lawyer. Indeed, there are opportunities for people to work for international organisations or for other entities where you do not have to seek professional recognition or professional admission. Particularly in a city like Paris, which is a very large international city, there are lots of international employment opportunities. Up until now, Australian spouses have been denied those opportunities.

In response to the question about the benefits, we have seen this over a number of years as something which would probably benefit Australia more slightly than the other way round. There have been issues for the French embassy here about their spouses being able to be employed in the French school, for example, or in other areas where the French language is

required. But for Australians it has probably limited our ability to work in international law firms or in the banking sector or in other areas where there are quite a lot of employment opportunities in Paris.

CHAIR—Are there likely to be more opportunities for dependants of Australian diplomats than there are for other diplomats in Australia: is that what you are saying?

Mr Trindade—Quite possibly, yes.

Senator COONEY—There is a convention we are going to look at later on—the convention on the recognition of qualifications. Has that got any play, given what the chair has asked?

CHAIR—This is evening we are looking at the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region. I am not asking you to comment on it, but it is interesting that it is on for discussion this evening.

Mr Milton—As I said before, so long as the spouse or dependant complies with Australian law and regulations then they can practise in those areas. And where Australia enters into a treaty which recognises foreign qualifications, that would allow practise in those as well.

CHAIR—We might bear this in mind for consideration this evening. Is there any other aspect of this treaty that you believe should be brought to the attention of the committee?

Mr Milton—No.

CHAIR—Thank you very much for your time. I appreciate your waiting. There will be a suspension of the hearing until approximately 1.30 p.m., when we will be dealing with the agreements with the United States and with New Zealand on social security.

Proceedings suspended from 12.33 p.m. to 1.34 p.m.

Social Security Agreement with the USA, and an Exchange of Notes Amending the Social Security Agreement with New Zealand

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

CARRICK, Ms Marion Florence, Director, New Zealand, Department of Family and Community Services

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

GORELY, Ms Amanda Louise, Director, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

SCULLY, Mr Mark James, Executive Officer, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

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

MURRAY, Mr Nigel Patrick, Director, Superannuation, Australian Taxation Office

CHAIR—Welcome. Today's hearings are part of the ongoing review of Australia's international treaty obligations. This morning we reviewed a number of treaties tabled in the parliament on 12 March, and we are continuing that process this afternoon. I have called witnesses from the Department of Family and Community Services, the Attorney-General's Department, the Australian Taxation Office and the Department of Foreign Affairs and Trade to give evidence relating to the agreements with the United States and with New Zealand on social security. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I invite you to make some introductory remarks before we proceed to questions.

Mr Barson—If it is acceptable to the committee, my comments will cover both US and New Zealand agreements. There are two separate treaty actions proposed in the documents: firstly, that Australia enter into a new social security agreement with the United States of America; and, secondly, that the proposed agreement with New Zealand be amended as set out in the exchange of notes. A new agreement with the USA was signed last September and is in addition to Australia's existing network of 11 international social security agreements. A new agreement with New Zealand was signed in March 2001 and will replace the existing agreement with New Zealand. The text of that new agreement was tabled last year, and the committee recommended taking binding treaty action. We are now proposing some amendments which will enable implementation of that agreement in accordance with the original intent, following some changes in New Zealand's legislation.

It might assist the committee if I briefly reiterate that agreements address gaps in social security coverage for people who move to, or live and work in, different countries. They help them maximise their income and allow them choice in where they live or where they retire, and they contribute to the overall bilateral arrangement between countries. They can, of course, also provide foreign exchange benefits for one or other of the two countries.

This department presented seven new social security agreements to the previous committee, and so it is good that we are now able to come back with some additional agreements to add to our global network. The new agreement with the USA is based on the same general principles of all our existing social security agreements. It will allow people to lodge pension claims from either country; it will help people to meet minimum qualifying requirements for benefits and to overcome time and other limitations on portability of payments if they live in either country; it will apply a specific income testing regime for Australia; and it will provide avenues for mutual assistance to facilitate the determination of correct entitlements.

The agreement with the USA will cover age pension, disability support pension for people who are considered to be severely disabled, pensions for widowed persons and carer's payment. The new agreement with the USA is significant because it includes provisions to avoid double coverage of seconded workers. This is the third agreement to include that coverage—our previous ones being the Netherlands and Portugal, which will commence on the same date as that of the USA. For Australia, these provisions affect the operation of the superannuation guarantee laws and have been negotiated in close cooperation with our colleagues in the Australian Taxation Office. In essence, what they do is provide that compulsory contributions—for example, in Australia's case, under superannuation guarantee laws—do not have to be paid in both countries when Australian and US employees are sent to work temporarily in the other country.

In terms of consultation in general, relevant community groups in Australia have been informed on the effect of the new agreement with the USA. Their comments have been sought, together with those from other community organisations and state and territory governments. We also, as a result of last year's hearings, consulted with the ACTU concerning the principle of including double coverage provisions in our agreements. None of that consultation process brought light to any concerns about the new agreement.

In terms of New Zealand, as I said before, we are just making some amendments to the new agreement between Australia and New Zealand. These amendments are being introduced through an exchange of notes and will complement the bilateral arrangements that were announced on 26 February 2001. The original agreement was signed on 28 March 2001. When it comes into force on 1 July 2002, it will replace the current agreement that has operated since 1995.

The amendments that we are putting to you today provide clarification in relation to the agreement, and they address some New Zealand government concerns that some aspects of the agreement no longer fit with recent changes in their social security law. We are also taking the opportunity to make a couple of other minor amendments which clarify parts of the agreement and ensure that both countries are able to implement in line with the original intent as stated by government.

Again on the New Zealand agreement, there was a consultation process—broad consultation with the welfare community. In this case we have not changed the intent or scope of the agreement. The benefits and obligations offered by it have not changed, so we have not sought to do any further consultation.

I think that is all I need to say. This is another step forward in our global network of social security agreements. We commend them to you for your questioning.

CHAIR—I would just like to clarify some of the numbers that are cited in relation to the social security agreement with the USA. Paragraph 9 of the national interest analysis states:

The Australian government currently pays pensions ... to around 3,800 US-born pensioners, the vast majority of whom are resident in Australia.

Can you clarify how many are actually resident and where the others are?

Mr Barson—Certainly. On that one, I shall immediately defer to my colleague.

CHAIR—Just before you do, I have a few other questions on the numbers. The analysis states:

... Australia pays pensions to approximately 450 people (not necessarily US-born people) residing in the US.

Perhaps you could clarify the circumstances in which Australia pays pensions to those people. And then paragraph 11 states:

The Department of Family and Community Services estimates that, through the Agreement, approximately 4,000 people residing in Australia and the US will benefit ...

Mr Barson—Yes.

CHAIR—Does that have any relationship to the 3,800 and the 450 that you refer to in paragraph 9? If not, how does that break up—that 4,000 in paragraph 11? How many are in Australia and how many are in the United States? Finally, what kinds of payments would these different categories of people be able to access now that they have not been able to so far? Could you just clarify that for me.

Mr Hutchinson—The figures mentioned in paragraph 9 of the national interest analysis are actually figures on the current people being paid. Of the 3,800 United States born pensioners that it refers to, I would estimate that about 3,400 are already in Australia. The balance, which currently is about 430, are in the United States. They are paid under our domestic portability law, which says, essentially, that, if you are getting an age pension in Australia, you can take that anywhere overseas indefinitely and still retain your entitlement. And people getting disability support pension with severe disabilities can also take their pensions overseas indefinitely. All other pension types have time limitations on them, but those two types—

CHAIR—Age and disability?

Mr Hutchinson—Yes, age and disability. They are payable indefinitely.

Mr Barson—People with a severe disability.

Mr Hutchinson—Severe disability, yes. Coming back to your other question, which I think was about the 4,000—

CHAIR—Yes, in paragraph 11.

Mr Hutchinson—I do not have the exact break-up with me, but I think, from memory, that the majority of people in Australia—something like 2,300—were expected to get United States pensions; the balance are people who were overseas and would comprise some of those 430 already getting Australian pensions who may get a slight increase out of the agreement.

CHAIR—Finally, could you clarify for me what kinds of payments those people would be able to access that they have not been able to access so far?

Mr Hutchinson—The payments they will be able to access that are covered in the agreement are age pension, disability support pension for the severely disabled, and the pension for widowed persons, which essentially comprises ‘parenting payment (single)’ for widows with dependent children. I think the other payment is carer payment. The reason those payments come up again is that, as I said before, if you get an age pension or a disability support pension and you are severely disabled, you can take that anywhere in the world. If you leave Australia before you become eligible to receive one of those pensions, you cannot claim the pension from overseas in the absence of an agreement. We would expect that the majority of those people to benefit from the agreement in the United States are people who will be able to claim age pension and/or disability support pension from the United States.

Mr Barson—It is not so much a new payment that they can claim; it is an ability to claim from overseas which they previously have not had. Similarly, their period of residence in Australia may not have been sufficient in itself to claim one of those payments; but under an agreement, when combined with the equivalent contribution period in the US, it may meet our requirements and they may then be able to claim a pension or payment that they have not been able to claim previously.

CHAIR—You mentioned carer payments. The national interest analysis talks about article 1 of the agreement having the effect of limiting some of Australia’s obligations, and you mentioned that the carer payments will not be as successful overseas as they are in Australia. Could you explain the rationale for limiting access to them overseas. Are there any other access differences that could affect Australians living in the United States?

Mr Hutchinson—Carer payments generally are payable to a broad audience in Australia. For example, the person does not have to be the partner of the person they are caring for to get carer payments. Originally, when carer payments were introduced, they were only for people who were caring for people who were recipients of social security pensions. As I just mentioned, they are now available in Australia to people who are caring for people who are not necessarily pensioners and who are not necessarily their partners. However, in the context of all of our international agreements, we limit payment of carer payments to people caring for their

partners, and the carer has to be in receipt of an Australian pension. We do that as a part replacement for the fact that we do not pay wife pensions anymore. We stopped granting wife pensions in 1995. Most of the other countries to which we pay have some sort of a wife pension or a survivor pension, so to some extent the carer payment that we include in agreements is an effort to reciprocate payments from the other country.

Mr WILKIE—I believe you sought the views of expatriate Australians to get their opinions on this. Did they make any recommendations in their submission, and what happened to those recommendations?

Mr Hutchinson—I think they did make some brief recommendations, mainly to do with taxation issues. I cannot recall off the top of my head what they were, to be honest. The general thrust of their submission was that they are very supportive of the agreement with the United States and very supportive of the government pursuing agreements with other countries.

Mr Barson—That was one of the key points of the Southern Cross Group's submission, for example, which is one of the major expat groups. I think that in every submission they have made they have urged the Australian government to enter into social security agreements with as many countries as possible. They have always supported the concept. Unless there is anything specific, that is the best I can say at this stage.

Mr WILKIE—If there is anything specific that has been implemented, could you please advise us of that.

Mr Barson—Certainly.

Mr BARTLETT—What is the estimated net cost to the Australian government? I note that there are 4,000 new recipients: will most of those be beneficiaries of the largesse of the Australian government or the US government?

Mr Hutchinson—As I said before, we estimate that there is a slight majority in Australia. We estimate that the US will pay about an additional $7 million in pensions into Australia, and I think we are estimating our outlays to be about $3 million a year, so we are net beneficiaries of the agreement in that sense.

Mr BARTLETT—That is $3 million, plus the extra $3.7 million for system enhancement?

Mr Hutchinson—Yes, the other costs are related to implementation costs of the agreement. All of our agreements are implemented in Australia by Centrelink, and the costs there arise from training, administration and systems changes that Centrelink put in place for the agreement to operate.

Mr Barson—To add to that, it is always complex when we try to sort out what the net effects of these things are. Under agreements, the other country pays a pension to a person in Australia, for example, that was not previously paid. That may or may not be a partial offset against an Australian payment. To the extent that it is an offset against Australia's social security costs, we are able to claim that in the budget process. To the extent, however, that it is cash in the person's pocket, because they end up with a net greater amount, we do not claim that as part of the

process. At times we tend to talk about the amount of inflow into Australia and the amount of outflow as one way of comparing the benefit or deficit to the two countries, but when we get down to actually talking budget figures, the only part of that we can count is outlays on pensions versus savings in outlays on pensions. That is an additional comment. The implementation of agreements always has initial costs. We tend then to look at the longer term benefits to Australia of a net positive inflow over time.

Mr BARTLETT—But a net outflow in terms of the budget?

Mr Barson—Indeed, it may be a net outflow over the forward estimates period in terms of the budget, because you do, as in this example, have some $3 million in systems enhancements to enable it to happen. That, however, is much more of a one-off cost and that is why we prefer to look at the longer term and the net benefit to Australia over a period of years.

Mr BARTLETT—I have one related question. In previous agreements of this type, how close to the mark have our estimates of payments and receipts turned out to be?

Mr Hutchinson—I do not know that we could give you a—

Mr BARTLETT—Are they generally fairly close?

Mr Barson—Yes, overall they have been fairly close. It is difficult, of course, some years later, when there are other changes in the other country, to really determine that. We are looking much more closely at that these days. For example, with the New Zealand agreement, we have already agreed with the Department of Finance how we will track the impact of those—and not only how we will track the impact of the agreement itself but how we will manage to do that when, at the same time, there are changes around immigration arrangements. The best answer I can give you is that our estimates are generally fairly close. We are trying to improve the transparency of those, in particular, by monitoring the savings process with New Zealand and some work we are doing at the moment on the cost benefit of agreements. When they are both released, they will show that.

Mr MARTYN EVANS—Are there any safeguards in the agreement to avoid the situation which occurred with United Kingdom where they did not pay indexation benefits to the UK pensioners living in Australia? Have we covered that aspect of the issue?

Mr Barson—Yes, we have. The UK is a particular situation dating, of course, from the fifties when the first social security agreement was entered into. The very earliest of those agreements reflected the situation in UK domestic law where indexation was not payable. The more recent agreement signed in the early 1990s—when Australia started saying, ‘Hey, we do not accept this’—did not include that. So, no, that situation is not going to arise again, and the agreements that we have entered into all contain appropriate provisions.

Mr MARTYN EVANS—Thank you, that is excellent and very good to hear. I hope we can negotiate a retrospective treaty with the UK to match that! I am sure that that will be a great test of the department’s skill. The only other question I had was in relation to the working life residence provisions, which are a fairly complex area of law.

Mr Barson—Yes.

Mr MARTYN EVANS—Am I understanding it correctly that periods of working life in the United States will count effectively as working life in Australia for the purposes of determining eligibility for our pension?

Mr Hutchinson—Yes. For example, as Mr Barson mentioned earlier, somebody in the United States, or in Australia for that matter, may not have the 10 years Australian residence required to qualify for an age pension—they may have only lived in Australia for four years, for example—but if they have six years worth of coverage in the United States, they can add that to their four years Australian residence to meet our 10-year minimum and therefore become eligible for a part age pension from Australia. But if they are in the United States, we will only pay them based on their actual working life residence in Australia. So we will pay them four-twentyfifths of an Australian means tested pension.

