

Report 53

Treaties tabled in May and June 2003

Investments – Sri Lanka

Social Security Agreements – Belgium, Chile and Slovenia

International Unification Agreement – Timor-Leste

International Labour Organization Conventions

Medical Treatment for Temporary Visitors – Norway

Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

Fulbright Agreement – United States of America

Joint Standing Committee on Treaties

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Membership of the Committee

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Resolution of Appointment

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

- a) matters arising from treaties and related National interest Analysis and proposed treaty actions presented or deemed to be presented to the Parliament,
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or:
 - (ii) a Minister; and
- c) such other matters as may be referred to the Committee by the Minister for Foreign Affairs and on such conditions as the minister may prescribe.



List of abbreviations

AAFC	Australian-American Fulbright Commission
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFFA	Department of Agriculture, Fisheries and Forestry Australia
DFAT	Department of Foreign Affairs and Trade
DWFN	Distant Water Fishing Nation
EEZ	Exclusive Economic Zone
EFIC	Export Finance and Insurance Commission
FACS	Department of Family and Community Services
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labour Organization
IME Act	<i>National Health Amendment (Improved Monitoring of Entitlements to Pharmaceutical Benefits) Act 2000</i>
IPPA	Investment Protection and Promotion Agreements
ISPS	International Ship and Port Facility Security

IUA	International Unitisation Agreement
IUU	Illegal, Unreported and Unregulated
JPDA	Joint Petroleum Development Area
JSCOT	Joint Standing Committee on Treaties
MCS	Monitoring, Control and Surveillance
MHLC	Multilateral High Level Conference
NIA	National Interest Analysis
PBS	Pharmaceutical Benefits Scheme
RFMO	Regional Fisheries Management Organisations
PFRP	Pelagic Fisheries Research Program
RHCA	Reciprocal Health Care Agreement
SARS	Severe Acute Respiratory Syndrome
UNCLOS	United Nations Convention on the Law of the Sea
UNTAET	United Nations Transnational Administration in East Timor
USA	United States of America
VMS	Vessel Monitoring System



List of recommendations

Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments

Recommendation 1

The Committee supports the Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments and recommends that binding treaty action be taken.

Social Security Agreements

Recommendation 2

The Committee supports the proposed *Agreement with Belgium on Social Security* and recommends that binding treaty action be taken.

Recommendation 3

The Committee supports the proposed *Agreement with Chile on Social Security* and recommends that binding treaty action be taken.

Recommendation 4

The Committee supports the proposed *Agreement with Slovenia on Social Security* and recommends that binding treaty action be taken.

Agreement Relating to the Unitisation of the Sunrise and Troubadour Fields

Recommendation 5

The Committee supports the International Unitisation Agreement and recommends that binding treaty action be taken.

Denunciation of International Labour Organization Conventions

Recommendation 6

The Committee recommends that the Australian Government denounce the following International Labour Organization (ILO) Conventions:

- No. 83: Labour Standards (Non-Metropolitan Territories) Convention, 1947;
- No. 85: Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947; and
- No. 86: Contracts of Employment (Indigenous Workers) Convention, 1947.

Agreement on Medical Treatment for Temporary Visitors between the Government of Australia and the Government of the Kingdom of Norway

Recommendation 7

The Committee recommends that the Government investigate ways of improving data collection for the purposes of monitoring costs associated with similar agreements.

Recommendation 8

Although reservations are expressed concerning the adequacy of the data collection, the Committee supports the Agreement and recommends that binding treaty action be taken.

Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

Recommendation 9

The Committee supports the Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and recommends that binding treaty action be taken.

Recommendation 10

The Committee recommends that in future international Treaty negotiations of this kind, Australia seek to give preference to more rigorous language of the kind contained in Article 5(b) 'best possible scientific evidence' in contrast to the ill defined terms of Article 5(c) 'precautionary approach' with the consequent definitional and commercial uncertainty that this ill defined term carries at the international level.

Recommendation 11

The Committee recommends that Australia support and encourage through the preparatory conferences the aim of ensuring that countries that are proposed as members of this body ratify the Fish Stocks Agreement.

Exchange of Notes for the Financing of Certain Education and Cultural Exchange Programmes

Recommendation 12

The Committee supports the views expressed in the National Interest Analysis and the Exchange of Letters amending the Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America for the Financing of Certain Educational and Cultural Exchange Programmes, and recommends that binding treaty action be taken.

Introduction

Purpose of the report

- 1.1 This report contains advice to the Parliament on the review by the Joint Standing Committee on Treaties of a series of proposed treaty actions tabled on 14 May 2003¹ and 17 June 2003², specifically:

14 May 2003

- *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields, done at Dili on 6 March 2003;*
- *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, done at Canberra on 12 November 2002;*
- *Agreement on social security between Australia and the Kingdom of Belgium, done at Canberra on 20 November 2002;*
- *Agreement on social security between the Government of Australia and the Government of the Republic of Chile, done at Canberra on 25 March 2003;*

1 See *Senate Journal*, 14 May 2003, p. 1791 and *House of Representatives Votes and Proceedings*, 14 May 2003, p. 873.

2 See *Senate Journal*, 17 June 2003, pp. 1859-1860 and *House of Representatives Votes and Proceedings*, 17 June 2003, p. 962.

- *Agreement on Social Security between the Government of Australia and the Government of the Republic of Slovenia, done at Vienna on 19 December 2002; and*
- *International Labour Organization Conventions:*
 - No. 83: Labour Standards (Non-Metropolitan Territories) Convention, 1947;*
 - No. 85: Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947;*
 - No. 86: Contracts of Employment (Indigenous Workers) Convention, 1947.*

17 June 2003

- *Agreement on Medical Treatment for Temporary Visitors between the Government of Australia and the Government of the Kingdom of Norway, done at Canberra on 28 March 2003;*
- *Exchange of Notes, done at Canberra on 7 April – 27 May 2003, Amending the Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America for the Financing of Certain Educational and Cultural Exchange Programmes of 28 August 1964;*
- *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu on 5 September 2000; and*
- *Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000, done at London, 15 March 2000.*

- 1.2 The Committee deferred tabling its review of *Amendments to the Annex to the International Convention for the Safety of Life at Sea, 1974, including consideration and adoption of the International Ship and Port Facility Security (ISPS) Code (London 12 December 2002)*,³ in order to investigate further the impact of the Convention on Australian ports and port facilities.

3 See *Senate Journal*, 14 May 2003, p. 1791 and *House of Representatives Votes and Proceedings*, 14 May 2003, p. 873.

Briefing documents

- 1.3 The advice in this report refers to National Interest Analyses (NIAs) prepared for these proposed treaty actions. Copies of the NIAs are available from the Committee's website at: <http://www.aph.gov.au/house/committee/jsct/index.htm> or may be obtained from the Committee Secretariat. These documents were prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty.
- 1.4 Copies of treaty actions and NIAs can also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade (DFAT). The Australian Treaties Library is accessible through the Committee's website or directly at: <http://www.austlii.edu.au/au/other/dfat>.

Conduct of the committee's review

- 1.5 The Committee's review of the treaty actions canvassed in this report was advertised in the national press and on the Committee's website.⁴ In addition, letters inviting comment were sent to all State Premiers and Chief Ministers and to individuals who have expressed an interest in being kept informed of proposed treaty actions such as these. A list of submissions and their authors is at Appendix A.
- 1.6 The Committee also took evidence at two public hearings held on 16 and 23 June 2003. A list of witnesses who gave evidence at the public hearing is at Appendix B. A transcript of evidence from the public hearing can be obtained from the Committee Secretariat or accessed through the Committee's internet site at: <http://www.aph.gov.au/house/committee/jsct/index/htm>.

4 The Committee's review of the proposed treaty actions was advertised in *The Australian* on 28 May 2003 and 25 June 2003. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee.

Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments

Introduction

- 2.1 The purpose of the *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, done at Canberra on 12 November 2002*, is to encourage and facilitate bilateral investment by citizens, permanent residents and companies of Australia and Sri Lanka, in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence.¹ The Agreement is intended to put Australian investors in a better position to benefit from the investment opportunities in Sri Lanka by providing them with a range of guarantees relating to non-commercial risk.²

1 Australia has concluded 19 Investment Promotion and Protection Agreements (IPPAs) since 1988. A list of these Agreements can be located at <http://www.info.dfat.gov.au/TREATIES>.

2 National Interest Analysis (NIA), para. 5, and see JSCOT, *Report 22: Five Treaties Tabled on 11 May 1999*, p. 4, where the Department of Foreign Affairs and Trade (DFAT) discussed how IPPAs are beneficial to both parties of an Agreement. This Agreement also accords

Background

- 2.2 Australia is the second largest foreign investor in Sri Lanka.³ In 1998 Australians invested about \$28 million in Sri Lanka out of total direct investment of \$193 million in that year from all countries. The Sri Lankan Board of Investment approved \$22 million in project proposals involving Australian investment in the first eight months of 2002. The Board estimated that, as at July 2002, the total stock of Australian investment in Sri Lanka was around \$600 million.⁴
- 2.3 The Committee was advised that:
- the Sri Lankans initiated the negotiations ... [Australian] Ministers look at a number of factors in deciding whether a country should be added to the [priority] list. These obviously include the levels of investment between the two countries, actual and potential; the bilateral relationship between the parties and matters such as those. Negotiations usually take the form of the parties exchanging their model investment agreements and then either entering into formal communications or face-to-face negotiations. In the case of the Sri Lankans there was one round of face-to-face negotiations in Canberra and negotiations were conducted on the basis of the Australian model text.⁵
- 2.4 A number of large Australian companies were part of a trade delegation that visited Sri Lanka in September 2001. Many of these companies are currently assessing investment options. Areas of potential investment include education, food processing and cold storage facilities.⁶
- 2.5 Currently, the major Australian investors in Sri Lanka include Australia's Pacific Dunlop, P&O Australia (Colombo Port), Hayleys/Australian Dyeing Company/MGT (knitted fabrics and dyeing), IE & DR Pope (woven polypropylene) and BHP Steel (roofing sheets). The Department of Foreign Affairs and Trade

with Article 23 of the Investment Promotion of the Multilateral Investment Guarantee Agency [1998] ATS 24.