Mr MARTYN EVANS—So for the purposes of qualifying, it counts, but for the purposes of payments, it does not?

Mr Hutchinson—That is correct. And that works both ways—in the US, too.

Mr Barson—I can add to that. Yes, the objective here is to avoid people who have lived in more than one country failing to be eligible for a pension from either country because they do not meet the criteria for either country.

Mr MARTYN EVANS—Yes.

Mr Barson—By allowing the period of residence or contribution in the other country to be counted, we will both end up recognising that person as eligible. However, Australia will only pay its share of the person's pension based on a proportion.

Mr MARTYN EVANS—Presumably it is then topped up by the US authorities to the extent that they are eligible.

Mr Barson—From the UK experience, one does not use the term 'top up'.

Mr MARTYN EVANS—No.

Mr Barson—But yes, they would expect to receive an equivalent pension from the US, based on a similar sort of arrangement.

Mr MARTYN EVANS—Is that kind of provision in our other agreements—

Mr Barson—Yes.

Mr MARTYN EVANS—principally with the UK, for example?

Mr Barson—The UK, again, is different. The agreement with the UK was one of our original host country agreements, of a different nature. As you know, we do not have an agreement any more with the UK. Were we to enter into another one, we would have to seriously consider whether we wanted another host country agreement or whether we were willing to enter into a reciprocal agreement. Unfortunately, it is a bit premature to try to answer that one.

Mr MARTYN EVANS—Right.

Mr Barson—But yes, across our social security agreements that is a common feature.

Mr MARTYN EVANS—I ask that because the majority of my constituents are ex-UK residents rather than ex-American residents. Thank you.

Senator TCHEN—You have already answered, for Mr Evans, part of the question I wanted to ask. To get it quite clear in my mind: basically, these agreements will enable people who are unable to qualify in one or more countries—because they have a split residency period—to access, pro rata, their entitlement.

Mr Barson—Yes.

Senator TCHEN—In that case, can you take me through articles 7 to 10? It seems to me that for the United States all that is required is that you prove that you have lived both in the United States and Australia. The Australian residency or working period is converted to the American period and if the sum total adds up to a qualifying period for the United States then you get a pension on a pro rata basis; is that right?

Mr Hutchinson—That is correct.

Mr Barson—Can I explain that in a slightly roundabout way? It may help with your question.

Senator TCHEN—Yes.

Mr Barson—All countries, including Australia, have criteria for eligibility to their particular social security schemes. In some countries, such as the US, that is based on periods of coverage by that scheme. In Australia it is based on residence. In some countries it is based on years of contribution. The issue here is that we require 10 years of residence in Australia; similarly, the US legislation requires around 10 years of coverage in that system. It may be that a person would not have sufficient time in either country to qualify. The virtue of an agreement is that it enables both countries, firstly, to recognise the period of coverage and therefore eligibility; and, secondly, having done that, to pay their proportional share of the person's pension, generally based on working life residence and the number of years actually spent.

Senator TCHEN—Australia's qualification is based on residency; the US one is based on payment into the employment insurance system, isn't it?

Mr Hutchinson—Yes.

Senator TCHEN—So if someone is resident in Australia for five years but not employed, the United States will still recognise that?

Mr Hutchinson—No. The US requires that they have been employed, self-employed or subject to the SG laws in Australia for that period to count for meeting their minimum qualifying requirements.

Senator TCHEN—So, while they recognise the Australian residency period, the criterion is still the US criterion?

Mr Hutchinson—It is matched broadly to their criterion; that is correct.

Senator TCHEN—Is that why it only takes six paragraphs to describe the United States calculation and 12 paragraphs to describe the Australian calculation?

Mr Hutchinson—Possibly. Certainly theirs is very complex.

Senator TCHEN—Can I ask a very quick question. What sort of pensions are not covered, other than the war widow pension and the veterans pension?

Mr Barson—Disability support pension is not covered unless the person has a severe disability. 'Severe disability' means those people who cannot work—I am doing this from memory—for a period of two years and who can work fewer than eight hours a week. There a couple of other criteria for the person to be deemed 'severely disabled'.

CHAIR—That is the query that the NSW government had, was it?—the definition of severely disabled.

Mr Barson—It could be. In virtually all of our social security agreements, because the arrangements for disability support pension, invalid pension and their equivalents vary considerably in different countries, the point of commonality that we have generally been able to find is around payments for people who are severely disabled, who cannot work, except for a very short period of time. For this reason, all except two of our social security agreements cover only people with severe disability within the DSP group. That enables a more comparable situation to that which exists in other countries. So that is an example of a payment which is not covered.

Senator TCHEN—Are there other things not covered?

Mr Hutchinson—Most of the whole range of social security payments are not covered. As I said earlier in the hearing, apart from age pension and disability support pension for severely disabled persons, virtually all the other Australian payments are payable outside Australia for very limited periods only.

Mr Barson—Newstart, for example, is not part of the social security agreement.

Senator TCHEN—I see. Perhaps this question should be directed to the Australian Taxation Office. I understand that the United States pension benefits will be higher than the Australian ones.

Mr Murray—Yes. The US system is quite different from the Australian system.

Senator TCHEN—Because it is an insurance system, they should pay higher than the Australian system.

Mr Murray—I guess it would depend on a number of factors. It is hard to give a yes or no answer to that. In the US system, the employee and the employer are both required to contribute roughly six or seven per cent per annum into the US social security fund; so there is a separate trust fund, if you like, set aside. In contrast, in the Australian system, under the super guarantee legislation the employer is required to put in nine per cent to a privately run fund, so the systems are quite different in that respect and it is hard to say which one would give the higher end benefit.

Senator TCHEN—If the United States benefits were generally higher than the Australian benefit, would a recipient of a United States benefit incur a taxation liability through receiving that benefit?

Mr Hutchinson—We have a double tax agreement with the US—which is not an area which any of us at the table can speak authoritatively on.

CHAIR—We had evidence on it this morning.

Mr Hutchinson—Exactly, yes. But my understanding is that the double tax agreement with the US provides that US and Australian pensions, anyway, are taxable only in the source country.

Mr Barson—I would add to that and comment that, of course, the Australian pension system is still subject to a means test; and so, if you did have an example where a person did have a substantial income from another system, all that money is taken into account in the means test arrangements—for Australian pensions, anyway. While it is not a taxation answer, it is certainly a social security answer.

CHAIR—On that, I note that, at paragraph 40 of the national interest analysis:

> The ACT Government was concerned about the possible cost involved with the provision of additional concessions ... This concern was addressed, as it was ... expected there will be minimal grants to Australian residents under the Agreement because of the application of the income and assets test.

Can you take me through how that would work in practice; for example, for a claim for access to our old age pension?

Mr Hutchinson—Certainly. The only instance where it is going to become an issue is where a person comes to Australia and has less than 10 years residence and presumably is close to age pension age. Most US-born people in Australia that are still here at age pension age will

probably have been here for more than 10 years and qualify without the need to use the agreement. Really you are talking about the incidence of aged migration from the US, where there are people who are at or near age pension age coming here from the US. I do not recall the figures now, but we did look at the historical figures on this and the figures are fairly low. The other factor is that if you are talking about people coming to Australia from the US with very little or no previous residence in Australia then they are people who are probably going to have spent a long working life in the United States and therefore will come with a sizeable US pension and probably be means tested out of our system anyway.

CHAIR—On the concerns that were raised during the consultation period, the New South Wales government also raised an issue about the coverage of de facto partners. What was the outcome? What is the US legislative position? It says the New South Wales government was satisfied with the reply to their query—do you know what it was?

Mr Hutchinson—My understanding was that it was more of a query. I am not sure what perspective the ACT government's query—

CHAIR—No, this is the New South Wales government.

Mr Hutchinson—As I understand it, the law in the US will vary from state to state. For our purposes it is not so much an issue, because we apply our own definitions of a partner for the purposes of paying Australian pensions, and the US apply their own law for the purposes of paying US pensions.

CHAIR—Whatever the reply was, the New South Wales government was satisfied with it.

Mr Hutchinson—Yes. We would be happy to give the committee a copy of the reply.

Mr Barson—Without going into great detail, you are correct. The issue is that the arrangements vary considerably state by state, and under US social security law a spouse can include a person whose relationship is recognised by law but who is not married in the married sense of the word. But at the same time a person is considered a spouse if they are validly married. So there is a distinction between what is recognised broadly in social security in terms of de facto relationships and what is actually recognised under the US Social Security Act, but it varies between each state.

CHAIR—With common law marriages and the like.

Mr Barson—Yes. But I think we satisfied the New South Wales government that the agreement would not cause additional problems in this area and will provide a consistent way of dealing with a matter that is dealt with very differently across states. I can get a copy of the response to you if you wish.

CHAIR—Thank you. Just to wrap up on the New Zealand agreement, the amendments do bring about some changes, but it was felt that there was no further consultation necessary. I know there was wide consultation in relation to the agreement itself, but no further consultation was deemed necessary on the amendments because the benefits and obligations had not changed. But they had, hadn't they, in some instances?

Ms Carrick—The benefits and obligations had not changed in terms of the effect on the customer so much as in terms of the effect on either government's ability to implement the agreement as the original intent. So from a community viewpoint we were not including any additional payments or removing any payments. We were simply putting in text that clarified the original policy intent.

CHAIR—So what impact will the amendments have on Australia as opposed to individuals?

Mr Barson—Can I say that slightly more bluntly. When New Zealand changed some of its legislation and that meant we had to make some changes to how certain things would be done, we took the opportunity to clarify some points which, again, while they were probably okay in terms of text, in hindsight we felt they could have been better worded and be easier to implement from both government's sides—but, as my colleague said, they did not change the effect on the client, on the customer. What they did was correct some points which, if they had gone ahead as written, would have been far more difficult to implement than we originally thought.

CHAIR—Have the amendments varied New Zealand's obligations under the agreement?

Ms Carrick—No, they have not.

CHAIR—Deputy Chair, anything else?

Mr WILKIE—I think it seems quite reasonable.

CHAIR—I thought you might say that at 10 past two. Thank you very much for your attendance here today, during lunch hour. It is much appreciated.

Proceedings suspended from 2.10 p.m. to 8.00 p.m.

Promotion and Protection of Investments Agreements with Uruguay and Egypt

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

GORELY, Ms Amanda Louise, Director, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

SCOTT, Mr Peter Guinn, Executive Officer, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

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

CHAIR—This is a resumption of the hearings of the Joint Standing Committee on Treaties and a part of our ongoing review of Australia's international treaty obligations. We have a number of treaties under review this evening and, accordingly, I welcome officers from the Attorney-General's Department and the Department of Foreign Affairs and Trade to give evidence relating to the two agreements with Egypt and Uruguay on the promotion and protection of investments. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make any introductory remarks before we proceed to questions?

Mr Scott—We would like to make some brief introductory remarks in relation to the submissions to these two national interest analyses on the investment, promotion and protection agreements. The NIA's otherwise cover the rationale for Australia's entry into these treaties. A number of the submissions on the two investment agreements asserted that the investor-state dispute resolution procedures within them provided an avenue by which powerful corporations could challenge the right of democratic governments to regulate essential services and would act as a disincentive to enacting such regulation. I would like to make it clear that investment agreements do not in fact limit the ability of governments to pass laws or to regulate essential services. An investor can only take action if the government in question has failed to comply with obligations made under the investment agreement. Of course, having made those obligations it is obliged to ensure that its domestic law is compliant with them before concluding the treaty. This may also only occur if the government has imposed some kind of discriminatory measure that adversely affects the investor concerned. Laws and regulations that do not represent a breach of the investment agreement or do not represent discriminatory treatment against the investor are not open to question under the investor-state dispute mechanism.

Community concerns regarding investment agreements and, in particular, the investor-state dispute resolution procedures have arisen primarily from cases decided under the North American Free Trade Agreement which, of course, provides for its own and distinct mechanism. It contains different obligations; nevertheless, this has been the source of concern in relation to

this particular model of dispute settlement. An example of such a case that has given rise to concern involved an American investor and the Canadian government, arising from a decision by the Canadian government to prohibit the transport of certain hazardous wastes from Canada to the United States. The tribunal found that this decision breached Canada's international obligations under the NAFTA treaty protecting investors. It was not due to Canada's inability to protect the environment, but because of the discriminatory nature of the regulation in question and the fact that it did not have the environmental benefit that the regulation claimed. Consequently, the finding was not anti-regulatory or anti-environment, but simply anti-discriminatory.

Investment agreements provide an important avenue for the protection of Australian investors. The majority of Australia's investment agreements are with developing countries whose legal systems may not be as developed, sophisticated or transparent as Australia's system. As such, the alternative dispute resolution procedures included in investment agreements provide an avenue by which Australian investors can redress wrongs in the event that local remedies are not satisfactory or available.

One submission mentioned a case against the Argentine Republic before the International Centre for Settlement of International Disputes—ICSID. A decision in this case has been handed down in the state of Argentina's favour. The main basis of the decision was that the claimant had failed to first take action in the domestic Argentinean courts. Proceedings to annul the award have been commenced and a decision is still pending upon this but it demonstrates that the international arbitration procedures do not arbitrarily or unjustifiably intrude into states' regulatory decisions or the contractual relations between an investor and the state.

Over 134 countries have ratified the ICSID convention. ICSID's web site asserts that over 1,100 investment agreements have been entered into around the world similar to the two that the committee has before it today. Nevertheless, to our knowledge based on information available on the ICSID web site and in our records in the Department of Foreign Affairs and Trade, Australia has never been brought before ICSID in relation to an investment dispute and no Australian investor has ever brought a dispute against another country in ICSID.

Two submissions concerned article 7 common to the two agreements which deals with expropriation. It is very difficult in the abstract to decide whether or not a particular measure, including those in relation to taxation, can be considered to be expropriation. However, it should be noted at the outset that an investor would only be successful under article 7 if an expropriation were not in the public interest or for a public purpose and/or not under due process of law and/or discriminatory and/or not accompanied by the payment of prompt, adequate and effective compensation.

Under the Australian Constitution, section 51(xxxi) provides that the Commonwealth can acquire property for any purpose in respect of which it has the power to make laws. However, such acquisition must be on just terms. In relation to the states, there is a presumption that the legislature does not intend to acquire property without compensation. It is unlikely that a foreign investor in Australia would obtain a better result under the investment agreement than it would under domestic law in Australia. Thus the foreign investor's ability to go to international arbitration does not constitute an advantage over Australian investors or investors from countries with no investment agreement with Australia.

In conclusion, we would submit that the risks highlighted by these submissions related to entering into the investment agreements are more apparent than real. Some of the concerns surrounding investment agreements arise from a misunderstanding as to the kinds of governmental actions that can be successfully challenged. Given the protections inherent in Australia's legal system and Australia's generous treatment of investors in general, it is unlikely that such an action against Australia would be sustained let alone attempted. By contrast, investment agreements provide important protection for Australian investors overseas. They provide guarantees that may not be available under the laws of the countries in which the investments are made. In addition, they provide Australian investors with the ability to go to international arbitration if the host country is unable to provide a sufficiently developed or sophisticated legal system.

CHAIR—Thank you. Could I just clarify one thing. When you were talking about article 7, you said that a number of conditions have to be complied with before a party can nationalise, expropriate, or subject to measures having the effect equivalent to nationalisation or expropriation. Did you add 'national interest' to that?

Mr Scott—I did not.

CHAIR—I thought you said 'national interest' and 'public purpose'.

Mr Scott—I said 'public interest' or 'public purpose'.

CHAIR—It does not actually say that in the article. It just says 'public purpose'.

Mr Wild—I think it says 'public purpose' in one of them and 'public interest' in the other.

CHAIR—In what other?

Mr Scott—The wording is slightly different between the investment agreement with Egypt and the investment agreement with Uruguay.

Mr Wild—It is 'public purpose' in the one with Uruguay, and 'public interest' in the one with Egypt.

CHAIR—Is that in the same article?

Mr Wild—Yes.

CHAIR—This agreement—and, I assume, the agreement with Egypt—closely follows the Australian Model Investment Promotion and Protection Agreement.

Mr Scott—It does.

CHAIR—Have we got similar bilateral investment protection agreements with other countries? If so, which other countries?

Mr Scott—I believe we have 16 bilateral investment agreements in force with other countries, and we can provide the committee with a complete list of these at the conclusion of these hearings.

CHAIR—Are you in a position to say how those agreements have been working?

Mr Scott—It is difficult to say. We choose countries with which to engage in an investment agreement based on a number of factors which could, in themselves, result in a self-fulfilling increase in investment. That is, if particular investors indicate a particular interest in a certain country, then we will direct our efforts to concluding an investment agreement with that country. Pretty much the basis for entering into most of our investment agreements is an Australian national interest, in the form of particular investments either in place or proposed with that particular country, or countries with whom we wish to increase a bilateral investment relationship. It generally follows that, after the agreement has been concluded, there will be an increase in foreign investment, but it may have been other factors that led to that increase. It is difficult to ascribe an actual improvement in investment relations between the two countries to the agreement itself. What we do know is that investors, particularly large investors, place a certain stock in having the agreement in place, from the perspective of the protection that it offers in relation to guarantees about non-discriminatory treatment and protection against expropriation, in particular.

CHAIR—So it is sort of putting the egg before the chicken, in the sense that you cannot estimate, or you cannot assess, the outcome in terms of greater investment flows, but you are assuming that unless you have an agreement like this in place, it is not going to encourage people or companies to invest.

Mr Scott—Yes. It is difficult to separate out the benefit in terms of increased investment, either to Australia or the other way, from what would otherwise be normal commercial factors. But we have had the experience that large commercial investors have sought to have such investment agreements in place prior to making or increasing their investment, because they see it as having some kind of assurance for them, that their investment will be treated properly by that country.

CHAIR—Is there any evidence of that requirement in relation to Uruguay? You have said that a large number of Australian companies have considered investing in Uruguay but have not so far proceeded. Do we know why that is the case?

Senator SCHACHT—They beat us in the World Cup in the soccer. That is one reason they are probably not trying to invest in the joint.

CHAIR—Are you aware of any other reason, other than their soccer prowess?

Mr Scott—Apart from the soccer, I do not believe we have actually received reasons from the companies for why they may not have proceeded with the particular investment concerned. It is also impossible to judge whether some of these companies were seeking a competitive tender opportunity which they may not have been successful in, in relation to another company having been chosen to fulfil the tender.

CHAIR—Has there been consultation with any companies or councils representing companies—corporate Australia?

Mr Scott—In relation to the Uruguay agreement, I would need to check the records about the bilateral area that maintains our relationship with Uruguay—

Senator SCHACHT—Let me just interrupt. You are asking us to look at this agreement. In the folder there you do not have any information about particular Australian companies which were looking to invest in Uruguay in the last 12 months or which will be looking to invest in the next six months and why this agreement would encourage them to invest. If you have not looked at that, why are we doing this one? Why not pick Paraguay or Chad?

Mr Scott—There are two bases on which we designate which countries we will negotiate an investment agreement with. The first is on request.

Senator SCHACHT—From whom?

Mr Scott—The other country.

CHAIR—Has Uruguay requested this?

Mr Scott—Uruguay has in fact requested this agreement.

CHAIR—Has Egypt requested its agreement?

Mr Scott—Egypt requested its agreement as well.

Senator SCHACHT—Do we always say yes to every request?

Mr Scott—No, we do not. We rarely initiate an investment agreement of our own accord. The general pattern experienced by most developed or OECD member countries is that a developing country will approach them seeking to conclude an investment agreement and generally also a double taxation agreement. These two agreements are integral to a country's aspirations to join the OECD and they are essentially integral to any serious kind of ongoing investment in that country. When we determine the factors for choosing to conclude an investment agreement with Uruguay as opposed to another country that may have sought one, amongst the bases of that decision are: Australian investor interest in that country, Australian potential for investments with that country, Australia's interest in that country being able to successfully conclude an application to join the OECD and also an assessment of whether there will be a direct financial interest to Australia in terms of investment coming from that country into Australia. That last point is generally a secondary concern given that the primary interest from Australia's perspective is the protection of Australian investors in that other country.

Senator SCHACHT—How many investors do we have in Uruguay? Sorry, Madam Chair.

CHAIR—I had finished and you were next, Senator Schacht. Then it is Mr Bartlett and then Mr Adams. Keep going.

Senator SCHACHT—First of all, as this is dealing with Egypt, I should declare that, when I read the briefing paper this morning, to my astonishment I found that it mentioned a company called Centamin. I have owned 1,000 shares in Centamin since 1969. It is declared on the pecuniary interest.

CHAIR—I am sure that is now on the record.

Senator SCHACHT—It is on the record.

CHAIR—Nothing to declare with Uruguay?

Senator SCHACHT—Nothing other than we lost the soccer, which I was bitterly disappointed about.

CHAIR—You do not have a personal interest in that.

Senator SCHACHT—You may want to take this on notice or you could provide this to the committee in confidence if you want to: I would like to know what companies you have talked to, if any, where these agreements with Uruguay would make it easier for them or give them more confidence to invest in either of those two countries.

Mr Scott—We can certainly make that inquiry if it has not already been made. I can tell you what the principle Australian investors currently in Uruguay are. These would have been a significant contributing factor to our determining that it was worth our while to pursue the investment agreement with Uruguay for their ongoing protection in the marketplace there. Hoyts has joint venture operations in Uruguay. Burns Philp has been in Uruguay since the mid-1950s and currently has a 50 per cent market share. A Brambles subsidiary is also soon to begin operations in the packaging products and services sector. In the lead up to the negotiation of the IPPA we have had interest from P&O Australia. It bid, unsuccessfully in the end, for a concession at the Montevideo port facility. A transport company is also in the process of bidding for construction of a light rail system between Montevideo and a coastal resort region of Uruguay. It is the existence of these ongoing tender processes and the connection between those companies, the Australian Embassy on the ground and the Department of Foreign Affairs and Trade that would have encouraged us to seek to conclude an agreement quickly with Uruguay. The commercial interests of particular Australian firms are a crucial factor in making our decision.

CHAIR—I think it would be fair to say that the national interest analysis does not set out that there has been such a level of consultation. Paragraph 19 says that there is consultation with state and territory governments and paragraphs 6 and 7 mention a few companies, but there is no indication to us that there is any case based evidence that you are proceeding upon. This information does not indicate where this information comes from or whether anybody has spoken to Rio Tinto, Pioneer, Hoyts, P&O, North or anybody about their experience and whether they have anything to add or any suggestions or recommendations. That would be perhaps something to take on board for future national interest analyses as well.

Senator SCHACHT—You mentioned two companies in Egypt—Centamin Egypt and the AWB Five Star Flour Mill, which is a project that we might have helped with AusAID some

years ago, or something connected to it—but they were already there before this agreement. You mentioned the irrigation system at Toshka, called the Southern Valley Development Project. They are all taking place without this agreement.

Mr Scott—In relation to a number of the desert development programs, with which Australia has particular expertise, they are not necessarily concluded now and Australian expertise would not necessarily be those that are chosen. Nevertheless, having the agreement in place is designed to encourage the Australian companies with the requisite expertise to seek to develop investments and market share in Egypt in relation to these particular projects.

Senator SCHACHT—There is one last question on this point, particularly about Egypt. Egypt is a modified democracy at best—a one party state—but they do have elections. Mr Barak's party always seems to win. If one of those companies—say Centamin—had a dispute over the licensing arrangements they had to prospect for gold near the Red Sea, is there a system whereby they can sue the government or is that an unheard of proposition? In Western democracies, you can actually sue the government and you do not get shot or locked up; you might just lose the case and have to pay a large amount of damages. Does Egypt have a history of accepting people being able to sue? If they do not, does this agreement protect Australian companies from being able to sue if they believe there has been a commercial breach by another Egyptian company, above all if the government has reneged on some arrangement?

Mr Scott—If an Australian company is involved in a dispute with the Egyptian government because the Egyptian government has reneged on the terms of a contract or is somehow discriminating against the Australian company to its detriment in contravention of the terms of the agreement, if the Australian company believes it will not get a fair hearing in the Egyptian courts, then the agreement provides for the international dispute settlement between that company and Egypt. Egypt, in signing the agreement, has promised in advance that it will submit itself to the jurisdiction of the international arbitration, whether it be ICSID or under the UNCITRAL trial rules. In that respect—

Senator SCHACHT—This is an improvement; this is a bigger protection for Australian companies?

Mr Scott—It is. My colleague has pointed out to me that Egypt has in fact been a litigant before ICSID, so it is certainly possible and it has been achieved by other investors.

Mr Wild—As a defendant.

Mr Scott—The state is almost always the defendant in an ICSID matter.

CHAIR—Where did the applicant come from?

Mr Wild—Sorry?

Mr Scott—The nationality of the applicant—the investor.

CHAIR—The plaintiff, the applicant—whatever.

Mr Wild—You cannot tell properly from the name.

Mr Scott—We can ascertain that.

Senator SCHACHT—Take the AWB, which is now privatised and so on. We have been selling wheat to Egypt—a very good market—for a very long time. If there is a dispute about payment—I do not know whether Egypt has ever reneged outright on previous payments—can a private company go to arbitration or is it restricted to companies with Australian government connections?

Mr Scott—No. As a private company, it can take Egypt to ICSID. That is the purpose of the investor-state dispute settlement provisions that we have put into these agreements. As to whether the Australian company would be able to sue Egypt in the Egyptian courts, I cannot answer that. Egypt is obliged to allow itself to be taken to court under the agreement. That is one of the dispute settlement options.

Senator SCHACHT—The other one is where the company is using Egyptian supplies—petrol or whatever they may be—and the company has not delivered under the contract. Can that be taken under this agreement or do they have to take their chance in an Egyptian court?

Mr Scott—In that case, where the defendant would not be the Egyptian state, it must be dealt with under the local law of Egypt.

Senator SCHACHT—This agreement will not give any protection to those Australian companies; they will have to take their luck under Egyptian law.

Mr Scott—They will. What the agreement does is oblige Egypt to ensure that the Australian company has access to Egyptian courts to take that action. Beyond that, of course, it does not dictate what that law must be, except for the fact that the law cannot discriminate against the Australian or the foreigner.

Senator SCHACHT—With Egyptian law, there are two ways to cook yourself on this. They can find against the Australian company and say, ‘On all the evidence, we believe it is this way.’

Mr Scott—In relation to what protection this agreement can provide, we obviously cannot guarantee that each and every court proceeding between an Australian national and an Egyptian national in Egypt will come out one way or another. What we can ensure is that the Egyptian government provides access to the Egyptian courts to the Australian investor and, if the outcome is manifestly unfair or unjust, there is a provision for the Australian government to seek consultations with Egypt in relation to such outcomes.

Senator SCHACHT—Is there any evidence that the Egyptian legal system is under undue pressure to be Islamic in outcome?

Mr Scott—I need to seek further information on that.

Mr BARTLETT—You have largely answered my question. What about the reverse situation? I am more concerned about possible action by overseas companies challenging Australian government legislation. I thought I heard you dismiss the submissions objecting to the treaty as having concerns that are more apparent than real. Are you aware of any examples with similar treaties or of a hypothetical situation with this treaty where a foreign company—in this case, perhaps not terribly likely because of the countries we are talking about—is likely to challenge an Australian government decision that argued that it was in Australia's best interests that such an investment did not go ahead in Australia?

Mr Scott—No, and the reason for that is that the agreement only covers post establishment. That means it does not apply to decisions about whether to admit an investment or not. It can only apply once the investment has been admitted by the Foreign Investment Review Board and is in place in Australia.

Mr BARTLETT—Have we had similar arrangements with other countries—European or US companies that have invested in Australia—which have, post investment, challenged an Australian government decision?

Mr Scott—Naturally, there have been several cases where companies in Australia which are foreign investments have taken the Australian government to court in one relation or another.

CHAIR—Pursuant to these bilateral agreements?

Mr BARTLETT—Yes, that is the point.

Mr Scott—I cannot tie it to a specific bilateral investment agreement.

Mr BARTLETT—Could you take that on notice? The critical point for me in this type of treaty is, again, whether we are further signing away some of Australia's sovereignty in allowing foreign countries to question or undermine what really are legitimate decisions of the Australian government.

Mr Scott—We did a search, and it was only a computer based find search, in relation to Australian High Court cases and we could not find a citation of an Australian investment agreement in any of these cases—but we can repeat that search more thoroughly.

CHAIR—Would they have to be High Court cases rather than Federal Court cases?

Mr Scott—We were just choosing High Court cases, because the thing that we were particularly looking for was in relation to expropriation. When you are talking about a decision that is anti a particular governmental measure that has somehow diminished the value of an investment, generally it is believed that an expropriation claim could be possible in such circumstances. That is why we have chosen to look through the High Court. Equally, of course, it could apply in a state or territory jurisdiction as well, or the Federal Court. We will do a more thorough search, but, certainly to our knowledge, no such action has been taken in Australia.

CHAIR—When you come back with the names of the 16 countries with whom we have bilateral agreements, perhaps you could add that information too.

Mr ADAMS—We have 16 of these agreements. We do not have one with China?

Mr Scott—We do have one with China.

Mr ADAMS—And the US? We do not have one with the US?

Mr Scott—We do not have one with the US. Generally we do not have them with OECD countries, because the kinds of guarantees for protection of investments are basically part of the OECD investment code and, as a consequence, these would have no useful effect.

Mr ADAMS—We received 14 public submissions that this treaty had an investor-state complaints mechanism which was used by large corporations to tear away at the legislation of countries like Uruguay, to take advantage of their weaker legal positions. How would you answer that?

Mr Scott—I would say that that is a misinterpretation of what use there has been of the investor-state dispute mechanisms that are provided. On the one hand, if we are talking about investor-state disputes then we are talking about an arbitration outside of the domestic jurisdiction of the country concerned, which means that any weaknesses that that country's jurisdiction may have are actually being avoided. Consequently, you are up before an arbitral panel which is not dependent upon the system there, but is having to interpret the terms of the treaty or the terms of the contract between the government and the investor or the state of the investor. So, to that extent, we do not see that it weakens the position of the state at all. We see that it creates a level playing field for the state and the investor.