3 NIA, para. 6.

4 NIA, para. 10.

5 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 3.

6 NIA, para. 12.

(DFAT) advised that at least \$100 million of the total Australian investment is tied up in the production of rubber gloves.⁷

- 2.6 The Committee understands that, in the medium term, Sri Lanka will require significant investment in its power sector and Australia is well placed to become involved as an investor and supplier to this sector.
- 2.7 Sri Lanka is considered to have a relatively open and transparent investment regime. The current peace process and the prospect of a return to strong economic growth are likely to lead to increased export and investment opportunities. According to the NIA, the implementation of much needed reforms should also lead to increased investor confidence.⁸

Features of the Agreement

IPPA Agreement model

- 2.8 The Committee was advised that this Agreement closely follows the Australian model Investment Protection and Promotion of Agreement (IPPA) text.⁹ The Agreement covers the post-establishment treatment of investments; decisions to admit new investments (either through acquisitions or new businesses) remain the sole purview of the host government. It establishes a clear set of obligations relating to the promotion and protection of investments in accordance with each Party's laws, regulations and investment policies.¹⁰
- 2.9 The Agreement does not limit either Government's ability to pass laws pertaining to pre-establishment investment or to regulate sensitive sectors.¹¹

7 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 5.

8 NIA, para. 9.

9 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 2.

10 NIA, para. 14.

11 NIA, para. 7.

Dispute resolution

2.10 The Committee has been informed that the investor-State dispute resolution procedures included in the Agreement provide an avenue by which Australian investors can redress wrongs without recourse to the local legal system (for example, by recourse to the International Centre for the Settlement of Investment Disputes).¹² DFAT advised the Committee that:

There is state-to-state dispute resolution, which is the traditional type in treaties between two countries. There is also investor-state dispute settlement, which allows an investor to take action against the host government in the event of a dispute relating to an investment. Under the 19 investment protection and promotion agreements that we have in force, we have never gone to state-to-state dispute settlement or investor-state dispute settlement. There have of course been issues in relation to the investment protection and promotion agreements, usually regarding Australian investments within other countries, but these have always been worked out before recourse to the dispute settlement procedures in the agreements.¹³

2.11 According to the NIA, the Parties undertake to consult on matters concerning the review, interpretation or application of the Agreement and endeavour to resolve any disputes connected with it by prompt consultations and negotiations.¹⁴ Formal procedures are established for the settlement of disputes concerning investments between the Parties and between a Party and an investor of the other Party.¹⁵

2.12 In dispute situations investors are to be provided with full access to competent judicial or administrative bodies regarding disputes with other investors and there is provision for the recognition and enforcement of any resulting judgements or awards.¹⁶

2.13 The NIA states that the Agreement is an important safeguard for Australian companies that wish to participate in major projects in Sri Lanka. It will send a positive message to Australian business about

12 NIA, para. 8, also see Joint Standing Committee on Treaties (JSCOT), *Report 22: Three Trade and Investment Treaties*, p. 4.

13 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 5.

14 NIA, para. 19.

15 NIA, para. 19.

16 NIA, para. 20.

investing in Sri Lanka by offering most favoured nation treatment in regard to the treatment of Australian investments, by providing guarantees about expropriation/nationalisation and by establishing mechanisms for resolving disputes over investment matters.¹⁷

Investment in education

- 2.14 The Committee understands that Australian educational institutions have been established in Sri Lanka. The Australian College of Business and Technology has opened a campus in Colombo and the University of Southern Queensland has launched a distance-education facility.¹⁸
- 2.15 There is opportunity for further development of investment initiatives in education between Sri Lanka and Australia.¹⁹ DFAT advised the Committee that though there are currently few Australian institutions investing in educational opportunities in Sri Lanka, this Agreement would facilitate the growth in joint venture educational enterprises between both countries:

... this is an area where we would be looking to make some inroads because of the number of Sri Lankan students currently in Australia—I think it is about 2,000. Generally, we are attracting a lot of students from that part of the world to Australia—we have got about 10,000 Indians and large numbers of Bangladeshis and Pakistanis. It would be part of that regional focus, if you like, to attract students to Australia and then, from that, you sometimes see investment going in in the form of campuses and joint venture educational enterprises. So I could confidently expect that that would be a growth area for us and that this treaty would assist that.²⁰

17 NIA, para. 8.

18 NIA, para. 11.

19 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 10.

20 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 11.

Issues

Costs

- 2.16 The Committee has been informed that compliance with the Agreement has few foreseeable direct financial costs for Australia. Costs may be incurred in the event of a dispute between the Parties, should the dispute be submitted to an Arbitral Tribunal at the request of either Party (Article 12). Under these circumstances each Party bears the cost of the arbitrator it has appointed and of its representation in arbitral proceedings, while the cost of the Chairman and the remaining costs of arbitration are borne in equal parts by the Parties unless otherwise decided by the Tribunal.²¹
- 2.17 Australia and Sri Lanka are parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.²² Under Article 13(2)(b) of the Agreement, which deals with the settlement of disputes between a Party and an investor of another Party,²³ a Sri Lankan investor may refer a dispute relating to an investment in Australia to the International Centre for the Settlement of Investment Disputes (ICSID). In this case, the Australian Government may be required to bear all or part of the cost of arbitration and any relevant ICSID fees, subject to the discretion of the tribunal. The Government would also have to pay the cost of any award handed down in favour of the Sri Lankan investor. To date, no case has been referred to the ICSID in relation to Australia's existing investment promotion and protection agreements.²⁴
- 2.18 The Committee understands that under the Agreement Australia may be liable to pay compensation, indemnification or restitution for losses owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or similar events in its territory (Article 8), or in the event that an investment is expropriated or nationalised (Article 7). While this is a potential cost, it is highly unlikely that this would eventuate in the Australian political and investment environment. In addition, Australia's Constitution

21 NIA, para. 22.

22 *Convention of Settlement of Investment Disputes between States and Nationals of Other States* [1991] ATS 23.

23 Treaty text, p. 7.

24 NIA, para. 23.

provides for guarantees of compensation in the event of expropriation or nationalisation (s. 51(xxxi)).²⁵

Security

2.19 The Committee is concerned about the impact of the security situation on Australians working or trading with Sri Lanka.²⁶

2.20 According to the NIA, the substantial Sri Lankan community in Australia (around 70,000 people) has the potential to emerge as a significant source of investment funds for the Sri Lankan economy, and that Australian investment in Sri Lanka is likely to accelerate as the current peace process gains momentum.²⁷ However, the Committee notes that the acceleration of investment is dependent on the security environment and the current peace process in Sri Lanka. Phillip Stonehouse advised the Committee that the current security situation is safe for the time being:

The current security situation is quite stable. Our travel advices for Sri Lanka have been changed to reflect the fact that it is now a reasonably safe place to visit, do business and live. So, for the time being, the peace process is having a very positive effect on security for not just Sri Lankans but Australians and other international residents and visitors there.²⁸

2.21 The Committee acknowledges that Article 8 of the treaty provides that where an investor suffers loss by war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar event, any claim for compensation, restitution, indemnification or other settlement by an investor of a Party will be accorded treatment which is no less favourable than that for investors of any third country.²⁹

25 NIA, para. 24.

26 *Transcript of Evidence*, 16 June 2003, p. 4. Also see JSCOT, *Report 46: Treaties Tabled 12 March 2003*, pp. 56-57, where DFAT noted that Export Finance and Insurance Commission (EFIC, which is now a corporation) provides investment and political risk insurance to international corporate investors. See the EFIC website <http://www.efic.gov.au>.

27 NIA, para. 13.

28 Philip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 4.

29 NIA, para. 16.

Consultation

- 2.22 DFAT advised the Committee that the Australia-Sri Lanka Council had been consulted on the proposed Agreement. The Council supports the IPPA and will encourage investment.³⁰
- 2.23 Mr Russell Wild further advised that there had been no formal consultation with the Sri Lankan community,³¹ mainly because the Sri Lankan community in Australia is believed to be more professionally than commercially focused:
- I think it is fair to say that the Sri Lankan community here is not only well integrated but it is also substantially a professional community. It is not particularly commercially focused on its original homeland, if you like, but we are hoping that this treaty might spur some sort of bridging role by the community.³²
- 2.24 The Committee sought clarification on the consultation process set out in the NIA, particularly regarding the responses of industries and organisations approached by DFAT. The Committee was subsequently advised that all responses received by DFAT supported the proposed treaty action.³³

Implementation

- 2.25 The Committee understands that the Agreement complies with existing Australian legislation. The Agreement will be implemented within the framework of Australia's existing laws and policies relating to foreign investment.³⁴

Entry into force

- 2.26 The Committee has been advised that in accordance with Article 15(1), the Agreement will enter into force on the date on which both
-

30 *Consultations Annex*, tabled with the NIA and Treaty text, p. 1.

31 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 6.

32 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 6.