Mr ADAMS—But, if in the agreement it said that a certain company would supply the investor with a certain amount of produce, and there were environmental reasons why that produce was not delivered, what would happen in those sorts of circumstances? Doesn't the corporation have a fair bit of influence over that investment or the partner in the investment—which is the government, I take it?

Mr Scott—I am reluctant to go into hypothetical cases, because of course there are any number of factors that come into play before we are talking about taking a matter to investor-state dispute. If you are talking about a term in a contract between two nationals—that is, not between the state and the investor but between an investor of one country and an investor of the other country—then what you have initially is a contractual dispute between two investors, if the one is not able to perform. If the reason for the lack of performance is that the government of that investor has enacted a law with an environmental protection intent that has meant that the contract could no longer be performed, then, depending upon whether that law were a genuine law which applied equally to all—both the nationals and the foreigners—in that particular jurisdiction, there would not be an action under the investment agreement to be brought against the government, and so it becomes a bit difficult to see where the complaint would lie. But, as I said, the hypotheticals are very difficult to discuss, because there are so many factors that would in some cases favour a domestic resolution or which would completely preclude the operation of investor-state dispute because there would be no legitimate nexus to the state concerned.

Mr ADAMS—Have there been these sorts of disputes in the past? We have had 14 submissions to this committee from the public along those lines, so there must be some concern out there in the public that this sort of agreement is not a fair agreement, that it is favouring one side against another.

Mr Scott—As I said in the opening statement, we believe that the concerns are basically being generated out of concerns that have arisen through NAFTA litigation where an investor did, in fact, prevail in an action against the state of Canada. But in a sense the decision in that case has, we believe, been misinterpreted or misunderstood by the group that has generated the campaign mail that you received by way of submissions. That is, the investor had in fact been discriminated against and the measure being imposed by the government did not operate to protect the environment but rather to discriminate against the nationals of a particular country. In other words, the measure was not an environmental measure at all; it was a protectionist measure designed to protect local industry. To a lay audience hearing the outcome of this case, it sounds as if a company has won out over the government. That is of course true, but it is not that the company has gotten rid of environmental legislation that was going to impede its operations in that country; it has gotten rid of a discriminatory law that, without protecting the environment, was protecting the local industry of the country that had legislated.

Mr ADAMS—I can foresee a lot more mail on these issues, Mr Scott.

Mr Scott—Yes, and we are anticipating it because, over the last two or three years, these issues have gained a higher public profile and consequently are really only now coming to the attention of the public. But I would point out that the ICSID convention has been in existence for almost 50 years. Australia has been including investor-state dispute settlement provisions in our investment agreements, which are published and available to the public, for some 14 or 15 years. It is important to recognise that, in all of that time, no large corporate investor has ever taken Australia to ICSID in relation to a governmental measure. What has happened, of course, is that there has been litigation in the domestic courts, and that is as it should be. Most investors would only seek to use the international dispute settlement procedure if they had some reason to believe that the outcome for them in the local court would somehow perpetuate the discrimination they believed they were suffering in the jurisdiction concerned. We believe the track record of the operations of ICSID, and in particular the complete noninteraction of the system with Australia, demonstrates that the system is in fact operating as it ought to.

Senator COONEY—Article 10 of the Uruguayan agreement talks about subrogation. It says:

> If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee ...

I would not have thought that Australia would make a payment as a guarantor. What is that referring to? This contemplates Australia making a payment to an investor—Qantas or someone—under a guarantee or a contract of insurance. Would that happen in Australia very much?

Mr Scott—It certainly happened under the Export Finance and Insurance Corporation that the government had established, which was an insurance scheme to provide protection to Australian exporters. But, even if it does not have a direct relationship with Australia, several countries operate government insurance corporations and the subrogation provision is very

important to settle who is the owner of a particular claim when an insurance contract that the government may have made with a particular investor has been paid out.

Senator COONEY—Where a party or an agency—that is a subrogation clause, I suppose—has made a payment to an investor of that party, and has taken over the rights and claims of the investor, it would apply usually to the other country rather than to Australia, wouldn't it?

Mr Scott—As I said, there have been circumstances where the Australian government has acted as guarantor to what would be classified as an investment under this agreement. But it is certainly important from Australia's perspective to very clearly understand—with regard to countries that do provide on a regular basis guarantees to investors in Australia—who is the owner of the claim if a dispute were to arise over it.

Senator COONEY—So this applies to Uruguay and Egypt rather than to Australia?

Mr Scott—It applies in both cases to those areas where Australia still is the insurer of a particular investment, but it would have more relevance to those countries that we have these investment agreements with who have large government run insurance corporations.

Senator COONEY—Could you get a list of those companies or those people that Australia guarantees under article 10 and article 14 and any disputes arising out of that?

Mr Scott—Yes.

Senator SCHACHT—Let me get this clear. On notice, you will give us information—and you may wish to put it in confidence to us—about the numbers of companies, in both Uruguay and Egypt, who have contacted you to say that this agreement encourages them to invest?

Mr Scott—Yes.

Senator SCHACHT—You mentioned to my colleague Mr Adams that we have one of these agreements with China. From my knowledge, from visits to China, one of the issues that Australian, Western and foreign investors consistently raise is the fact that the Chinese government does not have transparent law. Under the treaty we have had with China, can you take on notice how many times Australian companies have had to use the Australian government to go to independent arbitration because of a dispute with the Chinese government?

Mr Scott—I can answer that question now: the answer is none. Australia has not engaged in compulsory dispute settlement with China over an Australian investment in China. Neither has an Australian investor sought to have China submit itself to compulsory investor-state dispute settlement. For obvious reasons, we cannot disclose any dialogue between Australia and China, or Australia and an investor in China, over conditions prevailing in that country.

Senator SCHACHT—Even in confidence to this committee?

Mr Scott—Perhaps in confidence to the committee.

Senator SCHACHT—I ask that you take that on notice. This is the treaties committee, and I think we have had a reasonable track record. You are not accusing us of leaking, are you!

Mr Scott—Not at all.

CHAIR—It is commercial-in-confidence.

Mr Scott—Obviously a company which seeks to discuss a commercial matter with us—

Senator SCHACHT—I understand that argument completely. It is just that many Australian companies have complained that in China, when it comes to the crunch, if they have a dispute—not with the government but with other operators—they cannot get satisfaction in a transparent way through the civil courts.

Mr Scott—We want to make the point very clearly—and this relates to your first question on notice in relation to which companies, in the case of Uruguay and Egypt, have said that they would prefer to invest in Uruguay or Egypt if an agreement were in place—that this agreement is designed to minimise the risks of investing in developing countries. It cannot eliminate them.

Senator SCHACHT—I understand that.

Mr Scott—Obviously, in an environment where the returns are quite high for these companies but where there are certain problems with the transparency of the legal system or the adequacy of local remedies, this agreement does not provide a panacea to those problems, but it does provide certain guarantees that would enable the investor, particularly in the case of a dispute with the country concerned, to go outside of the country and seek settlement of that dispute in the arbitration procedure provided by ICSID. It also does provide an obligation on that country to consult with Australia if we believe that obligations it has under the agreement to provide access to justice for Australian investors, or to provide non-discriminatory treatment to Australian investors, are not being met. These are genuine improvements on what would otherwise be the status quo in the absence of this agreement.

Senator SCHACHT—If a country comes to us and says, 'Look, company A, B, C have signed an agreement to explore for diamonds. We gave them the contract and then they disappeared and did not pay,' or they did something that even we would say was a bit rugged to say the least, do we have any examples of where they have used one of the 16 agreements to say, 'We want you to deal with that company or put them before an arbitration system?' Will you take that on notice?

Mr Scott—We can take on notice to give you all the numbers—abstract figures—of that degree of activity between Australia and our investment agreement partner as to the behaviour of Australian investors and their behaviour towards Australian investors.

CHAIR—I have a couple of general questions about the national interest analyses: who prepares these analyses for Uruguay and Egypt?

Mr Scott—The Department of Foreign Affairs and Trade.

CHAIR—What sources do they draw upon?

Mr Scott—The information kept by the geographic area of the department which monitors the bilateral trading relationship with that country primarily.

CHAIR—Are you aware who prepared the one on Uruguay and the one on Egypt?

Mr Scott—Yes.

CHAIR—Who did it?

Mr Scott—I did it.

CHAIR—How long did it take you?

Mr Scott—The drafting, a matter of hours; clearance with the Attorney-General's Department and the Department of the Treasury—

Senator SCHACHT—Three years.

CHAIR—No, I am just interested in the compilation of them. I have asked you to do other things in relation to national interest analyses. I am trying to get a better understanding of what goes into the preparation of them, not just in relation to these two agreements. Earlier today, it seemed that the national interest analysis was missing some fundamental basis, some evidence that we were looking for. I am trying to get an idea of how you go about preparing one of these.

Mr Scott—It would not be an imposition to add the sort of information that you have been seeking. It would just be a matter of asking the geographic areas different questions, and with notice for the next investment agreements we may be putting forward. There is no reason why it would be a particular burden on us to provide you with that additional information.

CHAIR—I think it is because so often we see this wording that there are no official estimates, or there is no modelling or analysis available, and the committee is looking for some evidence upon which to base its reasoning in its recommendations. If we do not have any, we will just be taking these rather bland statements.

Senator SCHACHT—On this point, I appreciate your honesty, Mr Scott, in saying that you did it in several hours based on the material available in the geographic—Uruguay is supposed to sit on America's desk, is it?

Mr Scott—The Central American map—Canada, Central America, Latin America.

CHAIR—Canada, Latin America and the Caribbean section.

Senator SCHACHT—You would have one part-time officer looking after Uruguay with six other countries, I should imagine. You would not have one dedicated officer looking after Uruguay?

Mr Scott—I do not believe so. It is a combination of the resources in the section which may, as you say, be half a person's time a day, and also the resources in the embassy which services Uruguay.

Senator SCHACHT—In any of these countries, is the material you have available just a variation of material from a range of sources—such as the *Economist*, the *Time* magazine, world source newspapers, media stories from around the world on the Internet et cetera—or do you actually have held in confidence material you get from our intelligence agencies, from ONA to ASIS et cetera?

Mr Scott—Obviously the department has broader resources available to it than simply the media and economic journals and magazines. Just having people on the ground who cover the country of Uruguay provides us with additional insights.

Senator SCHACHT—We do not have a full-time ambassador there, do we?

Mr Scott—No, we do not, but I believe it is covered from our mission in Buenos Aires.

Senator SCHACHT—Do we have a full-time consul? Do we have a trade commissioner?

Ms Gorely—There is an honorary consul, I would assume.

Mr Scott—In Montevideo.

Senator SCHACHT—And he is a Montevidean?

Ms Gorely—I do not know who that person is.

Senator SCHACHT—A Uruguayan?

Ms Gorely—I do not know who that person is.

Senator SCHACHT—He does not have a security clearance?

Mr Scott—No.

Ms Gorely—No.

Mr Scott—But the point I am making is that the information is not simply based on open source material. There is material that the department holds, often from direct contact with Australians living in Uruguay or Egypt, trading with Uruguay or Egypt or investing in those countries.

Senator SCHACHT—Obviously from time to time you would have in the department information as a result of our good relations with a series of other countries in the world—the United States, Great Britain.

Mr Scott—I am not in a position to comment on that.

Senator SCHACHT—No.

Ms Gorely—Can I make a general point regarding the content of national interest analyses. We too have been looking at how they are structured. With this being a new committee, we are very interested in feedback from you on their usefulness. We would like to engage in a dialogue with the secretariat on how we can make them more of a user-friendly document for the committee. That is something that we have already taken on board.

CHAIR—I am not sure that you were here this morning, but we did raise the issue with the double tax agreement with the US. It is just that it was crying out for more detail, for some economic modelling, for some evidence upon which we could base an assessment. It might all be over there in departmental files but, if we do not have a more complete assessment provided to us, it is in some instances pretty skinny material.

Ms Gorely—Could I also just add that often national interest analyses take much longer to prepare than these ones because they are the work of a number of departments. Even if, say, a line agency is preparing it, they still all have to be cleared by DFAT and the Attorney-General's Department.

CHAIR—Let me just declare that the reason I raised it to start off with is that in the national interest analysis on Uruguay in paragraph 17 we were talking about Australia and Uruguay, and all of a sudden we had Egyptian investors in the middle. I thought that the word processor has slipped up. I just started on that train of thought as to how useful the national interest analyses could be.

Mr Jennings—Could I just add that the involvement of the Attorney-General's Department is a partnership arrangement with Foreign Affairs and Trade. Clearly, we are every bit as interested as Foreign Affairs and Trade in ensuring the committee has the most useful document in front of it. Clearly we will work with Foreign Affairs to that end.

CHAIR—I can assure you that we will take up your suggestion.

Mr Jennings—I have been taking notes. I was not here this morning.

CHAIR—I will try and get some committee feedback from the committee members as well, particularly those who were on previous committees.

Senator SCHACHT—When this went up to the government to be approved by the Minister for Foreign Affairs, I assume it went to cabinet to be approved.

Mr Scott—No. In relation to the investment promotion and protection agreement program, the policy proposal that is represented by such agreements was agreed by cabinet, but subsequently each of these individual investment agreements is decided—

Senator SCHACHT—It is the policy structure then. It does not have to go to a cabinet meeting.

Mr Scott—It does not have to go to cabinet any more.

Senator SCHACHT—But it has to go to the minister?

Mr Scott—It has to go to the Minister for Foreign Affairs, the Minister for Trade, the Attorney-General and the Treasurer.

Senator SCHACHT—And is the national interest document that we got the same as they got?

Mr Scott—Yes.

Senator SCHACHT—It is?

Mr Scott—Yes.

Senator SCHACHT—And there were no annexes or attachments that we did not get but that they got.

Mr Scott—That is right. The difficulty is that officers from the Treasury and the Attorney-General's Department are involved in the negotiation of these agreements. They are part and parcel of the process of developing the instruments in the first place. When we draw up the text of the national interest analysis—

Senator SCHACHT—That is not the point I wanted to ask about. The point I wanted to find out about concerned the issue raised by the chairperson about the structure of the national interest document. I am just interested to know, if we have a query about what we are doing, that you may provide a better document to you own minister one day.

CHAIR—Thank you for your being here this evening. We have run a bit over time.

[9.00 p.m.]

International Convention for the Suppression of Terrorist Bombings

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

GORELY, Ms Amanda Louise, Director, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

SCOTT, Mr Peter Guinn, Executive Officer, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

CHAIR—I now call on witnesses from the Department of Foreign Affairs and Trade to give evidence relating to the International Convention for the Suppression of Terrorist Bombings. Mr Scott, would you like to make some introductory remarks about this before we proceed to questions?

Mr Scott—Yes, I just want to make a short statement again. The International Convention for the Suppression of Terrorist Bombings is part of a broad framework of international treaties intended to combat the worldwide escalation of acts of terrorism. Terrorist attacks by means of explosives or other lethal devices have become increasingly widespread, and a review of the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism found that the existing multilateral legal framework did not adequately address these attacks. The purpose of the convention is therefore to enhance international cooperation between states in devising and adopting effective and practical measures for the prevention of such acts of terrorism and for the prosecution and punishment of their perpetrators. It also serves to reaffirm the unequivocal condemnation by states of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among states and peoples and which threaten the territorial integrity and security of states.

Australia already has extensive domestic legislation designed to combat the kinds of acts covered by the convention. Acceding to the convention will dramatically increase the effectiveness of these domestic measures through providing for a mechanism for cooperation with other countries in investigating and prosecuting terrorist crimes committed in or against Australia or by Australians. The convention enhances international cooperation between states by requiring the parties to establish jurisdiction over offenders when they are its nationals or commit offences in its territory or on vessels carrying its flag or aircraft registered there. The convention also permits a state party to establish jurisdiction over an offender who commits an offence against its nationals or against its government facilities abroad or on board government aircraft, or over an offender who is a stateless person habitually resident in that country or attempting to exercise duress over that country. The convention also provides for mutual legal assistance in criminal matters by state parties and the transfer of detainees in this context to assist with the investigation or prosecution of offences. The party in whose territory an alleged

offender is present is obliged to investigate and, if appropriate, take steps to ensure that person's presence for the purpose of prosecution or extradition.

Implementation of the convention will not require amendments to be made to state or territory legislation. The Commonwealth Criminal Code Act 1995 will be amended to implement the convention. Australia's accession to the convention would not impose any direct financial costs. Costs related to law enforcement activities such as investigations, prosecutions, extradition proceedings and responses to mutual assistance requests will be borne from existing resources. All states and territories were consulted in the negotiation and decision to accede to this convention. The states and territories were consulted on the basis that Commonwealth legislation would establish a comprehensive jurisdictional and procedural regime over convention offences without interfering with the responsibility of states or territories to provide for offences committed in Australia. The bill to implement the convention provides that proceedings must not be commenced without the Attorney-General's consent. Amongst other things, the Attorney-General must have regard to whether the conduct constituting an offence also gives rise to an offence under a law of a state or territory and whether a prosecution relating to the conduct under the state or territory law has been or will be commenced.

We make one note on the submission headed 'International Convention for the Suppression of Terrorist Bombings'. It refers to matters which are not covered either by this convention or by the bill presently before parliament to implement this convention. Specifically, neither the convention nor the bill refers to imprisonment or detention without access to a lawyer or detention without charge. It appears that the author of the submission was focusing primarily on other bills related to the government's counter-terrorism package of bills that has recently been considered by the Senate committee.

CHAIR—So I take it that this is not your national interest analysis?

Mr Scott—No, I am talking about a submission made by a member of the public.

Senator SCHACHT—They thought they were dealing with that package of bills.

Mr Scott—I believe so.

CHAIR—But this is not your national interest analysis?

Mr Scott—It is.

Senator SCHACHT—Are you getting a bonus for all this work?

Mr Scott—No. This was drafted jointly by the Department of Foreign Affairs and by the Attorney-General's Department. The Attorney-General's Department has the portfolio coverage of issues under the terrorist bombing convention.

CHAIR—I guess the most obvious point to make is that this was all done pre-September 11.

Mr Scott—Yes.

CHAIR—The 1997 convention and the convention that came into force in May 2001—

Mr ADAMS—In New York.

CHAIR—Yes, that is interesting. You mention in the national interest analysis that, 'As at 8 February 2002, 48 such instruments had been deposited'—that is, instruments of ratification.

Mr Scott—That is correct—and\or accession.

CHAIR—As at today's date, how many are there?

Mr Scott—I believe there are now 59 states party to this convention.

CHAIR—Does that include the United States?

Mr Scott—I believe that it does not for the time being.

Senator SCHACHT—Are they putting it to their Senate?

Mr Scott—I believe they intend to submit it to their Senate. I know it has gone to their Senate, because I have seen the reference, but I do not know whether the Senate has actually considered it.

Ms Gorely—There are 12 UN antiterrorism conventions, this being one of them, and Australia is already party to nine of them. Since September 11 they have taken on a heightened degree of international importance. For instance, the Security Council resolutions that were passed immediately after September 11 call upon all states to become parties to these conventions.

CHAIR—When you say that Australia is party to nine, are they treaties we entered into prior to September 11?

Ms Gorely—Yes. All of them were entered into prior to September 11.

CHAIR—So there is this one; how many others are still to be entered into?

Ms Gorely—There are three in total.

Mr Scott—The two other conventions are the International Convention for the Suppression of the Financing of Terrorism, which will be tabled before JSCT in the next hearings, and the Convention on the Marking of Plastic Explosives, which differs from the other 11 in that it does not create offences for terrorism.

CHAIR—This one, as in the one before us?

Mr Scott—No, it is the Convention on the Marking of Plastic Explosives for the Purpose of Detection. The MARPLEX convention, as it is known, does not create specific terrorist offences. It provides for a regime in relation to the marking of plastic explosives.

Mr ADAMS—To make them traceable.

Mr Scott—Yes. The Australian government is considering whether it should ratify this convention. The reason we have not ratified it until now is that advice from the Department of Defence was that the technology the convention relates to is now obsolete and that there is now more advanced technology for the tracing of plastic explosives. However, in the wake of September 11 and in an effort to make universal the membership of all 12 conventions the government is reconsidering that particular instrument as well.

CHAIR—I guess that raises my primary concern in relation to this convention: is it still considered to be adequate post September 11?

Mr Scott—It is. In some respects this convention had an amazing degree of foresight in that not only would it cover the use of an aircraft as an explosive device; it would also cover the sending of anthrax through the mail as a form of terrorism. The convention's definition of terrorist bombings essentially amounts to the placement of any substance that would cause injury or death to individuals in its presence. So it is the belief of the states who are party to this convention, and also of states who are proposing to ratify it, that it would have covered the international mailing of anthrax letters. So, in many respects, this convention is very topical and would have had direct relevance both to the attacks in relation to the hijacked aircraft and to the distribution of anthrax-laced mail.

CHAIR—So what do we need in domestic law to ratify this? You say that there are going to be amendments to the Criminal Code?

Mr Scott—Yes.

CHAIR—In what ways is that act going to have to be amended?

Mr Scott—The reason we are proposing the specific legislation is that, in order for the extradition provisions and the mutual legal assistance provisions to work effectively to guarantee that we have the necessary dual criminality, we need to enact the very offence that the convention specifies in article 2. In that way we know that the offence in our country is the same as the offence in each of the other countries. That will facilitate our ability to cooperate with them and the other parties' ability to cooperate with us in investigating, prosecuting and preventing these kinds of terrorist attacks.

The fact that most of the kinds of criminality envisaged by the convention are probably covered by other elements of the federal Criminal Code and also by the states and territories should not be a bar to ensuring that our capacity to cooperate with other countries in relation to these offences is watertight. For that purpose, and in relation to all of the other conventions that we have ratified in the antiterrorism series, we will enact at the Commonwealth level the offence as provided for in the convention.

Mr MARTYN EVANS—Obviously everyone is sympathetic to the intent of making internationally criminal the basis of terrorist activity, but given that the period when this was drafted was well before the most recent motivating example, I cannot quite find in here the link between terrorism and the actual activity which is envisaged. The way in which the articles are drafted means that shooting at someone in a train with a rifle would constitute a terrorist bombing, which was the subject of this convention. There is no attempt in the convention to link the activity, obviously criminal but perhaps not 'terrorist', with the actual concept—that we have in the package of bills, for example—of 'terrorist activity'. This treaty, it seems to me, goes right down the scale because it does not attempt to link that obviously criminal but nonetheless probably non-terrorist activity all the way back up.

CHAIR—So there is no definition of a 'terrorist act'.

Mr MARTYN EVANS—No; all it really requires is an explosive or a device which has the capability to cause injury or death to anyone in a public transport system or a public place. Dropping a rock on a train from a bridge probably would fall within this definition because there is no link back to the evil which is being perpetrated in terms of an 'international terrorist' concept.

CHAIR—Doesn't it have to be exploding?

Mr MARTYN EVANS—No, it just requires a lethal device which is capable of causing death or injury. In other words, dropping a rock on a train in a public transport system or a public place constitutes a 'terrorist act'—as I read it. As you say, it encompassed the use of an aeroplane against a public building. That was remarkable foresight but, on the other hand, one could also say it was a remarkably broad definition. The only reason it incorporated that device is that the definition is so broad it will incorporate almost anything.

Mr Scott—I think that you need to bear in mind a couple of things. The first is the politics of the negotiation of these kinds of instruments. The reason we have a series of 11 subject specific conventions making specific crimes criminal acts, subject to international cooperation, is that it has simply not been possible to agree on a broad definition of 'terrorism' or what a 'terrorist offence' would be. Even after September 11, efforts to conclude a treaty—which is going by the title of the 'Comprehensive Treaty on Terrorism', which is not designed to replace these instruments but merely to fill any remaining gaps there may be—have not been able to succeed in finalising a definition of a 'terrorist offence'.

So, instead, the international community took the option of negotiating subject specific offences. If you look at the earlier conventions in relation to attacks against civil aviation or attacks against airports, maritime navigation, fixed platforms and so on, you will find that in general these conventions do not require a terrorist intent in relation to the offence they provide.

Senator SCHACHT—Are you telling us there does not have to be a terrorist intent to define an act as terrorism?

Senator COONEY—It has got to be a criminal intent.

Mr Scott—It has to be a criminal intent. There has to be the intent to unlawfully commit the offence, but the link with the word 'terrorism' or the link with the intent to intimidate a population or force a government to do or not do something or to further a political or religious goal is not present in the majority of those antiterrorism conventions, particularly the earlier ones. The only context in which we have come close to that is in relation to the hostages convention and also in relation to the terrorist financing convention. The reason has been political. Although we all knew that these particular forms of criminality were typically adopted by terrorists in order to further their goals, the pain of needing to negotiate what terrorism amounted to and whether that included national liberation movements was simply too much and, rather than have nothing proceed, the conventions proceeded on a crime by crime basis where specific acts of criminality were adopted where there was a criminal intent but not necessarily a terrorist criminal intent written into the text. The object and purpose of the treaties is very clear, in this case from the title and also the preamble: it is evident that these conventions are aimed to reduce, punish and prosecute terrorist attacks.

CHAIR—Bombings, not throwing rocks off trains.

Mr MARTYN EVANS—No. The title says one thing—

CHAIR—The title says it is a terrorist—

Mr MARTYN EVANS—but clearly the articles say another.

Mr Scott—But the point is again that the conventions, importantly, require a transnational scope. So article 3 would rule out in most instances the kind of activity that we are talking about. Also, just the general operation of the criminal law, which is very well established, would tend to eliminate from the operation of this kind of multilateral cooperation instrument offences which are either of a purely domestic nature or of a nature utterly unrelated to terrorism.

Mr ADAMS—You are a bit naive on history.

Senator SCHACHT—I am just trying to think of some examples. There is a group of people in Australia of Kurdish origin who are fighting for independence for Kurdistan. They have had some rather lively demonstrations, you might say, and occasionally they might get carried away and a molotov cocktail is heaved through the window of an Iraqi business or whatever else—someone gets burnt to death or badly injured. Under our criminal law they are going to get prosecuted for everything from arson to causing bodily harm. But can Saddam Hussein, if he does accede to this, say that this person is actually in a political act, this was an act of terrorism against the Iraqi embassy, that he wants the person extradited to Baghdad, which is where the person originally came from, somewhere in that area, to be tried under the terrorist act?

Mr Scott—The convention does not actually oblige you to extradite whenever the request is made and can be made under the agreement. The convention provides for specific safeguards in relation to cases where you believe that there are persecutorial elements behind a request for extradition.

Senator SCHACHT—So an unpleasant regime—to put it that way—even though they have acceded to it, cannot insist on the extradition?

Mr Scott—They cannot. What they can insist on in that case is that we prosecute.

Senator SCHACHT—Under our criminal law?

Mr Scott—Under our criminal law.

Senator COONEY—Absolutely right. That is hardly debatable.

Senator SCHACHT—If we do sign this and we put this legislation you have just mentioned through the federal parliament, does that mean the person can be charged with arson causing bodily harm et cetera as well as with an act of terrorism? That has a bigger penalty; that is 25 years. Can you be charged with both?

Mr Scott—As I read out in my opening statement, there are two things at work. One is that if the crime is committed in a state or territory which has jurisdiction over the offence and they are exercising that jurisdiction the Commonwealth cannot proceed. That is built into the legislation. The state and territory jurisdiction in criminal matters has precedence over the operation of the Commonwealth act.

Senator SCHACHT—Let us go to another case: not Iraq but America. Some maniac in Australia has—

Mr ADAMS—Go to an industrial dispute where an international labour organisation becomes involved. We have a boat tied up at the moment because of foreign crews. There is an international maritime union. If that body was involved in a dispute and the boat blew up or something, the people involved could be charged under this act with committing a terrorist act. That might not be the intent, but this has become statute and people could be charged with committing a terrorist act.

Mr Scott—Again, we are running into the problem that if you are talking about hypotheticals it is very difficult to answer. In relation to the joint operations of the criminal jurisdiction of the federal government and the criminal jurisdiction of the state government, you would really need to consult with the areas within the Attorney-General's Department that deal with the relationship between those jurisdictions. All I would say is that, if in the context of an industrial dispute sabotage of that kind were perpetrated, there would be existing laws under Australian law that could apply. The question would be: what choice would we make? For this particular counter-terrorism convention before a charge can proceed the matter must be considered by the Attorney-General. The Attorney-General is the one who authorises whether it is a terrorist offence as opposed to coming under another law.

Mr ADAMS—Sure. But I do not always trust Attorneys-General. They come from the other side of politics sometimes.

CHAIR—Lionel Murphy.

Mr ADAMS—Those are the sorts of issues I think we are trying to tease out.

Senator TCHEN—You trust the Attorneys-General of your side?

Mr ADAMS—There are already international conventions that will override the state law. The High Court has nearly settled that issue. I am still a little concerned about that.

Mr Scott—I do not actually accept that this convention would override the law of Australia. The courts of Australia would apply the legislation that implements this convention. To that extent, the prosecution under the Terrorism Bombing Convention Act would be applying that act. It would not be applying the convention.

Senator SCHACHT—You said before that with this convention there will be complimentary enabling legislation introduced.

Mr Scott—Yes.

Senator SCHACHT—Has that been introduced?

Mr Scott—Yes, it has. It was considered by the—

Senator SCHACHT—It is not in of the package of the five controversial bills—

Mr Scott—Yes, it was.

CHAIR—Yes. It is part of the Senate Legal and Constitutional Legislation Committee report.

Senator SCHACHT—I see. That is right.

Mr ADAMS—Now we are moving.

CHAIR—In relation to that committee report, there are about five bills. Right?

Mr Scott—Yes.

CHAIR—They create new terrorism offences.

Senator SCHACHT—They do.

Mr Scott—They do.

CHAIR—And the Senate Legal and Constitutional Legislation Committee has made recommendations about that that are currently being considered by the government?

Mr Scott—Yes.