33 DFAT, *Submission 23*, p. 1.

34 NIA, para. 21.

Parties have notified each other in writing that their internal legal requirements for the entry into force of the Agreement have been fulfilled. It is proposed that the exchange of notes take place as soon as both Parties have completed their internal legal requirements.³⁵

Concluding remarks and recommendations

2.27 The Committee is aware that this Agreement may be influenced by both the peace process and the security situation in Sri Lanka. The Committee believes however that the provisions of the proposed Agreement offer adequate protection to Australians and Australian companies investing in Sri Lanka. The Committee therefore supports the proposed treaty action between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka.

Recommendation 1

The Committee supports the Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments and recommends that binding treaty action be taken.

35 NIA, para. 4.

Social Security Agreements

Introduction

- 3.1 Three social security agreements were tabled in the Parliament on 14 May 2003, namely:
- *Agreement on social security between Australia and the Kingdom of Belgium, done at Canberra on 20 November 2002;*
 - *Agreement on social security between the Government of Australia and the Government of the Republic of Chile, done at Canberra on 25 March 2003;*
and
 - *Agreement on social security between the Government of Australia and the Government of the Republic of Slovenia, done at Vienna on 19 December 2002.*
- 3.2 An additional social security agreement was tabled on 17 June 2003:
- *Agreement between the Government of Australia and the Government of Republic of Croatia on Social Security, done at Zagreb on 13 May 2003.*
- 3.3 This chapter reports on the Committee's review of the proposed agreements with Belgium, Chile and Slovenia. The review of the agreement with Croatia will be included in a future report because many of the relevant witnesses were unavailable to appear at the hearings.
- 3.4 The Committee found that some issues which arose in the course of the review are common to all three agreements. This chapter will therefore address general issues relating to the three agreements before commenting on matters which are specific to each individual agreement.

Background

3.5 The three social security agreements included in this chapter are an addition to Australia's existing network of 13 international social security agreements.¹ The Committee has reviewed many of these agreements on previous occasions and reported its findings and conclusions to the Parliament.²

Purpose of the proposed agreements

3.6 The purpose of the proposed agreements is to:

- provide enhanced access to certain social security benefits by addressing gaps in social security coverage for people who live and work in either country;
- to provide for portability of social security benefits from one country to another;
- to assist people to maximise their income and allow them a greater choice of which country to live in or retire in and thus contribute to the overall bilateral relationships between the countries;³
- to remove, in the case of Belgium and Chile, the obligation on employers to make two superannuation contributions for an employee seconded to work in the other country (double coverage). New provisions ensure employer and employee contributions are made only to the relevant superannuation scheme in their home country. There is no double coverage provision in the Agreement with Slovenia.

3.7 The Agreements cover age pensions, disability support pensions for people who are severely disabled and survivors' pensions. Most people benefiting from the agreements will be age pensioners.

1 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 14.

2 See JSCOT, *Fifteenth Report* (New Zealand); JSCOT, *Report 27: Termination of Social Security Agreement with the United Kingdom and International Plant Protection Convention*; JSCOT, *Report 32: Six Treaties Tabled on 7 March 2000* (Denmark); JSCOT, *Report 33: Social Security Agreement with Italy and New Zealand Committee Exchange*; JSCOT, *Report 41: Six Treaties Tabled on 23 May 2001* (New Zealand); JSCOT, *Report 43: Thirteen Treaties Tabled in August 2001* (Canada; Spain; The Netherlands; Austria; Portugal; Germany); JSCOT, *Report 46: Treaties Tabled 12 March 2002* (New Zealand and the United States).

3 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 14.

- 3.8 Estimations of the number of people who, under the agreements, will become eligible to claim benefits include:
- 700 people residing in Australia and Belgium;
 - 600 people residing in Australia and Chile; and
 - 450 people residing in Australia and Slovenia.
- 3.9 The Committee was advised that out of the approximately 1 800 beneficiaries covered by these three agreements, the number of people living in all states and territories of Australia who would immediately benefit is in the order of 250 people.⁴ The Committee was advised that there are 105 626 pensions currently being paid under total agreement countries into Australia.⁵

General issues

Estimations of potential beneficiaries

- 3.10 The Committee was concerned to ensure the reliability of the figures included in the NIA for the potential number of beneficiaries under these agreements.
- 3.11 The Department of Family and Community Services (FACS) advised that many factors affected estimates of numbers of people and costs:
- We use our census data, for example, to determine the number of people of certain ages from certain countries of birth and immigration data to predict duration of time in Australia and age when they left the other country to predict working life contributions. There are also other circumstances that arise after an agreement has been signed that affect migration flow in either direction.⁶
- 3.12 FACS indicated that the estimates were developed in consultation with Centrelink and other agencies on the basis of factual data and likely trends and were accepted by the Department of Finance and Administration as a reasonable basis for budget calculations. In relation to major changes to the agreement with New Zealand:

4 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 16.

5 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 16.

6 FACS, *Submission 26*, p. 1.

...we have a specific 'savings monitoring' exercise agreed with Department of Finance and Administration that will answer the question for that agreement. Similarly, with our most recent agreements (with the United States and Germany) we have active plans to evaluate the results of those agreements. It is too early to make any meaningful comparisons (these agreements having commenced only in October 2002 and January 2003 respectively).⁷

- 3.13 In relation to most of the early agreements, however, FACS advised that it was not possible to provide a specific comparison in relation to the original estimates:

primarily because all the original source documentation is no longer available. Relevant estimates were made in the mid to late 1980s and some of the files have been culled/destroyed. There are also limitations on how far back Centrelink data goes.⁸

- 3.14 The problem was compounded by changes in circumstances in countries since the original estimates were done and the inability of some partner countries to reliably disaggregate information on people using the agreement to qualify:

For those countries, the only point that matters to them is that people do or do not qualify, and they do not maintain electronic records of nature of that qualification ... the effect of an agreement may be to increase the amount paid, but this is not necessarily recorded as linked to the agreement and the person is not listed as an 'agreement' pensioner.⁹

- 3.15 FACS provided a table showing the number of pensions paid into Australia by agreement partners, separated into people who do and do not rely on the agreement, and similar figures for Australia.

7 FACS, *Submission 26*, p. 1.

8 FACS, *Submission 26*, p. 2.

9 FACS, *Submission 26*, p. 2.

Table Pensions Paid into Australia by Agreement Countries and into Agreement Countries by Australia (as at 29 June 2003)

Into Australia by Agreement Country			Into Agreement Country by Australia	
<i>Agreement Country</i>	<i>Total pensions paid</i>	<i>Pensions paid under Agreement</i>	<i>Total pensions paid</i>	<i>Pensions paid under Agreement</i>
Austria	6 866	Not available	958	860
Canada	4 106	1 535	1 136	930
Cyprus	1 039	521	782	255
Denmark	471	Not available	74	56
Germany	18 289	Not available	329	100
Ireland	1 370	400	384	185
Italy	54 580	47 434	19 363	16 762
Malta	2 656	2 095	3 713	2 985
The Netherlands	9 156	Not available	4 331	4 093
New Zealand	575	575	560	560
Portugal	502	Not available	1 077	457
Spain	2 127	1 857	3 652	2 767
USA	4 864	Not available	465	46
TOTAL	106 601	54 417	36 824	30 056

Source FACS, Submission 26, p. 3.

3.16 The Committee understands that when an agreement is being negotiated with another country the Government may be unaware of the numbers of people in Australia who are receiving a benefit from that country. Mr Barson explained that:

We may have overall estimates of numbers that are provided to use but, again, the mobility of people means that that may change fairly quickly. We have been reasonably close to our initial estimates in most cases. There have been cases certainly, such as the recent renegotiation with New Zealand, where the numbers of people taking up citizenship and therefore remaining eligible for some social security payments are, at the moment, considerably different from our original estimates. But in terms of pensions, particularly age pensions, we are able to do fairly accurate estimates of the number of people who may be eligible on population data. The problem is once we try to include means test assumptions: until we are actually dealing with the people as potential claimants, it is difficult to know exactly what income they have. We are able to do estimates from the changes to existing

people and we are able to do estimates based on information that we exchange with the other country.¹⁰

Review of Agreements

3.17 In reviewing the three proposed agreements the Committee took the opportunity to explore the effectiveness of existing agreements.

3.18 According to FACS, which was responsible for the negotiation of the agreements, five of the 13 established agreements had been reviewed recently:

There were two things that happened. Firstly, legislation changes in either country can make particular parts of the agreement out of date and requiring revision. Similarly, changes in the arrangements in the countries—such as superannuation guarantee, means tests or other changes—also can require those sorts of alterations. For example, we have been discussing with Malta changes to the agreement there in relation to disability. So, yes, those are constantly under review.¹¹

3.19 FACS explained that the review of the agreement with Malta had not been triggered by a legislative change, but by a routine review of the agreements. FACS advised that Malta and Ireland were two countries currently out of step with Australia's standard agreement approach:

So progressively we have been changing those agreements and Malta was the next one that we started to move on in that revision. Shortly we will be negotiating with Ireland on a similar revision. So those agreements are constantly under review and either country is able to initiate a review and a renegotiation.¹²

Exchange rates

3.20 FACS advised that it obtains feedback from beneficiaries under social security agreements:

The beneficiaries in both countries are in contact with us through Centrelink, and Centrelink International Services, which is based in Hobart, provides regular feedback to us from people born in

10 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 18.

11 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 15.