CHAIR—This argument about what is or what is not a terrorist attack: is that one of the issues that the government is currently looking at as a result of the Senate recommendations?

Mr Scott—As I understood it, the bill relating to the terrorism bombing convention was not part of that particular controversy in relation to the general offence of terrorism provided for—

CHAIR—That was the Security Legislation Amendment (Terrorism) Bill. That is where all that controversy arose.

Mr Scott—Yes, but that matter is not being considered by me or my area of the Department of Foreign Affairs and Trade. That is the specific consideration—

CHAIR—Attorney-General's?

Mr Scott—The Attorney-General's Department, yes.

CHAIR—I just want to get this straight. The only issue that the suppression of terrorist bombing convention has raised is in terms of the amendments to the criminal code? That is what is being considered by the Senate Legal and Constitutional Legislation Committee? Is that right?

Mr Scott—Yes.

CHAIR—Not legislation that reflects this convention on—

Senator SCHACHT—Per se.

CHAIR—Per se.

Senator COONEY—It did consider that.

CHAIR—Hang on.

Mr Scott—What the bill does is introduce the offence into the Criminal Code and then provide for the various cooperation mechanisms through the Extradition Act, the mutual assistance act and so on.

Senator COONEY—This was considered, along with other legislation, by the Senate committee.

Senator SCHACHT—That is right.

Mr Scott—Yes, it was.

CHAIR—But in terms of the Criminal Code amendment.

Senator COONEY—It was considered along with what was called the terrorist package.

Senator SCHACHT—The other question then is this. If the package of bills—I think there were five of them implementing this convention—was not carried by the parliament, for whatever reason, does that make this treaty that we have now acceded to inoperative?

CHAIR—We have not acceded to it.

Mr Scott—We have not acceded to it.

Senator SCHACHT—If we do accede to it, but do not carry this package of bills, would it make our accession irrelevant because there would be no enabling legislation?

Mr Scott—We would not accede to it without the enabling legislation, because it would have no effect under Australian domestic law.

Senator SCHACHT—So at some stage the parliament will have to deal with a piece of legislation to enable us to make the accession workable.

Mr Scott—Yes, to make it possible.

Senator COONEY—Isn't the position this. We have laws already which cover this sort of conduct in Australia itself, and what the bill does is to extend the jurisdiction in respect of an offence committed as described in article 2 of the convention. It extends the jurisdiction of Australia to Australian ships, to a person who is an Australian citizen. It attempts to pick up acts that are done outside Australia as well as acts done in Australia. Isn't that what is happening here?

Mr Scott—It attempts to do two things. First, yes, it attempts to establish a broad jurisdictional regime which has the necessary nexus to Australia. The second thing it does is ensure that there is a common offence of terrorist bombing that is understood by all the parties to this convention, to facilitate international cooperation in criminal proceedings. Without that assurance of a common criminal offence, there could be impediments to our ability to extradite or have extradited to Australia individuals who are suspected of committing these offences and also our ability to cooperate with prosecutions taking place abroad where we have certain evidence.

Senator COONEY—And doesn't the bill now before parliament go further than what is envisaged by this convention?

Mr Scott—I did not understand that it did.

Senator SCHACHT—Attorney-General's can answer this.

Ms Gorely—Can we ask the Attorney-General's Department to take that question on notice?

Senator SCHACHT—No. They can answer now if they can.

Mr Jennings—Senator—

Senator COONEY—Can I just tell you why.

CHAIR—Who is asking the question. Senator Cooney, what is your question?

Senator COONEY—A person commits an offence if the person intentionally delivers, places, discharges or detonates a device and the device is an explosive or other legal device and the person is reckless as to that fact. That concept of recklessness does not appear anywhere at all in the convention, does it?

Mr Jennings—I am—

Senator COONEY—Is that right, Mr Jennings? The concept—just listen to what I am saying—of recklessness does not appear in the International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997.

Mr Jennings—It talks in the offence provision in article 2 about ‘intentionally delivers’ and so on. I was going to say that I myself am here as the Office of International Law is always present at these hearings to assist the committee with technical issues. I am not in a position—

Senator SCHACHT—Is anyone from Attorney-General’s in a position to answer?

CHAIR—No. Mr Jennings is here for the Attorney-General’s Department.

Mr Jennings—That is why I wanted to indicate that I am happy to take your question on notice and get the appropriate response.

Senator SCHACHT—I think Senator Cooney has asked a very good question. The legislation now before us from the government, which the Senate committee has recommended be amended, talks about various things which are not required in the convention.

CHAIR—The recommendations of the committee do not go to the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002. They only go to the Security Legislation Amendment (Terrorism) Bill. Their report, which presumably is being considered by the government as we speak, makes a number of recommendations, but none in relation to the suppression of terrorist bombings.

Senator COONEY—But in any event, can you take on notice—this is the suppression of terrorist bombings bill—72.3(1)(b) and 72.3 (2)(b) and (e), which talks about recklessness and states:

the person is reckless as to whether that intended destruction results ...

Mr Jennings—That is not a problem at all. I will take it on notice.

Senator SCHACHT—As I understand it, the original bill gave powers to the Attorney-General to proscribe certain terrorist activities, organisations et cetera. Is that required under the convention?

Mr Scott—That is a different bill. That is not required under this convention.

CHAIR—That is only the Security Legislation Amendment (Terrorism) Bill. It is not under this one.

Mr ADAMS—There is a fair bit of complexity going on here.

Senator SCHACHT—But it is all in the same package that we are dealing with in the parliament, and it is what the Senate committee looked at. As I understand it—not being on the committee, and not being involved heavily—the government proposed a proscription arrangement. There have now been debates that we could deal with many of these things without proscribing, like putting in the issues of intent et cetera. Does the convention require us to do one or the other, or can we do both?

Mr Scott—The convention does not require a proscription element. The bill to implement the convention does not require a proscription element, either.

Senator COONEY—The convention in article 2.1(b), as an element of the offence, has this provision:

With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Yet that is transferred across without there being a reference to the major economic loss. I wonder why the phrase 'to result in major economic loss' was left out?

CHAIR—These are really questions for the Attorney-General's Department, aren't they? I do not want to waste Mr Scott's or the committee's time, because I think that if they are not issues that came up in the Senate Legal and Constitutional Legislation Committee, they are clearly going to be—

Senator COONEY—We are asked to look at this convention, and this convention—

Mr ADAMS—We will never get to the bottom otherwise.

CHAIR—All I am saying is perhaps we need a witness from the Attorney-General's Department.

Senator SCHACHT—The legislation—the five packages—actually carries out the ways in which this convention in legislation can be implemented. It is an enabling piece of legislation—one of the five bills. It might not be the specific one that the Senate committee looked at, so in the debate in the parliament it is legitimate to ask, 'How does the legislation, the enabling legislation, fit the convention?' As to the suggestions and questions that Senator Cooney has raised, we do need a response from Attorney-General's.

CHAIR—Major economic loss is in there, Senator Cooney, under 72.3(2)(e).

Senator COONEY—Article 2.1(b), right at the end of the paper, says:

... likely result in major economic loss ...

whereas it has been translated as:

the person intends to cause extensive destruction to the place, facility or system

In other words, it has not put in the qualification that appears in the convention.

CHAIR—It does. It says, ‘the person is reckless as to whether that intended destruction results or is likely to result in major economic loss.’

Senator COONEY—Yes, you are right.

CHAIR—But I think the point that Senator Schacht has made is that the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 did come before the Senate committee, but there are no recommendations on it. I was not on that committee either, so I do not know what analysis they gave. We do not get much from this Senate report. But if, in fact, there are outstanding questions then I think somebody from Attorney-General’s ought to come and we will have another time.

Senator SCHACHT—My point is that if the package of five bills goes through and we accede to this, the government will announce that it helps adopt and implement this convention in Australia; that we have signed up to it. I want to know what happens if the parliament chooses to amend this package of bills and the variations that are there, either in accordance with the Senate committee, if that is relevant, or if other members of the public or other parties propose amendments, as I suspect they will in view of the controversial debate that has already taken place.

I just want to get something formally on the record from Attorney-General’s that says, ‘Look, if you move this amendment, you have basically made this convention inoperative—we can accede to it but we are not carrying out its intent domestically.’ I want them to give the range of things that would be the minimum we would have to do to make the accession to this convention, so that we can actually say to the United Nations and everywhere else, ‘We have done our bit—here is the piece of legislation.’ And if it is not one of these five bills, what else is it?

CHAIR—Mr Jennings, could you take that on board and make an inquiry within the A-G’s Department as to who ought to be present here to give that sort of evidence? Then we will make some arrangement with the secretariat.

Senator TCHEN—My question will be directed to Mr Jennings and the Attorney-General’s Department as well although, as you have already indicated, you will probably need to take this on notice as well as my question relates to this convention. I will make some reference to the Senate report, but I will not be asking you to comment on the Senate report and the other legislation because, for one thing—and obviously Senator Schacht and Mr Adams are not aware of this—the Prime Minister has already said that he welcomes the report from the Senate committee, which indicates that there will be substantial changes. But then again, Senator

Schacht, it is not in your nature to pay attention to what the Prime Minister says, as I understand.

CHAIR—I think the point is that there are no recommendations about this particular bill.

Senator SCHACHT—I know, but we do not know how the government is going to respond—whether in total, or in part—and there is other debate in the Senate.

Senator TCHEN—There is plenty of time for that. Mr Jennings, as Mr Scott has pointed out, the national interest analysis says that Australia already has extensive domestic legislation designed to combat the kinds of acts covered by the convention, so by acceding to this convention Australia will dramatically increase the effectiveness of these domestic measures. The kinds of acts covered by the convention in article 2 are actually quite extensive, as Mr Evans already pointed out. It includes people intentionally delivering, placing, discharging or detonating an explosive or other lethal device—any device in other words—'into or against a place of public use, a state or government facility' and so on, with the intention of causing death, and so on. Any person would commit an offence if he attempts to do so and any person would commit an offence if that person participates, encourages, organises or in any other way contributes to the commission of one or more of such offences. So, basically, article 2 covers just about everything.

The national interest analysis says that Australia already has extensive domestic legislation to cover all these eventualities, yet 3.34 in the Senate's report says:

> The Committee has also heard evidence of certain gaps in Australia's current legislative framework.

Presumably this is from the Attorney General's Department or from the agency under the department—

> Consequently the Committee considers that new legislation to achieve a comprehensive approach to deal with terrorism is justified.

So there must be very persuasive evidence. Which one is right: the evidence given to the committee, or the statement in this national interest analysis that Australia already has extensive domestic legislation? They cannot both be right. If there are significant gaps in the legislation, this statement must be wrong—more simplistic, at least.

Mr Jennings—Could I take that on notice?

CHAIR—Are we going to find the right person within the Attorney-General's Department to give some evidence before this committee?

Senator SCHACHT—Send out a search party!

Senator TCHEN—My concern is that national interest analysis should be a proper analysis.

Mr Scott—That particular statement was intended to point out the fact that if anybody in Australia unlawfully or intentionally kills someone, injures someone or does severe damage to a

public building, those offences are already criminal offences under Australian law. That is what is intended to be covered by the national interest analysis. The idea is that it is not that there is a new concept of criminality being adopted under this convention. I cannot comment on the reference in the Senate committee report except to say that there is no reason why the two cannot be compatible in the sense that the convention calls for widespread international cooperation, and it could be that the elements that would facilitate that cooperation are represented by the gaps—again, not knowing the specific reference within the Senate committee report.

Senator TCHEN—I perfectly understand the intention of the convention; I am just concerned that some of the statements that are presented to us to argue the case seem to be so simplistic and are contradicted on this occasion by some other evidence. That concerns me.

Senator COONEY—Mr Scott, you were saying this is much the same as any other criminal provision. Clause 72.3 (3) of the bill says:

(3) Strict liability applies to paragraphs (1)(c) and (2)(c).

Could you point to any other criminal provision in Australia, with a penalty of imprisonment for life, where an element in the offence is one for which the accused is strictly liable?

Mr Jennings—I will take that on notice.

CHAIR—Barney, that is one of the issues that the Senate committee did raise about creating offences with elements of strict liability, given the very high proposed penalties. So clearly that is something that the government will take on board.

Senator TCHEN—I have a question for Mr Scott by way of a comment. Reading through the articles of the convention, and also the NIA pointed them out, this seems to be very much a big brother—in fact, a big mother—type of convention because it is full of things that state parties shall do and must do. This committee spent more than a year looking at the matter of the International Criminal Court. The minds of a number of our members were very much exercised by the idea of sovereignty, whereas with this convention we could give away all our sovereignties basically by an executive agreement. As Senator Schacht said, anybody can be extradited to Egypt, because it actually specifies that any of those acts are not political acts.

Mr Scott—I think the reason that there is reference to the fact that these acts cannot be considered political acts is that, in most developed extradition regimes, it is a valid basis not to grant extradition when the offence is a political offence. This convention specifies that you cannot consider this kind of offence a political offence; therefore, you cannot allow the political justification, which is the universal basis for justification for terrorist acts, to operate as an impediment to the international cooperation of the prosecution and punishment and prevention of terrorism. Secondly, in relation to—

Mr ADAMS—That has been the IRA's position for years.

Mr Scott—It is certainly the position adopted by most organisations that use terrorism as a political tool. In relation to whether we would be losing our sovereignty by acceding to the

convention, obviously the first point to make is that the government is making the choice to enter into a cooperative bargain agreement, where the bargain is: 'We will give you something in exchange for something that you will give us.' Safeguards are built into the instrument to ensure that it cannot become a tool of oppression and, more importantly, that there is a balance of obligations. The extradition one is a good one because it says that we are not obliged under any circumstances to give up somebody in Australian custody to a foreign country if we believe that that person will thereby suffer persecution. In exchange for that protection, we guarantee that we will investigate and prosecute the matter. That is the standard obligation within instruments of this kind.

Australia, as we have pointed out, is already party to nine instruments which contain very similar—almost verbatim—provisions relating to international cooperation. These have never been viewed from the prospective of the government as inhibitors to the sovereignty but, rather, as an important mechanism to enable cooperation between states that otherwise would not be able to take place. That is, it provides an advantage to the Australian criminal justice system that we would not otherwise have but for making this bargain on equal terms with the other parties to the agreement.

Senator TCHEN—In practical terms, in an international situation, a convention like this—a demand from a state party—would really only be practicable if it were backed up by 18-inch guns and a forest of Tomahawk missiles.

Mr Scott—I think it is fair to say that extradition, mutual assistance relations and judicial cooperation go on on a daily basis without any requirement or need for such threats because it is a mutual relationship. If we do not get the cooperation we have bargained for, we will not provide it in exchange. All our bilateral extradition treaties contain similar sorts of obligations with similar kinds of safeguards. They operate on a mutual respect basis and operate well on that basis.

CHAIR—Mr Jennings, do you want to add something?

Mr Jennings—Yes. This is something that I can comment on because, in a past life, I worked in the extradition area of the department and I am aware of these sorts of provisions and these types of multilateral conventions. They do not provide for a detailed extradition regime; they look at making this treaty the basis for an extradition where you do not otherwise have an agreement—for example, with the other country. If I can take you to article 9, paragraph 2, of the convention, it says:

When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as the legal basis for extradition ...