12 Roger Barson, *Transcript of Evidence*, 16 June 2003, pp. 15-16.

those countries or people who are in receipt of an agreement pension through those countries.¹³

3.21 FACS reported relatively frequent misunderstandings and complaints about the impact of exchange rates under these agreements:

The exchange rates have had two impacts. Obviously they have an impact on the amount of foreign pension that a person receives in Australia as the interest rates fluctuate up and down—that is something that is not within our control, of course, because that is a commercial matter—but they also have an impact on Australian pensions that are paid because any change in the income received by a person impacts, through the means test, on the amount of Australian pension.¹⁴

3.22 Other issues that have been raised with FACS include subjects such as how the exchange rates work, what happens in a more volatile exchange rate climate and why a person is given a different rate by their bank than the rate which they are deemed to have received in the means test process. FACS emphasised the logistical difficulties involved in processing these payments:

I think you would appreciate that it is difficult, with that number of pensions coming into Australia, to deal with individual exchange rates, individual banking arrangements and the exchange rate actually received on the day.¹⁵

3.23 The Committee was informed that the process currently in place is that a notional exchange rate is taken, which normally is based on the Commonwealth Bank rate five days before the beginning of the month, which had been shortened from 15 days.¹⁶ As for the reason for the change from 15 days to five days:

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

13 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 16.

14 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 16.

15 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 17.

16 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 17.

variations, but one that is as close as possible to the period of payment.¹⁷

Whole of government approach

- 3.24 The NIA referred to the fact that the Queensland Government mentioned the desirability of a 'whole of government approach' in negotiations for these social security agreements. FACS added that not only Australia but other countries had also raised it:

The agreement with Belgium, for example, came out of discussions between the two countries on health and social security arrangements. In many of these countries the health insurance system is funded and dealt with as part of the social security system, so, yes, a number of the countries are negotiating combination agreements with each other. We have not done that yet. I think we considered that in the case of Belgium. The two negotiations on agreements proceeded at the same time with the same intent but, because of the different administration arrangements and very different nuances between the two systems, they actually went forward as separate agreements. It has mostly been raised simply because the other countries have combined those systems and they find it easier to deal with both.¹⁸

- 3.25 FACS has said that they were certainly willing to do that in any case where it was feasible at the time:

At times social security arrangements have a different priority for us and the country than perhaps do health insurance arrangements: social security arrangements for us have a far greater level of reciprocity and are, therefore, more important to us in terms of a mobile society.¹⁹

- 3.26 Mr Barson from FACS added: 'I can certainly see the time coming where we negotiate these as one parcel. It simply has not happened yet.'²⁰

17 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 17.

18 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 17.

19 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 17.

20 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 17.

Future Agreements

- 3.27 Given that Australia has signed an agreement with Slovenia, the Committee inquired as to whether a similar agreement would be negotiated with other countries in the region.
- 3.28 FACS informed the Committee that they were discussing with the Minister the priorities that should be put on other potential agreement countries, including other countries in that region, such as the Czech Republic and Slovakia. However, no decision had been made on those priorities yet. FACS stated that they would be in a better position to answer once they had set out priorities for the next 12 months:

The negotiation of agreements is a fairly fluid matter because, while in principle it may be a good thing for the two countries to do, in Europe particularly a lot of the countries have been preoccupied with their own internal arrangements. For example, while it was agreed some time ago that our agreement with Switzerland would be a good thing to do, it has had to wait until other priorities have been dealt with.²¹

Budgetary concerns

- 3.29 The Committee noted that the ACT Government had expressed concern over the impact social security agreements have on State and Territory budgets.²²
- 3.30 Mr Barson indicated that FACS had invited further information from the ACT Government:
- I understand, although I cannot be certain, that the concern was about an expansion in the number of eligible pensioners and therefore costs to a state or territory in terms of concessions that the state or territory may extend to people. I think the reality with these agreements is that around 120 people nationally will become eligible for the first time.²³
- 3.31 FACS expressed the view that these agreements do not create a great impost on states and territories and that the impost would be far greater from changes in population or migration.²⁴

21 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 19.

22 National Interest Analysis (NIA): Agreement with Belgium, Annexure A; Agreement with Slovenia, Annexure A.

23 Roger Barson, *Transcript of Evidence*, 16 June 2003, pp. 19-20.

24 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 20.

- 3.32 The Committee was advised that as yet no response had been received from the ACT Government:

We responded to them when we received their concern and we will continue to talk with them. That is my understanding of it. If it is different then we will have to work with them on what it is.²⁵

- 3.33 The Committee notes that this issue arose in a previous report of this Committee.²⁶ In that instance the Committee stated:

We note the ACT and WA Government's concerns about the potential cost of concessions under these agreements and encourage the Commonwealth when negotiating future agreements to take this issue into account.²⁷

- 3.34 The Committee notes the absence of further concerns from the WA Government. Furthermore, the ACT Government, in response to an invitation by the Committee to comment on the proposed agreement, indicated that it would 'not be making a submission to the Committee on these matters at this time.'²⁸

Community awareness

- 3.35 The Committee believes that it is important that Australian residents are made aware of their rights under these agreements.²⁹ The Committee was interested to ascertain what steps FACS would take in implementing the agreements, to ensure that all interested beneficiaries were notified. Mr Barson responded that:

...Centrelink has country of birth information on its customers. Centrelink through its own correspondence with those people will draw attention to it. We will have an advertising program prior to the introduction of each of these agreements, informing the public generally that they will be coming into place. We are also writing and sending publicity material to the relevant community groups.³⁰

25 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 20.

26 JSCOT, *Report 43: Thirteen Treaties Tabled in August 2001*, paras. 2.17-2.19.

27 JSCOT, *Report 43: Thirteen Treaties Tabled in August 2001*, para. 2.25.

28 ACT Government, *Submission 19*, p. 1.

29 In particular, the Committee notes that it has flagged this issue in a previous report, where the expatriate Southern Cross Group expressed concern at its findings that the vast majority of expatriates had no knowledge of the network of social security agreements being developed by the Australian Government. JSCOT, *Report 43: Thirteen Treaties Tabled in August 2001*, para. 2.22.

30 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 19.

- 3.36 The Committee inquired as to whether there were any gaps in this notification process that could be improved.
- 3.37 Mr Barson conceded that some people who had come into contact with Centrelink had said that they did not know about the agreements. While acknowledging this was an issue, he informed the Committee of the sometimes considerable difficulties involved in contacting people who may be eligible for benefits but who had not previously come into contact with Centrelink:

I think all we can do there is to continue to provide the information to the public. Of course, there are cases where people are out of the country and come into Australia and miss that publicity campaign, and we pick them up through their identifying their country of birth on first contact with Centrelink. But I must admit that it is difficult for us to bring it to somebody's attention unless we know they exist. Certainly there will be people who are future beneficiaries who will not have seen this as relevant to them at the time that it was advertised ... If we know they exist, they will get notification of it. If we do not know they exist, they will be notified the first time they come into contact with Centrelink.³¹

Agreement with Belgium

Currency controls

- 3.38 The Committee notes that the Chilean and Slovenian agreements contain a currency control provision but that there is not one in the agreement with Belgium.
- 3.39 While the negotiations with Belgium had commenced on the basis of Australia's typical agreements, a large number of the wordings in this agreement were not Australia's normal text as the agreement with Belgium had been negotiated in English from the Belgian side. Further, a currency control clause was not seen as being relevant to the particular situation in Belgium, and Belgium did not propose it in their English version of the text.³²

31 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 19.

32 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 20.

- 3.40 Further, while currency control provisions have been in previous agreements, they do not have a day-to-day impact and – overall – they are ‘not one which we see is necessary for including in future agreements’.³³

‘Inside’ and ‘Outside’ Australia rates

- 3.41 The Committee was interested in Article 17 of the Agreement with Belgium, which enables people in Australia to be paid the ‘outside Australia rate’ of pension if that rate was higher than the ‘inside Australia rate’. Mr Hutchinson described the operation of the two tests:

For people in Australia who do not have 10 years residence and who use their periods of insurance or contributions in the other country to get early access to an Australian age pension, until they have 10 years Australian residence any foreign pension they receive is directly deducted from the rate of Australian pension otherwise payable. So if the maximum Australian pension rate is \$10,000 and they are getting a \$6,000 Belgian pension, we would pay them \$4,000, subject to their having no other income. Inside Australia everybody is paid based on a flat rate subject to the income test. Outside Australia we proportionalise pensions, so that somebody who has lived in Australia for less than 25 years will get a pro rata Australian pension. So someone living in Belgium would get 15/25th of an Australian pension if they had had 15 years of working life residence.³⁴

- 3.42 By allowing payment of the outside Australia rate where this was higher than the inside Australia rate, article 17 was a concession given by Australia:

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

33 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 20.

34 Peter Hutchinson, *Transcript of Evidence*, 16 June 2003, pp. 20-21.

ensure that the person gets the benefit of the higher outside Australia rate.³⁵

Agreement with Chile

Chilean pension of mercy payments

3.43 The Agreement with Chile refers to Chilean pension of mercy payments, which relate to issues in Chile between 11 September 1973 and 10 March 1990. The Committee was informed that there is a fixed group of around 400 people in Australia who are entitled to receive a Chilean pension of mercy, but that this group would decline over time:

Of those, 70 are currently in receipt of social security income support in Australia. So, depending on their other income, we would expect those 70 people and perhaps a few more to benefit from that particular provision.³⁶

3.44 The Agreement obliges Australia to disregard, from all its social security income tests, Chilean pension of mercy payments. According to Mr Barson, any income received has an impact on a person under the Australian pension system through the means test:

This means that there are people who have been receiving the Chilean pensions of mercy and have had those pensions treated as income for Australian means test purposes; therefore, the Australian pension that would be payable to that person has been reduced accordingly.³⁷

3.45 FACS advised that there had been 'quite a bit of dissatisfaction' with this from the community on the grounds that these particular payments were not made in the nature of a pension, or with the intention of being a pension:

They are reparations for human rights abuse or political violence, and it is not appropriate to treat those payments as income.³⁸

3.46 This agreement resolves this issue through clauses which exclude the pensions of mercy from treatment as income for the purpose of the

35 Peter Hutchinson, *Transcript of Evidence*, 16 June 2003, p. 21.

36 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 22.

37 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 21.

38 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 21.

Australian means tests. FACS saw this as an appropriate way of dealing with those particular payments. FACS told the Committee that Australia had been assured by Chile during negotiations that the payments did not represent income forgone or a payment for income that was lost, but were treated as an ex gratia payment relating to people who were victims of human rights abuse or political violence.³⁹ FACS also advised the Committee that the basis of the agreement was that wherever payments could be identified as separate from any other pension payment the person may have been receiving, then the Chilean pension of mercy would not be treated as income:

So it is incumbent on the person to be able to demonstrate that a particular part of the payment is a pension of mercy, and they are able to do that with documentation from the Chilean government.⁴⁰

- 3.47 The Committee was advised that the mercy pensions were not lump sum payments and that it was not possible for a Chilean to choose a lump sum rather than a pension-style payment under Chilean law:

They are made in a similar way to a pension, and this has been part of the confusion about its treatment. One way of looking at these payments is as a regular source of income. However, we have been convinced that the appropriate way to regard them is as a payment of reparation for previous damage.⁴¹

- 3.48 Mr Barson advised the Committee that calculation of the amount was variable 'based on a rather complex calculation', but which would probably amount to under \$1 000 per year.⁴²

Amnesty concerns

- 3.49 The Committee sought comment in relation to concerns raised by the forum organised by the Chilean community in New South Wales and the ACT which studied the agreement. The concerns related to the provision exempting pensions of mercy for social security rate calculation purposes, as the exemption was not retrospective and that there was no amnesty for those who may not have declared that they receive Chilean pensions

39 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 21.

40 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 22.

41 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 22.

42 Roger Barson, *Transcript of Evidence*, 16 June 2003, pp. 22-23.

(including pensions of mercy), as required by the Australian Social Security Law.⁴³

- 3.50 Mr Barson contested this view on the grounds that the Government had a general social security amnesty from 20 September 2000 to 19 January 2001 under which people were able to declare the receipt of a foreign pension without penalty:

The view of the government is that that was an appropriate amnesty and there is no need for a further amnesty on this occasion because it is assumed that people will have already declared under the previous amnesty any income that they are receiving. Some 284 people declared for the first time as part of that previous amnesty that they were receiving Chilean pensions.⁴⁴

- 3.51 The Committee inquired as to what would happen if someone came forward now.

- 3.52 Mr Barson responded that as the amnesty was no longer in place people who had not declared the payment could be liable for a debt:

We would be happy to discuss with them what income they have been receiving from Chile and how that would affect their Australian pension. There is of course an existing obligation that people declare their income from all sources. Centrelink would be talking with them about what impact, if any, receipt of that money should in retrospect have had on their Australian pension, and there may be a debt.⁴⁵

Exemptions in other social security agreements

- 3.53 The Committee was interested to find out whether any of the other 13 social security agreements that are in force contain an exemption similar to that given to the Chilean pension of mercy payment.

- 3.54 Mr Hutchinson from FACS indicated that there was an exemption in the Italian agreement for a welfare supplement that Italy pays into Australia, which was not considered as income because:

... it is a welfare supplement that Italy pays—and most countries have a welfare type payment similar to our payments. To the best of my knowledge, Italy is the only country that actually pays it

43 Annexure A, tabled with the NIA and Treaty text, p. 1.

44 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 23.

45 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 23.

outside Italy. What we do when we pay our payments into other countries is we normally exempt the welfare payments that they may make, because they are generally means tested as well and it is obviously necessary to avoid circularity in income testing... I guess Italy would be subsidising our welfare payments if we did not do it.⁴⁶

- 3.55 Mr Barson noted the existence of an exemption that exists in law for Holocaust payments by several countries to people who are victims of the Holocaust in Europe:

That was recently extended to include payments made by two other countries ... France and the Netherlands. That is an exception that has existed for some time in law but has not been done as part of a social security agreement. It was also done that way, I understand, because it was a payment that was made across a range of countries for a single event; so it was more appropriate at the time to deal with it in the law rather than in an agreement.⁴⁷

- 3.56 Concerned that there might be comparisons between communities, the Committee inquired as to whether there were any other countries with whom Australia has an existing agreement where an exemption issue had arisen and has not been able to negotiate it.

- 3.57 FACS was not aware of any countries where that had happened. However, countries where that may have happened in different circumstances, such as Austria and Germany, had already been addressed through the legislative arrangement for Holocaust victims.

- 3.58 The Committee was advised that there was some interest in other countries such as Uruguay for a similar exemption:

If we were to proceed with an agreement with them, I am told by community groups that there are [reparation] payments that they would wish to see exempted...but we are not in negotiations with Uruguay so at the moment it is not an issue.⁴⁸

- 3.59 The Committee considers the inclusion of this clause to be appropriate, especially in light of the human rights abuses that occurred in Chile. It also seems to be consistent with the approach taken in relation to the exemption in the agreement with Italy referred to above and the exemptions that Australia provides for Holocaust victims.
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46 Peter Hutchinson, *Transcript of Evidence*, 16 June 2003, p. 24.

47 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 24.

48 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 24.

Agreement with Slovenia

Negotiations

- 3.60 The Committee was interested in how negotiations progressed with Slovenia. FACS responded that there were no disagreements on matters of any substance:

The answer is that the negotiations were—one should never say ‘very easy’—not difficult. We found that the government of Slovenia was very interested and very positive about the value of this agreement. In fact, it was anxious to see it concluded earlier rather than later.⁴⁹

Double coverage

- 3.61 The Committee inquired as to why there was a double coverage provision in the Belgian and the Chilean agreements, but not in the Slovenian agreement.

- 3.62 Mr Barson informed the Committee that the inclusion of double coverage provisions had been a recent issue for FACS and there were only three existing agreements that had included double coverage provisions. The Slovenian agreement did not include a double coverage provision because the negotiations had started some years earlier:

In that initial round of negotiations, the countries that we were dealing with did not, at that stage, want to include superannuation guarantee under the arrangements that applied. So the Slovenian agreement just followed through on that.⁵⁰

- 3.63 FACS advised that it may review arrangements with some of these countries over the next few years where the superannuation guarantee was raised and discussed but had not been included in the agreement for various reasons:

I expect that we will be approaching those countries over the next few months and asking whether they would like now to reopen those discussions, at some future time, and include superannuation guarantee. So it is simply a matter of timing.⁵¹

49 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 18.

50 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 25.

51 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 25.

Implementation

Enabling legislation

- 3.64 The Committee was advised that the only legislative amendment required to implement the proposed treaty actions will be the annexure of the social security agreements to the Social Security (International Amendments) Act.⁵²

Entry into force

- 3.65 The Committee observed that the start date for each of the proposed treaty actions was different. While the proposed date for the Belgium agreement was 1 July 2005, the proposed date for both the Chile and Slovenia agreements was 1 January 2004.

- 3.66 The Committee inquired as to the reason for the difference in the start dates. Mr Barson from FACS advised the Committee that:

The only differences are processes that need to be completed in both countries. Some countries need a longer lead time for their own parliamentary and approval processes.⁵³

Consultation

- 3.67 The Committee was advised that, in relation to the three social security agreements, FACS had sought the views of relevant community groups and State and Territory Governments, including consultation with the Australian Council of Trade Unions (ACTU) over double coverage principles.⁵⁴

- 3.68 The Committee was interested in the consultation process in relation to these social security agreements. FACS advised the Committee that:

We rely on our own state officers, who have contact with a large number of community organisations and with the embassies for those countries, to identify cultural groups or groups with a large

52 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 15.

53 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 15.

54 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 14.

constituency that it would be useful to write to. We identify as many as we can, and we spread the word as widely as we can. That is not to say that there are not individuals who are not affiliated with those community groups who may not have an interest, but simply that we try and spread the word through the community as best we can. It is not only our consultation process; the embassies also have contact with their own former residents and have their own mechanisms for advising people of these. Increasing use of the Internet means that we are increasingly now getting inquiries from all over the world from people who have found out about this agreement and had three years employment there in 1972. We are getting better at doing it or the communication system is getting better at ensuring that people have that understanding.⁵⁵

- 3.69 The Committee was also advised that ‘the community is generally supportive of the agreements and that no significant issues or concerns have been raised’.⁵⁶
- 3.70 The Committee was satisfied with the level of consultation in relation to the three agreements presented before the Committee.

Concluding remarks and recommendations

- 3.71 The Committee supports binding treaty action in relation to the four social security agreements. The Committee agrees with the view that these agreements ‘can boost the benefits of expatriates and save money for employers’.⁵⁷ The Committee continues to support the Government’s efforts to expand the network of social security agreements, in particular the inclusion of double coverage provisions in the agreements with Belgium and Chile. Furthermore, the Committee encourages the Government to pursue the inclusion of a double coverage provision in the upcoming review of the Slovenian agreement.

55 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 25.

56 Roger Barson, *Transcript of Evidence*, 16 June 2003, p. 14.

57 Paul Wastell, “Benefits abroad”, *HR Monthly*, May 2003, p. 42.

Recommendation 2

The Committee supports the proposed *Agreement with Belgium on Social Security* and recommends that binding treaty action be taken.