However, it is important to read the last sentence of paragraph 2, which says:

Extradition shall be subject to the other conditions provided by the law of the requested State.

That triggers the application of the domestic extradition law of the requested state. For example, if Australia gets a request and the basis for it is this convention, our extradition act is triggered with all the protections that you find. I think Mr Scott referred to the issue of not surrendering

someone who might be subject to persecution, torture or what have you. If you look at the extradition act, there are a range of issues that would be addressed in that context.

The nature of these types of conventions does not purport to establish a detailed extradition or mutual assistance regime. It allows this to be the mechanism to say: ‘We have a request for that person’s extradition but, at the end of the day, it will have to run through your domestic law’—in whichever country that may be—‘and be subject to those protections.’ Indeed, that extradition law is reflected, for example, in our bilateral agreements as well—the relevant protections and so on. I just thought I would add that clarification because these do not create a detailed regime. As that example indicates, you would fall back on your domestic law with, in Australia’s case, the range of protections that are provided for there.

Senator TCHEN—Thank you, Mr Jennings, and thank you, Mr Scott. I have some reservations about the ICC as well, but I like to think positively. I support the ICC, and I support this one as well.

CHAIR—Given the hour and the fact that we have two more treaties to consider and, given that we will arrange another hearing with somebody from the Attorney-General’s Department—and, Mr Scott, I would suggest that it might be appropriate that you return to the committee—I think we should move on. Thank you very much for your time.

[9.52 p.m.]

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

BUSH, Ms Amanda, Acting Principal Legal Officer, International Family Law Section, Attorney-General's Department

McGINNESS, Mr John, Acting Assistant Secretary, B Branch, Civil Justice Division, Attorney-General's Department

CHAIR—I welcome witnesses from the Attorney-General's Department to give evidence relating to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of the parliament. If either of you would like to make some introductory remarks, please do so, and then we will proceed to questions.

Mr McGinness—The government's decision to ratify this convention is in response to a number of difficulties faced by Australian authorities and Australian parents in the international family law and child protection area. In particular, I will mention four problems we have faced in relation to international family law cases. The first is the problem we have had with conflicting decisions between the Australian Family Court and overseas courts in child custody cases. This convention lays down clear rules of jurisdiction which, in the future, will indicate whether the Family Court does have jurisdiction which will be respected by family courts in other countries. The second problem the convention addresses is the problem we have had in obtaining recognition overseas for Australian custody orders. In the past, we have attempted to negotiate bilateral arrangements with other countries and we have really only got non-treaty arrangements with the USA and New Zealand. We have been unsuccessful in getting arrangements with European countries, mainly because they take the view that these matters should be covered by multilateral conventions and, in particular, they suggested that we ratify this child protection convention as a way of ensuring worldwide recognition of Australian custody orders.

CHAIR—Have those European Union countries that you are referring to ratified this?

Mr McGinness—I attended a meeting last month in The Hague at which the European Union indicated it was about to ratify the convention on behalf of the 14 members of the EU. That is expected sometime this year. The third problem we look to the convention to address is the problem of the parental responsibility rights of unmarried Australian fathers. Under the Family Law Act, unmarried fathers have parental responsibility in relation to their children. The law in other countries, such as New Zealand and the United Kingdom, is that those fathers' rights are not recognised. They have to go to court and get a custody order if they want their rights to be recognised.

Under this convention, the operation of the Australian Family Law Act in conferring those rights on Australian unmarried fathers will be recognised in those other countries if and when they ratify the convention. The fourth problem this convention will assist us with is the problem of international contact or access cases. It is often very difficult for Australian parents to litigate in foreign courts to establish their right of access to children in other countries. This convention has mechanisms within it which will assist those parents to obtain access rights. The national interest analysis which we submitted to the committee covers the question of consultation we did on this particular convention. In 1998, we circulated an issues paper to a wide variety of organisations working in this field with a view to helping us develop the implementing legislation. In September last year, we widely distributed a copy of the convention and the explanatory material to a large number of public interest groups and, again, to bodies like state agencies, legal aid organisations and law societies. In general, there was wide support for ratification of the convention.

The final matter I want to mention is the fact that the convention, apart from covering international family law cases, also covers international child protection cases. These are cases in which the child is alleged to have been abused or neglected, and the parents remove the child overseas to avoid the jurisdiction of Australian state child protection departments. We have been consulting closely with the state and territory departments on ratification of the convention, and the states and territories are in agreement with ratification. They are currently preparing a model bill for each state, which each state will eventually pass, implementing that aspect of the convention in Australia.

CHAIR—You mentioned that the European Union is going to ratify. Currently they do not want to negotiate bilateral arrangements. I assume other countries as well have refused to negotiate bilateral arrangements with Australia?

Mr McGinness—In general that has been the reaction we have had from most countries, yes.

CHAIR—What do parents do now in these circumstances where there are Australian parenting orders?

Mr McGinness—To the extent that the particular case is covered by The Hague child abduction convention they do have rights under that convention. That is fairly limited, in some ways, in its operation. The other option they have is to litigate in the foreign court to try and obtain an order from the foreign court giving them custody of the child.

CHAIR—So if you had a parenting order in Australia you would then, presumably, have to get legal representation, say, in France, to seek the same order?

Mr McGinness—Yes, you would have to relitigate the whole question in a French court.

CHAIR—Would you be able to get Australian legal aid?

Mr McGinness—My understanding is that no; legal aid authorities here will only finance custody litigation within Australia.

Senator SCHACHT—Can you take this question on notice if you cannot answer it now: over the last few years, say five, how many cases have there been in Australia where parents have had to seek to go overseas, or have had a problem with getting custody of their child? Is it 100 cases a year? Five hundred? Five?

Ms Bush—I can tell you the number of cases that we have had under the child abduction convention.

Senator SCHACHT—You say that is limited in its application, Mr McGinness. If we sign this and put the appropriate—there is no need for legislation on this one, is there?

Mr McGinness—Yes, there is a bill that the Attorney introduced in parliament.

Senator SCHACHT—If that legislation were to go through, how many more cases—which give a better definition than ‘child abduction’—are we looking at? Could you give me the child abduction figures first?

Ms Bush—In the calendar year 2001 there were 58 applications for the return of children who were brought to Australia, and there were 83 applications for the return of children taken out of Australia.

Senator SCHACHT—How many more do you think there will be under the new, broader definition of this particular convention?

Mr McGinness—The government does not maintain statistics on cases where parents have to go to an overseas court to litigate. We do not get notice of those. The parents simply get a lawyer in the other country.

Senator SCHACHT—So you have anecdotal information but no firm figures?

Mr McGinness—That is correct. We do have statistics on the USA and New Zealand because they are the two countries where we have bilateral arrangements.

Senator SCHACHT—My next question is about the most celebrated case that I can remember—and there have been many others—which was the Gillespie case where the kids were abducted out of Australia. It got a lot of publicity for obvious reasons. Was that an abduction case or was that one that this convention would now cover if Malaysia signed up?

Mr McGinness—Yes. That was an abduction case but Malaysia is not a party to The Hague abduction convention so that was unavailable.

Senator SCHACHT—Has Malaysia signed this one yet?

Mr McGinness—No.

Senator SCHACHT—We now have an increasingly large population in Australia of people with an Asian background with family connections in Asia. Have any of the Asian countries signed the convention?

Mr McGinness—The Australian government, through the Department of Foreign Affairs and Trade, has been encouraging countries in the Asia-Pacific region to sign to ratify The Hague abduction convention. For example, Fiji has recently ratified that convention.

Senator SCHACHT—So we have got one in the Asia-Pacific—Fiji. That is for the abduction convention. What about this convention?

Mr McGinness—This is still a fairly new convention. Like the abduction convention, we expect that over time more countries would ratify. It is a slow process.

Ms Bush—This one only came into force in January 2002.

Senator SCHACHT—Yes, I know. But if they have not signed up on the abduction one, I cannot see that they will be enthusiastic about signing this one.

Mr McGinness—That is possibly correct, particularly for countries which have sharia law as the basis of their family law.

Senator SCHACHT—I was just going to get to that. So, they will not sign?

Mr McGinness—If they have not signed the abduction convention, we do not expect them to ratify this convention.

Senator SCHACHT—That is right. Really, it is a paper tiger for these countries in particular.

Mr McGinness—For countries who do not currently have well established arrangements with countries like Australia, it is unlikely that they will ratify in the near future. All we can do is continue to lobby them. Again, I would make the point that for countries like the European countries, this will assist Australian parents quite substantially by relieving them of the obligation of litigating in those countries.

Senator SCHACHT—My last question reverses another issue. We have carried law in Australia to ban female genital mutilation; that is a barbaric practice. What would happen if citizens of Australia were of a religious or cultural bent that they wanted that operation performed on their child—it is illegal here in Australia—and they went to a country in the world where is not illegal and the cultural laws allow it to happen? Under this convention, can we take action in respect of abuse of children to seek an extradition to bring them back as Australian citizens?

Mr McGinness—In theory, under this convention a state court could make an order and ask that it be registered and enforced in that country requiring the child to be returned to Australia.

Senator SCHACHT—The biggest problem I suspect is that most of those countries that allow that barbaric practice will probably not be signing this convention.

Mr McGinness—Possibly not.

Mr ADAMS—You said that EU countries are going to sign it as a block and the UK and New Zealand are going to sign. We have quite a few issues with those two areas because of people's exchange, et cetera.

CHAIR—It was the USA, wasn't it?

Mr ADAMS—Is the USA going to come into this convention?

CHAIR—They are in it.

Mr McGinness—Yes, that is our expectation.

Mr ADAMS—How does that work now? Instead of somebody having to go and run their own case, what will occur under this convention? Will the department take up the case? Are there are obligations to return the child or to negotiate or something?

Mr McGinness—Under this convention, the idea is that the parent in Australia who wants the child returned to Australia would go to the Family Court and get a parental responsibility order. The Attorney-General's Department would liaise with authorities in the other convention country to have it registered and enforced there.

CHAIR—Acting as the Commonwealth Central Authority?

Mr McGinness—Yes, that is correct.

Mr ADAMS—In the convention, there are laid down opportunities for foster care et cetera. What is that dealing with?

Mr McGinness—Theoretically, at the moment, it is possible for a child protection department in this country to place a child in foster care in another country—for example, in New Zealand—if there are relatives in that country. There are mechanisms in this convention which provide for the central authorities to consult and cooperate in those sorts of cases.

Senator SCHACHT—Would this convention cover the celebrated case in 2000 of the Cuban boy who ended up in America? His mother died fleeing in a boat and he survived, and then the father from Cuba wanted to take him back, and half the Cuban exiles in Florida went crazy trying to stop it. In the end, the American courts ruled. Is that the sort of case for which this convention would establish useful arrangements so that it did not become a political issue?

Mr McGinness—Theoretically, it would be available to a parent to make use of this convention to try and achieve that outcome.

CHAIR—Presumably, that is because there would be conflicting jurisdictions—wasn't that the issue?—between the US courts and the Cuban authorities.

Mr McGinness—That is correct. If Cuba and the USA were parties to this convention, the US courts would have to recognise the jurisdiction of the—

Senator SCHACHT—In the end, the American court separately made its own—or the State Department made the ruling that the kid had to return to his father.

Mr McGinness—It went through the court process.

Senator SCHACHT—But it went through a court process, didn't it?

Mr ADAMS—The Attorney-General did it.

Senator SCHACHT—My only final comment is that—I think we cannot argue: this is not motherhood; this is childhood, so it cannot be opposed—the real problem is that the countries that you would really want to sign this are going to be very reluctant to do so. I know it is going to be a long, long time before the countries in our own region that we would really want to sign this do sign it.

Mr McGinness—I will just respond to that briefly by saying that that was our experience with the abduction convention, for example. There are now, I think, just over 70 countries who have ratified that.

Senator SCHACHT—But how many of the Asia-Pacific, South-East Asia, Middle East, South Asia countries have signed the abduction treaty? This is more difficult. Abduction is a bit harder to knock back. This is actually broader in context.

CHAIR—We are relieved that Monaco has ratified it, but—

Senator SCHACHT—Who wants Prince Rainier's kids, I suppose!

Ms Bush—If the committee would like, we can provide a list of the countries that are currently—

Senator SCHACHT—Yes. I do just apologise. That is fine.

Senator TCHEN—I find myself in the unusual position of agreeing with Senator Schacht.

CHAIR—You agreed with him?

Senator TCHEN—Yes.

CHAIR—I am glad we have got that on the record!

Senator SCHACHT—I must have said something wrong there! I will drink hemlock now!

Senator TCHEN—I am a bit more positive than him, because I think that, even if it does not apply in some countries, as long as it applies in some other countries, we probably should ratify this convention.

CHAIR—Do not say too much; he might change his mind.

Senator TCHEN—I have one point on which I disagree with him. I object to him picking out Asian countries.

CHAIR—I think he was saying it as a statement of fact.

Senator SCHACHT—It is a statement of fact. That is where a large number of our population comes from.

Senator TCHEN—That is okay.

CHAIR—I am just wondering whether, during the consultation process with the Family Law Practitioners Associations and the like, they were able to give some sort of indication of the number of cases they have on their books that this convention is likely to apply to. I am aware of a couple of cases, through a previous life—not mine; my professional life—but I am wondering if the Family Law Practitioners Associations gave any indication of the demand that there will be for utilisation of this convention.

Mr McGinness—We certainly did consult, for example, with the family law section of the Law Council and they expressed very warm support for ratification of this convention. Again, I think they are just going on anecdotal evidence. There is no real organised collection of statistics on international child custody cases.

CHAIR—Presumably there will be, now that there will be a Commonwealth central authority.

Mr McGinness—That is correct. If we ratify this convention, we will collect statistics on the use of the convention and its operation.

Senator SCHACHT—So you will have a dedicated officer in Attorney-General's looking after this?

Mr McGinness—It will be run by the same section which administers the Hague abduction convention.

Senator SCHACHT—How many people are in that? There are not enough usually, but how many?

Ms Bush—There are currently nine officers in that section.

CHAIR—That sounds enough. Are there any other questions? No. Thank you very much for your time this evening. Thank you for appearing before the committee.

[10.09 p.m.]

Convention on the Recognition of Qualifications Concerning Higher Education in the European Region

GORELY, Ms Amanda Louise, Director, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

SCULLY, Mr Mark James, Executive Officer, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

GREGORY, Dr Heather, Assistant Director, Educational Standards Branch, International Group, Department of Education, Science and Training

PEARCE, Mrs Margaret, Branch Manager, Educational Standards Branch, International Group, Department of Education, Science and Training

CHAIR—Last, but by no means least, I call witnesses from the Department of Education, Science and Training and the Department of Foreign Affairs and Trade to give evidence relating to the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mrs Pearce—The Lisbon Recognition Convention was negotiated under the auspices of the Council of Europe and UNESCO and adopted in Lisbon in 1997. It came into effect in 1999 and was signed by Australia in 2000. The new convention replaces several outdated UNESCO and Council of Europe conventions. Australia was party to one of these conventions, the Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region. Australia, as a party to that, was invited to sign the Lisbon convention. The Lisbon convention has similar aims to the earlier conventions but basically provides more detail about the responsibilities of ratifying states in relation to the principles underlying the recognition process, how the recognition of qualifications should be carried out and the collection and dissemination of information on higher education and recognition systems.