Recommendation 3

The Committee supports the proposed *Agreement with Chile on Social Security* and recommends that binding treaty action be taken.

Recommendation 4

The Committee supports the proposed *Agreement with Slovenia on Social Security* and recommends that binding treaty action be taken.

Agreement Relating to the Unitisation of the Sunrise and Troubadour Fields

Introduction

- 4.1 The *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields, done at Dili on 6 March 2003*, provides a comprehensive framework for the joint development of the Sunrise and Troubadour Fields, together known as the Greater Sunrise Field, lying in a defined Unit Area.

Background

- 4.2 The resource potential of the Timor Sea was initially the subject of the 1989 Timor Gap Treaty between Australia and Indonesia. Following the separation of East Timor from Indonesia on 25 October 1999, Australia entered into an Agreement with the United Nations Transitional Administration in East Timor (UNTAET) (the February 2000 Agreement) to allow Australia and East Timor to benefit from the continuation of exploration and exploitation activities in the Timor Sea.
- 4.3 Recognising that the February 2000 Agreement would end upon East Timor's independence, Australia and UNTAET/East Timor began negotiations to develop a framework for the joint development of

Timor Sea resources. Subsequently, the Timor Sea Treaty was signed in Dili on 20 May 2002, the date of East Timor's independence. Legislation to enact Australia's obligations under that treaty received Royal Assent on 2 April 2003, upon which day Australia and East Timor exchanged notes stating that their requirements for it to enter into force had been met.¹

- 4.4 Article 9 of the Timor Sea Treaty provides for any reservoir of petroleum that extends across the boundary of the Joint Petroleum Development Area (JPDA) to be treated as a single entity for management and development purposes. The Greater Sunrise field is one such reservoir of petroleum which straddles the eastern boundary of the JPDA.
- 4.5 The Treaty contemplates that Australia and East Timor will reach a separate agreement on the manner in which the deposit will be exploited, and on the sharing of such a deposit. Article 9 thus envisages the negotiation of an international unitisation agreement (IUA) covering the Greater Sunrise field.²

International Unitisation Agreement

- 4.6 The proposed IUA covers matters such as administration of the Unit Area, taxation, process for approval of a development plan, abandonment provisions, point of sale and valuation of petroleum recovered from the field, employment and training, safety, health, environmental protection, customs, security and dispute resolution mechanisms.³
- 4.7 According to the NIA, Greater Sunrise contains around 8.4 trillion cubic feet of natural gas and 295 million barrels of condensate, with a value estimated to be over \$A20 billion after allowing for production costs. The gas and oil fields will be treated on the basis that 20.1 percent of it lies within the JPDA and 79.9 percent lies within Australian jurisdiction (Annex E). This means that East Timor will receive approximately 18 percent and Australia approximately 82 percent of the revenue from the Greater Sunrise development.⁴

1 National Interest Analysis (NIA), paras. 10-11.

2 NIA, para. 11.

3 NIA, para. 8.

4 Joint Standing Committee on Treaties (JSCOT), *Report 49: The Timor Sea Treaty*, p. 13.

4.8 In his submission to the review of the IUA, Mr Pat Brazil pointed out that unitisation agreements are:

a common and proper feature of seabed treaties dealing with a common deposit that straddles international boundaries or limits, including deposits that straddle a joint development area ...⁵

4.9 The Committee was advised early in its Inquiry into the Timor Sea Treaty⁶ that the conclusion of a separate IUA was a matter of high priority as it was a prerequisite for the development of the Greater Sunrise field. A Memorandum of Understanding was signed on 20 May 2002, in conjunction with the signing of the Timor Sea Treaty, in which:

Australia and East Timor expressed their commitment to work expeditiously and in good faith to conclude that IUA by the end of this year.⁷

4.10 The IUA was signed by East Timor and Australia on 6 March 2003.

Maritime boundaries

4.11 As with the review of the Timor Sea Treaty the Committee received submissions which expressed concern about the boundaries, in particular that the maritime boundaries should be settled to give East Timor greater access to the Greater Sunrise field.⁸

4.12 The Committee was advised, however, that the IUA is:

substantively without prejudice to either country's maritime boundary claims.⁹

4.13 This claim is supported by Pat Brazil:

5 Pat Brazil, *Submission 1*, p. 1.

6 The JSCOT reviewed the Timor Sea Treaty and recommended that binding treaty action be taken. See JSCOT, *Report 49: The Timor Sea Treaty*. In the course of that inquiry evidence relating specifically to the IUA was taken. That evidence has been taken into account in the preparation of this report.

7 Dr Geoffrey Raby, *Transcript of Evidence*, 12 July 2002, p. 23.

8 Margaret Pollock, *Submission 3*; Oxfam, *Submission 6*; La'o Hamutuk: The East Timor Institute for Reconstruction Monitoring and Analysis, *Submission 7*; East Timor Information Centre for the Timor Sea, *Submission 8*.

9 John Hartwell, *Transcript of Evidence*, 23 June 2003, p. 72.

The Agreement makes it abundantly clear that no prejudice is to be suffered by either party by reason of the Agreement in this regard. This is done by Article 2...¹⁰

- 4.14 Conversely, in the event of permanent delimitation of the seabed, there is provision within the IUA for Australia and Timor Leste to reconsider the terms of the Agreement. Mr Brazil emphasised that the Agreement specifies that any new agreement shall ensure that petroleum activities entered into under the terms of this Agreement shall continue under equivalent terms:

It seems to me to be clear that the requirement of the continuity of equivalent terms is an undertaking that is enforceable by either party to the Agreement...¹¹

- 4.15 According to Woodside, the IUA will provide:

a basis on which title, fiscal and regulatory certainty and stability are maintained in circumstances where, following a final delimitation of the borders, the Timor Sea Treaty ceases to have effect.¹²

- 4.16 The Northern Territory Government acknowledged that, given the need to negotiate permanent boundaries in the future, the IUA, as presently negotiated, offers the best opportunity for the investors to proceed and bring the project to fruition:

The delays caused by negotiations for permanent maritime boundaries will lead to unacceptable delays for both nations, whereas the Sunrise International Unitisation Agreement does present an opportunity to proceed now.¹³

Benefits of the proposed treaty action

- 4.17 The IUA is essentially the framework which will allow commercial development of the Greater Sunrise field to proceed.¹⁴ According to Mr Maxwell, the IUA provides:

10 Pat Brazil, *Submission 1*, p. 2.

11 Pat Brazil, *Submission 1*, p. 3.

12 David Maxwell, *Transcript of Evidence*, 14 October 2002, p. 260.

13 Clare Martin, Chief Minister, NT Government, *Submission 15*, p. 1.

14 Dr Geoffrey Raby, *Transcript of Evidence*, 12 July 2002, p. 27.

a common understanding of all the key provisions of the treaty. In our view, the IUA is the obvious vehicle through which this can be achieved for the development of Greater Sunrise.¹⁵

- 4.18 In its submission to the Committee the Northern Territory Government put the view that it is the best interests of both nations to ratify the IUA without any delay in order to allow the project investors to proceed.¹⁶
- 4.19 The Queensland Government commented that the unitisation reflects the needs of those involved in the commercial development of the resources. The Queensland Government projected that if the Greater Sunrise gas projects prove to be commercially viable and it is elected that gas will be brought onshore for southern markets including Queensland, the projects would be expected to provide further significant upstream competition and broader development benefits to the Queensland gas market.¹⁷

Settlement of Disputes under the Agreement

- 4.20 The Committee notes the very detailed dispute resolution procedure set out in Annex IV to the Treaty. Essentially disputes are to be settled by consultation and negotiation. Failing resolution by these means or by any other agreed procedure, the dispute may be submitted (subject to certain conditions) at the request of either Government to an Arbitral Tribunal constituted in accordance with Annex IV. Mr Pat Brazil expressed the view to the Committee that the provisions appear to be appropriate and satisfactory.¹⁸

The Sunrise Commission

- 4.21 Article 9 establishes a Sunrise Commission for the purpose of facilitating the implementation of the Agreement. Of the

15 David Maxwell, *Transcript of Evidence*, 14 October 2002, p. 260.

16 Clare Martin, Chief Minister, NT Government, *Submission 15*, p. 1.

17 Terry Mackenroth, Acting Premier and Minister for Trade, *Submission 16*, pp. 1-2.

18 Pat Brazil, *Submission 1*, p. 2.

Commission's three members, two are nominated by Australia and one by Timor-Leste.