My branch is involved in this because two of the sections that I have responsibility for together form the National Office of Overseas Skills Recognition, or NOOSR, which is the Australian national information centre for the recognition of qualifications and has developed a very significant international reputation as an expert recognition body. It currently fulfils the obligations of the convention through its best practice guidelines, procedures, qualifications recognition and publications and its participation in the European network of information centres, which is an electronic information network which we respond to and provide information to on a daily basis. NOOSR also fulfils a function as party to the Regional

Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific. We currently hold the presidency of that convention and are developing a similar type of electronic network for that particular group.

The Lisbon Recognition Convention is designed to facilitate improved international mobility in higher education and to encourage fair and consistent practice. NOOSR currently carries out the roles outlined in that recognition convention. The only obligation that we do not believe that we carry out is the promotion and use of the diploma supplement, which is essentially a testamur. When you get a degree these days, you are given a testamur which says that you have received a degree from X university in a particular year. However, if you have a diploma supplement, it provides supplementary information to that testamur such as information about the education system in which the degree was taken—information that would help an assessor make a decision about the comparability of that qualification to the qualifications in their own country.

Recently we held a meeting with the deputy vice-chancellors and pro vice-chancellors international from all Australian universities and put to them the notion of holding a pilot project to look at the diploma supplement and how it might be introduced into Australian universities. We hoped to get two or three universities interested, and eight of them indicated their interest. So there is a great deal of interest from Australian universities in developing a diploma supplement and, in fact, in the whole Lisbon recognition process, because they can see that it will give Australian higher education qualifications a higher profile. It will support our internationalisation efforts and our marketing of Australian higher education, and they see it as a very positive move. I would like to complete the statement by saying that, in reality, NOOSR carries out most of the obligations of this convention currently, except for the diploma supplement and the promotion of the diploma supplement, which I mentioned.

CHAIR—Thank you. Maybe I missed something. The convention is entitled the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, but there are also non-European signatories such as Canada, the US and Australia.

Mrs Pearce—There are. And, as I mentioned, Australia was actually invited to sign because, when this convention was negotiated, it replaced a number of previous conventions to which Australia was party. I am not sure whether America and the UK were party to those previous conventions.

CHAIR—The USA and Canada.

Mrs Pearce—And Canada. I can certainly find that out for you.

Dr Gregory—That is right.

CHAIR—Is there any intention to expand the application of this convention to other states? We have three non-European and the balance are European.

Mrs Pearce—I think there is the ability to do that within the convention, but under the auspices of UNESCO there are a whole range of regional conventions and they are brought together on an annual basis by UNESCO. So there is this original convention covering the Asia

and Pacific area, there is one covering South America, there is one covering Africa and the Arab states, and so forth, which basically replicate the Lisbon recognition convention.

CHAIR—This convention is binding on the Commonwealth, not on the states or territories and not on our higher education institutions, however much they support it.

Mrs Pearce—That is right.

CHAIR—The national interest analysis says that the Australian Vice-Chancellors Committee will have partial responsibility for meeting the obligations of the convention. How does that come about?

Mrs Pearce—That is in terms of the diploma supplement and helping with the promotion of the diploma supplement. We are currently working with them to develop a pilot project to develop that supplement.

Senator SCHACHT—Why won't the bludgers sign up?

Mrs Pearce—I am sorry?

Senator SCHACHT—Why won't they sign up? Why don't they commit themselves to it?

Mrs Pearce—I cannot answer on behalf of other countries.

Senator SCHACHT—No, the AVCC—the Australian universities. You said this is not binding on them.

CHAIR—No, the convention is not.

Senator SCHACHT—It says that it is not binding on the Australian vice-chancellors or on Australia's higher education institutions. Why is it not binding on them?

Ms Gorely—Because it is a treaty between states.

Senator SCHACHT—But you have signed the treaty. I mean, how many billions of dollars do they get out of the federal budget every year?

CHAIR—Why don't we make it binding on them; is that what you are saying?

Senator SCHACHT—Yes. Why don't we make it binding on them?

Mrs Pearce—Perhaps I could just turn the question around. In Australia, higher education institutions are, of course, autonomous bodies and they have the competence to decide how they will recognise the qualifications of people trying to enter their institutions.

Senator SCHACHT—Autonomous? How much money do you give them every year? Taxpayers would like to know.

Mrs Pearce—But in terms of signing up for the convention, if I could just go to your original question, Senator Schacht—

Senator SCHACHT—You send them a blank cheque every year, do you, down at DEET—or whatever you call the department now?

Mrs Pearce—They have signed up to the convention in the sense that they consider it a very good idea and are very supportive of it. They have also signed up to those sorts of principles to the extent that they take NOOSR advice on recognition decisions when they are making admissions decisions about students from overseas.

Senator SCHACHT—But you cannot direct them.

Mrs Pearce—No.

Senator SCHACHT—If you make a decision under this convention and they choose to disagree, that is stumps, is it not?

Mrs Pearce—That is what?

Senator SCHACHT—Stumps. Wicket—you bowl them over.

CHAIR—It is a cricket analogy.

Senator SCHACHT—The stumps have gone out of the ground and there is no further correspondence entered into.

CHAIR—So, in other words, the Commonwealth is a party to the convention and the question is, if Australia's higher education institutions have some responsibility for meeting these obligations, how can we be assured that they will?

Mrs Pearce—We can promote the principles, as we do now, of fair and transparent recognition processes. All bodies in Australia involved in assessment of overseas qualifications use the guidelines, produced by NOOSR in its country education profiles, to make those admission decisions, so in that sense they have bought into the argument and support the convention.

Mr ADAMS—The universities in Australia will recognise professors' qualifications when they engage them in their universities in Australia. They have done that for years.

Mrs Pearce—That is right.

Mr ADAMS—This is a broader situation than that because we are now trying to jell things from each country together in recognition—harmonise, I think.

Mrs Pearce—An international approach.

Senator SCHACHT—Harmonisation.

Mr ADAMS—It is also jelling with trades and skills recognition in that area.

Mrs Pearce—This is only dealing with higher education.

Senator SCHACHT—But it was always an argument that we do not recognise doctors' qualifications.

Mr ADAMS—Yes. That was to be my next question.

Senator SCHACHT—Does this mean that a regime can be established whereby the qualifications of graduate doctors from universities in the European Union who meet the standards will now be accepted in Australia?

Mrs Pearce—The principle is that you would recognise cosignatories' qualifications unless there is a good reason not to do so. In Australia the recognition of professional qualifications is done by the professional bodies but guidelines are produced by NOOSR. The principle should be that you have fair and transparent processes in place: that someone can pick up a document and understand what the recognition requirements are for that profession in Australia.

Mr ADAMS—What Senator Schacht has raised with the medical profession does not apply though. The Medical Council of Tasmania is a law unto itself. I have had quite an argument with them over this very matter—a doctor with five years service has now been rejected. His qualifications have been rejected.

Senator TCHEN—That is not a university though; it is a medical association.

CHAIR—The question is: are professional bodies and employers also obliged to follow the convention's obligations?

Senator SCHACHT—Are they bound by this? Clearly they are not.

Senator TCHEN—They do not get any money from the Commonwealth.

Mrs Pearce—We would promote the obligations to the professions, and we do, as I mentioned, through our guidelines. But this convention actually deals with the academic qualifications, so it is the degree as opposed to other requirements of professional entry.

Senator SCHACHT—What about doctors? That is a degree from a university.

Mrs Pearce—But there are other requirements of professional entry other than the degree.

Senator SCHACHT—Yes, but there was conflict in the marketplace to protect our own incomes. We all know about that trick, don't we?

CHAIR—I want to understand the limitations of this convention. This convention only deals with academic qualifications.

Mrs Pearce—Yes. Essentially, the convention provides for mobility of students. These days many students do not just gain a degree from one university; they may well have a year or a semester of study abroad, for example. You want to be able to recognise that in the home country and recognise that when that student travels abroad. This provides a mechanism to do that. It is a little bit broader than that, but that is one of the things that stimulated the convention.

CHAIR—So it is really limited to students rather than overseas trained professionals and their employment.

Mrs Pearce—It is about the recognition of academic qualifications and that is part of the recognition of a professional. For a particular professional they may have to have a degree in physiotherapy. But there may be clinical requirements as well to enter their profession in Australia.

CHAIR—Like recognising a law degree from the law school of the Holy See but then—

Senator SCHACHT—Unless you do three years in a lawyer's office or articles, you do not get admitted—which is another crooked system.

Mrs Pearce—But you may have to do elements of Australian law, for example, if you have undertaken a law course overseas. You recognise the primary qualification and then you have to do some sort of bridging requirement.

CHAIR—Let us take law, for example, because I know a little about it. If you are a graduate from a law school overseas and you come to Australia and want to practice law, the barristers board, the legal practice board or some sort of admissions board or professional body has a look at it and says, 'The law school of Bulgaria does not have Australian property law, Australian torts law or Australian constitutional law so you have to go back and do it at the ANU.' That is the current situation, and then you have to go and do articles and everything else they require. What will change with this convention?

Mrs Pearce—I do not think a lot will change in Australia. One of the points I made in my opening statement is that we have fair and transparent practices in the recognition of overseas qualifications already. If the profession determined that you require Australian law and those other things you mentioned, they would set those requirements and you would have to go and do it.

CHAIR—So how would it work in reverse—that is, as an Australian graduate from a law school here going over to seek work in a law firm in Bulgaria? How is that going to advantage the graduate?

Mrs Pearce—To take that case as an example: Bulgaria has never heard of Australian law. They may contact our national information centre, which is NOOSR, and ask about the qualifications, and we would provide information. That is one element of it.

CHAIR—But that happens now.

Mrs Pearce—Yes, but, as I said, we have put into practice virtually all elements of this convention already. If we adopted the diploma supplement, a whole range of information about what that student has studied would be provided to the assessing authority in Bulgaria. That would be something different as a result of our implementing that aspect of the convention.

Senator SCHACHT—This treaty has all the impact of wet lettuce, really, in what it is going to do, hasn't it?

Mr ADAMS—I think the professions have won; I think they are still well in front.

Senator SCHACHT—It is very nice to tidy everything up, and I am not going to oppose it, but I make the comment that I think it is outrageous that the Commonwealth taxpayer provides billions of dollars to the tertiary sector and they then have in here, under the guise of academic independence, the right to opt out. That has nothing to do with academic independence. If we are going to sign the convention, if we think it is good enough, we should insist that they follow it, for goodness' sake.

Mrs Pearce—We believe they do follow it.

Senator SCHACHT—No, we should insist. They can opt out under this arrangement, can't they? Knowing the 37 universities, there will be some maverick vice-chancellor somewhere who, for his or her own ends, will do something like this. That is the recommendation I would like to put in this report: that the AVCC be made—

CHAIR—Noted.

Mrs Pearce—My colleague would like to add some clarifying points to your comment.

Dr Gregory—I have to say that my comment is not about your particular point; I want to say that there has been a lot of emphasis on the professions and they do have a high profile, but a lot of graduates from Australian universities who return to their home countries are actually just in the general employment market, of course. That is one of the strengths of this convention: it adds an extra obligation on the signatory countries in Europe and elsewhere to take pains to ensure that those Australian qualifications are recognised if at all possible. That is a very large group of graduates.

Senator SCHACHT—If one of the signatory countries finds that they have a complaint about the qualification from one of the people returning, you take it up with the AVCC and you do not have any power. You say, 'We'll consult with you; we'll plead with you; we'll beg you.' And they will say, 'We'll think about it.' The AVCC was once described to me by an ex vice-chancellor as 'the most evil committee in Australian public life'. Nevertheless, I find it extraordinary that you do not insist.

CHAIR—I think you have made your point.

Senator TCHEN—I would like to make a point about Senator Schacht's point. I have returned to the stage where I disagree with you!

Senator SCHACHT—I was trying to get you to say that after a while.

CHAIR—This is all for your benefit, you realise. Senator Tchen, we will come back to you. I would like to ask about paragraph 13, the national interest analysis. There was a point there that concerned me. In the wording of the last sentence in paragraph 13, you start off by saying:

> Improved recognition arrangements ... facilitate the recognition of overseas trained professionals' qualifications in Australia ...

and in the last sentence it says:

> It may also be of some benefit to those seeking the recognition of Australian qualifications for purposes of professional practice in countries which are party ...

It appears to imply a lesser obligation in the convention on other state parties to recognise Australian professional qualifications than there is on Australia. Is that the case?

Dr Gregory—It has really just been couched in that very cautious language, because it is not only in Australia that professional bodies make their own decisions about—

Senator SCHACHT—They are laws unto themselves.

Dr Gregory—Yes, that is right. We simply wanted to emphasise that it is of benefit to that part of the recognition process for professionals which consists of the recognition of their academic qualifications, as opposed to all the other requirements.

CHAIR—So you did not intend to suggest that there is any lesser obligation in the convention than there is on other state parties?

Dr Gregory—No.

Mrs Pearce—No.

Senator TCHEN—This point does not have much to do with my support of this convention either because, like Senator Schacht, I support—

CHAIR—Are you sure you need to make it?

Senator TCHEN—Yes, I think so, partly because of Senator Schacht's rather provocative statement about 'he who pays the piper calls the tune'.

Senator SCHACHT—Sorry, the federal government pays the damage. It is taxpayers paying millions of dollars.

Senator TCHEN—Academic independence is a very valuable thing. It should not be subject to this continued catchcry of 'taxpayers' money', because education excellence is what gains recognition. It really concerns me that, in the national interest analysis, the marketability of Australian education becomes an issue, because I think we should be providing education with the aim of excellence rather than constantly having to account for how much of the taxpayers' money we get. There is so much pressure from people who push the view of Senator Schacht, that education money must be accounted for, and that is forcing Australian education down this marketing path. I am really concerned about that.

Senator SCHACHT—I just thought it was reasonable that we ask them to sign up.

Ms Gorely—But there is an economic incentive for them to comply if they want to attract students from Europe—and we do attract a large number of fee paying students from Europe who want to do part of their course in Australia. If Australian universities want them to come along, they have to ensure that their qualifications are recognised when they go back home, otherwise students will not come.

Mr ADAMS—Exactly.

CHAIR—The United States, the United Kingdom and Canada have not yet ratified.

Mrs Pearce—Canada and the United Kingdom are in the process of ratification, and the US has started the ratification process as well.

Senator SCHACHT—They have to get the Oxford dons to agree, I suppose—get Oxbridge to agree on a system where they have to give up something.

CHAIR—Is there any other aspect of this convention that you think should be brought to the attention of the committee?

Mrs Pearce—I think we have covered it.

CHAIR—On that basis, I would like to thank you very much for your time and for being here so late this evening.

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

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

Committee adjourned at 10.34 p.m.