- 4.22 The Committee received two submissions which expressed concern that the Sunrise Commission is to be dominated by Australia. Mr Bryan Havenhand expressed the view that, based on the crucial importance of the oil revenue to the future of Timor-Leste, it is crucial that the Government of Timor-Leste has an appropriate input to the management of the Sunrise Commission.¹⁹
- 4.23 Mr Robert Peters, in his submission, shared this view:
- Given the disproportionate importance which the revenues from Greater Sunrise represent to Australia and the Democratic Republic of East Timor, I fail to see the need for Australia to want to dominate the Sunrise Commission by nominating two out of its three commissioners. The Sunrise Commission will not only have to monitor the implementation of the Treaty, but consult and make recommendations to both countries' Regulatory Authorities about best practices.²⁰
- 4.24 Mr Peters suggested that the Sunrise Commission be made up of six persons, with each country nominating three representatives. He stipulates that the representatives from each side should have expertise and qualifications in the production of petroleum, contractual law and industrial relations.²¹
- 4.25 The Department indicated that it had not been made aware of this concern in the course of developing the Agreement.²²

Taxation

- 4.26 The Committee was advised by the Department of Industry, Tourism and Resources that for taxation purposes the field is apportioned under different laws. Therefore, two different tax jurisdictions will apply to the Greater Sunrise field, one involving the JPDA and the other applying to the Australian area:

19 Bryan Havenhand, *Submission 5*, p. 1.

20 Robert Peters, *Submission 14*, p. 1.

21 Robert Peters, *Submission 14*, p. 1.

22 John Hartwell, *Transcript of Evidence*, 23 June 2003, p. 74.

the international unitisation agreement has to deal with the actual ring fences as to exactly where these points of taxation are, what are the various allowable costs and ... the apportionment of these.²³

4.27 The Department of the Treasury added that, given that the resource:

is divided virtually 80:20 between Australia and East Timor ... Twenty per cent of the resource which is in the JPDA area is taxed under the principles of the Timor Sea Treaty, which means that 90 per cent of the tax revenues go to East Timor and 10 per cent of those revenues go to Australia. The resource which is allocated to Australia is taxed under Australian principles, so the petroleum resource rent tax applies to that part of the resource and company tax applies to the income derived from that.²⁴

4.28 The Committee notes that production from the field is not likely to occur before 2009, at the earliest.²⁵ The Committee also notes that the projected revenue from the field is estimated to provide Australia with about \$8.5 billion over the life of the field of around 30 years, if developed using floating gas-to-liquids technology, with exports potentially worth about \$A1.5 billion to Australia annually.²⁶

Security Arrangements

4.29 The Committee notes that Australia and Timor-Leste shall make arrangements for responding to security incidents in the Unit Area and for exchanging information on likely threats to security.

Costs

4.30 The Committee was advised that Australia will incur no additional costs directly through this treaty action.²⁷

23 Ian Walker, *Transcript of Evidence*, 12 July 2002, p. 27.

24 Michael Buckley, *Transcript of Evidence*, 23 June 2003, p. 76.

25 NIA, para. 15.

26 NIA, para. 14.

27 NIA, para. 32.

Environment

- 4.31 The Committee was advised that there are safeguards in place to ensure that the resource is depleted in an environmentally responsible fashion. According to Mr John Hartwell of the Department of Industry, Tourism and Resources:

we and East Timor are both very conscious that any development that takes place within the unit area should have the highest environmental obligations ... We have agreed with the East Timorese that it would not be very sensible to have two different sets of environmental obligations on either side of that boundary. There will be a common approach to the environment.²⁸

Consultation

- 4.32 The Department of Industry, Tourism and Resources advised that the IUA was developed:

in close consultation with the Sunrise joint venture partners to ensure that it would provide the certainty needed for investment decisions. This involved, when appropriate, exposure to drafts of the text and continued detailed discussion on issues.²⁹

- 4.33 The Sunrise joint venture partners were represented in the consultations by Woodside Energy Ltd.³⁰ In addition, the Northern Territory Government participated in the negotiations as an observer.³¹
- 4.34 The Committee sought submissions from parties which had previously demonstrated an interest in the review of the Timor Sea Treaty. None expressed dissatisfaction with the consultation process.

28 John Hartwell, *Transcript of Evidence*, 23 June 2003, pp. 76-77.

29 John Hartwell, *Transcript of Evidence*, 23 June 2003, p. 73.

30 Woodside Energy Ltd was representing, in addition to itself: ConocoPhillips STL Pty Ltd; ConocoPhillips (95-19) Pty Ltd; ConocoPhillips (96-20); Shell Development (Australia) Pty Ltd; Shell Development (PSC 19) Pty Ltd; Shell Development (PSC 20) Pty Ltd; Osaka Gas Australia Pty Ltd; OG ZOCA (95-19) Pty Ltd; OG ZOCA (96-20) Pty Ltd; Woodside Petroleum (Timor Sea 19) Pty Ltd and Woodside Petroleum (Timor Sea 20) Pty Ltd.

31 NIA, Annex 1.

4.35 The Committee is satisfied that adequate consultation has occurred.

Entry into force

4.36 Bringing the Agreement into force requires Australia to notify East Timor in writing that Australia's requirements for entry into force have been complied with, and for East Timor to notify Australia when East Timor's requirements have been met. Entry into force will occur on the later of the two notifications.³²

Implementation

4.37 The NIA states that it is likely that consequential amendments will be required to some legislation, such as that set out in Annex II to the Treaty, which is legislation applicable in the Unit Area in relation to safety, health and environmental protection. It is anticipated that if legislation is required, it will be introduced to Parliament in the Spring sitting period in 2003.³³

Conclusions and recommendation

4.38 The Committee believes that the proposed treaty action is consistent with Article 9 of the Timor Sea Treaty which provides for any reservoir of petroleum that extends across the boundary of the Joint Petroleum Development Area (JPDA) to be treated as a single entity for management and development purposes.

4.39 The Committee recognises that significant decisions are yet to be taken on the methods of exploitation of the gas and oil fields which may have implications for the finer detail of the Agreement. Nonetheless, in accordance with its recommendation in *Report 49: The Timor Sea Treaty* the Committee believes that the early ratification of the IUA will provide a sound basis which will allow the developers to proceed.

32 NIA, para. 3.

33 NIA, para. 31.

- 4.40 In its 49th Report the Committee also emphasised the importance of the Australian Government ensuring that occupational health and safety and environmental standards that prevail in the JPDA are equivalent or superior to those applying in Australian jurisdiction. The Committee reiterates that these issues should be given prominence in the Unit Area to which the IUA applies.
- 4.41 The Committee is also mindful that in the current geopolitical climate security issues will be matters of considerable concern.

Recommendation 5

The Committee supports the International Unitisation Agreement and recommends that binding treaty action be taken.

Denunciation of International Labour Organization Conventions

Proposed treaty action

- 5.1 This chapter considers the proposed denunciation of the following three International Labour Organization (ILO) Conventions:
- *No. 83: Labour Standards (Non-Metropolitan Territories) Convention, 1947;*
 - *No. 85: Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947; and*
 - *No. 86: Contracts of Employment (Indigenous Workers) Convention, 1947.*
- 5.2 In accordance with Article 35 of the ILO Constitution, Australia has declared that the above three ILO Conventions apply only to Norfolk Island.¹

Background

- 5.3 In 1997, the ILO adopted the Instrument for the Amendment of the Constitution of the International Labour Organisation, to allow the

¹ National Interest Analysis (NIA), paras. 5 and 12.

abrogation of any ILO Convention that has 'lost its purpose' or 'no longer made a useful contribution' to attaining its objectives. The NIA states that Australia formally accepted this amendment on 11 October 2001. The Joint Standing Committee on Treaties examined the Amendment in Report 39, finding that it was a 'simple, sensible and no-cost treaty action' and recommended that binding treaty action be taken.² The proposed Amendment has not yet come into effect as it has not received a sufficient number of acceptances to-date.³ In accordance with the spirit of the proposed amendment, Australia has determined that it should not remain party to outdated ILO Conventions.⁴

- 5.4 The NIA states that ILO Conventions No. 83, 85 and 86 have been identified as irrelevant by Australia. The Committee was advised by the Department of Foreign Affairs and Trade (DFAT), that the continued application of these conventions to Norfolk Island serves no purpose and that the proposed treaty actions are in accordance with 'the objective of ensuring that Conventions which are no longer relevant to our national circumstances do not form part of Australia's regulatory structures'.⁵

Denunciation of ILO Convention No. 83

- 5.5 ILO Convention No. 83 requires ratifying countries to indicate the extent to which they undertake the provisions of the Conventions outlined in the Schedule to the Convention. The Schedule contains Conventions relating to the minimum age for employment, medical examination of young people, night work for young people and women, maternity protection, underground work for women, workers compensation, marking of weight on packages and weekly rest.⁶

2 Joint Standing Committee on Treaties (JSCOT), *Report 39*, p. 33.

3 The proposed amendment requires ratification from two-thirds of the member states, that being 117 of the 175 member states. Phillip Knight, *Transcript of Evidence*, p. 29 and NIA, para. 7.

4 Phillip Knight, *Transcript of Evidence*, 16 June 2003, p. 27.

5 NIA, Consultations Annex, p. 1.

6 The Conventions outlined in the Schedule to the Convention are: C3 Maternity Protection Convention, 1919; C14 Weekly Rest (Industry) Convention, 1921; C15 Minimum Age (Trimmers and Stokers) Convention, 1921; C16 Medical Examination of Young Persons (Sea) Convention, 1921; C17 Workmen's Compensation (Accidents) Convention, 1925; C19 Equality of Treatment (Accident Compensation) Convention, 1925; C27 Marking of

- 5.6 The National Interest Analysis (NIA) states that denunciation of this Convention is appropriate as it lacks widespread support amongst ILO members (the United Kingdom is the only other ratifying state out of 175 ILO member states), and the ILO no longer promotes its ratification.⁷ Further, it declared that of the 13 Conventions listed in the Schedule to Convention No. 83, only four were applicable.
- 5.7 Of the four applicable conventions in the Schedule to the Convention, C3 Maternity Protection Convention, 1919 and C17 Workmen's Compensation (Accidents) Convention, 1925, have not been ratified by Australia, and the NIA stipulates that it is inappropriate for Norfolk Island to be bound by standards which do not apply to the rest of the country. However, Australia will remain bound by the other two applicable Conventions listed in the Schedule, namely C19 Equality of Treatment (Accident Compensation) Convention, 1925 and C27 Marking of Weight (Packages Transported by Vessels) Convention, 1929.⁸

Denunciation of ILO Convention No. 85

- 5.8 ILO Convention No. 85 relates to the provision of labour inspection services. Specifically, the provision of suitably trained inspectors, the provision of 'every facility' for free communication between workers and inspectors, and that inspectors inspect conditions of employment at frequent intervals and that they be authorised to exercise certain powers by law.
- 5.9 Australia has declared this convention to be inapplicable to Norfolk Island following consultation with the Norfolk Island Government. Subsequently, Australia is no longer required to report on its implementation of this Convention to the ILO.⁹

Weight (Packages Transported by Vessels) Convention, 1929; C45 Underground Work (Women) Convention, 1935; C58 Minimum Age (Sea) Convention (Revised), 1936; C59 Minimum Age (Industry) Convention (Revised), 1937; C77 Medical Examination of Young Persons (Industry) Convention, 1946; C89 Night Work (Women) Convention (Revised), 1948; and C90 Night Work of Young Persons (Industry) Convention (Revised), 1948. For a full listing of all ILO Conventions see:

<http://www.ilo.org/ilolex/english/cvlist.htm>.

7 NIA, paras. 5 and 9; Phillip Knight, *Transcript of Evidence*, 16 June 2003, p. 28.

8 NIA, para. 9.

9 NIA, para. 10.

Denunciation of ILO Convention No. 86

- 5.10 ILO Convention No. 86 applies to workers belonging to or assimilated to the indigenous population of Norfolk Island. It provides that maximum periods of service that may be stipulated or implied in any contract of employment (written or oral) be prescribed by regulations.
- 5.11 As with ILO Convention No. 85, Convention No. 86 has been declared non-applicable following consultation with the Government of Norfolk Island, as it has had no practical effect.¹⁰ Therefore, the ILO no longer requires Australia to submit reports on the application of this convention.

Process of denunciations

- 5.12 The provisions for Conventions No. 83, 85 and 86 provide that a ratifying country may denounce the relevant Convention during a one-year period every ten years after the Convention first came into force internationally.
- 5.13 To denounce a Convention, a country must submit an instrument stating the intention to the Director-General of the ILO for registration. If the submission for denunciation is not made in the year following the ten year period, the country will remain bound for another ten years. The twelve month 'window of opportunity' for the three Conventions are as follows:
- Convention No. 83 commencing 15 June 2004;
 - Convention No. 85 commencing 26 July 2005; and
 - Convention No 86 commencing 13 February 2003.¹¹
- 5.14 Denunciation will come into effect one year after the submission for denunciation has been registered with the ILO.

10 NIA, para. 11.

11 NIA, para. 4.

Costs

- 5.15 There are no costs associated with the denunciation of these Conventions.

Consultation

- 5.16 The Committee notes the outcome of consultations with the Minister for Employment and Workplace Relations, the Minister for Regional Services, Territories and Local Government, the Government of Norfolk Island and the Australian Chamber of Commerce and Industry (ACCI). The NIA states that all parties support the proposed denunciations and noted that the Australian Council of Trade Unions (ACTU) had no objection to the proposal.¹²
- 5.17 Furthermore, the NIA provides that all State and Territory Governments either supported or did not object to the proposed denunciations of ILO Conventions No. 83, 85 and 86.¹³

Conclusion and recommendation

- 5.18 The Committee supports the principle that outdated ILO Conventions that have lost their purpose or no longer make a useful contribution to attaining the objectives of the ILO, should be removed from the ILO's list of statutes. Hence the Committee supports the proposed denunciation of ILO Conventions No. 83, 85 and 86. The proposed treaty actions would ensure ILO Conventions are relevant to Australia's circumstances and clarify Australia's international obligations.

12 Phillip Knight, *Transcript of Evidence*, 26 June 2003, p. 29.

13 NIA, Consultations Annex, p. 1.

Recommendation 6

The Committee recommends that the Australian Government denounce the following International Labour Organization (ILO) Conventions:

- **No. 83: Labour Standards (Non-Metropolitan Territories) Convention, 1947;**
- **No. 85: Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947; and**
- **No. 86: Contracts of Employment (Indigenous Workers) Convention, 1947.**

Agreement on Medical Treatment for Temporary Visitors between the Government of Australia and the Government of the Kingdom of Norway

Introduction

- 6.1 The *Agreement on Medical Treatment for Temporary Visitors between the Government of Australia and the Government of the Kingdom of Norway* provides residents of either country with reciprocal access to the public health system of the other country for any immediately necessary treatment that is required before returning home. It contributes to a safer travel environment for Australians visiting Norway by giving them access to immediate and necessary health care. In particular, it covers the traveller for pharmaceuticals, public hospital, and ‘out-of-hospital care’.¹

Background

- 6.2 The Committee was advised by the Department of Health and Ageing that Australia has concluded eight agreements with countries which

1 National Interest Analysis (NIA), para. 4.

have health systems of an equivalent standard to Australia,² and which can provide a high level of health care:

We have these agreements with countries which we believe have matching health systems and their major function is to protect the Australian population when they are travelling overseas, to ensure them a safe health environment when travelling for business, tourism or family reunions.³

Features of the Agreement

6.3 The Agreement provides health care in a range of situations, however, in particular, it:

- assists persons with pre-existing medical conditions who are perfectly fit to travel overseas but are unable to obtain travel insurance to cover their health needs;
- assists the aged who find it difficult to obtain travel insurance to cover their health needs;
- creates a safer environment for tourists, working holiday-makers and business people, which in turn strengthens ties between the two countries; and
- promotes goodwill by creating a welcoming environment for all visitors.⁴

6.4 The Committee has been advised that Article 3 of the Treaty provides that a person from the territory of one Party to whom the Agreement applies may receive treatment for any episode of ill-health which requires prompt medical attention, while in the territory of the other Party.⁵

6.5 Article 4 of the Treaty requires each country to provide visitors from the other with any immediately necessary treatment as is clinically required for diagnosis, alleviation or care of the condition requiring attention. This may occur in three ways, namely in-patient and out-

2 These countries are New Zealand, the United Kingdom, Italy, Malta, the Netherlands, Sweden, Finland, and the Republic of Ireland, NIA, para. 5.

3 Mark Burness, *Transcript of Evidence*, 23 June 2003, p. 42.

4 NIA, para. 6.

5 NIA, para. 7.

patient care in a public hospital, subsidised out-of-hospital medical services and subsidised prescription drugs.⁶

- 6.6 The Agreement does not cover treatment for which there is no immediate medical necessity and it specifically excludes:
- those entering for the specific purpose of receiving medical treatment;
 - Norwegian visitors entering Australia on student visas; and
 - diplomats, consular officers and their families.⁷
- 6.7 The Committee notes that Norwegians holding student visas are excluded from this Agreement, because the Australian Immigration Department requires overseas students to obtain student health cover before a visa is granted.⁸
- 6.8 The Committee notes that under this Agreement, medical costs are borne by the injured person and not by either party to this Agreement.⁹ This reinforces the need for travellers to hold the requisite travel health insurance, whether that person is in Norway or Australia.

Costs

- 6.9 The Committee was advised that it is not possible to undertake a strict cost benefit analysis of the Agreement, since there is insufficient data available in either Australia or Norway.¹⁰
- 6.10 Notwithstanding the lack of data, the NIA stated that an estimation of the reciprocity of the Agreement can be made based on the numbers of people travelling between the two countries. The costs associated with the provision of any necessary hospital care to Norwegian visitors in Australia will be offset by a similar cost being borne in Norway for Australian visitors.

6 NIA, para. 8.

7 NIA, para. 9.

8 Mark Burness, *Transcript of Evidence*, 23 June 2003, pp. 45-46.

9 Treaty text, p. 3, and NIA, para. 6.

10 NIA, para. 13.

- 6.11 Statistics gathered by the Australian Bureau of Statistics (ABS) indicate that there were a total of 2,149 Australians travelling directly to Norway and 14 100 Norwegian visitors to Australia in 1999-2000.¹¹ The ABS data, however, underestimates the number of Australian travellers to Norway as it counts only those who indicate they are travelling directly to Norway. It does not account for the numerous visitors who visit Norway as part of a wider European tour.¹²
- 6.12 The Committee is concerned that there is no specific data revealing the numbers of Australians visiting Norway as part of a wider European tour. Clearly, without comparative data it is not possible to determine accurate health costs under the Agreement.
- 6.13 The NIA however provides an indication of costs:
- ... the total cost of Medicare Benefits provided to RHCA [Reciprocal Health Care Agreement] visitors in 2001-2002 was \$5.9 million, covering some 1.6 million visitors. This was 0.08% of 7.8 billion, being the total Medicare outlays for the Australian population.¹³
- 6.14 The Committee notes that collection of data on usage of the Pharmaceutical Benefits Scheme (PBS) has been facilitated by the *National Health Amendment (Improved Monitoring of Entitlements to Pharmaceutical Benefits) Act 2000* (IME Act), which came into full effect in May 2002.¹⁴
- 6.15 Although limited, the data shows that in July 2002 RHCA visitors to Australia were supplied with a total of 1 135 scripts. This represents 0.007 percent of 15 551 165, being the total number of scripts supplied to the Australian population.¹⁵
- 6.16 The Committee was advised that since visitors from Norway will account for only around 0.9 percent of all RHCA visitors to Australia, the annual Medicare and PBS outlays for this group will be proportionately small.¹⁶

11 NIA, para. 14.

12 NIA, para. 14.

13 NIA, para. 15.

14 NIA, para. 16.

15 The original NIA read 0.02 percent (NIA, para. 16), however this figure was rectified at the hearing by Mark Burness, *Transcript of Hearing*, 23 June 2003, p. 42.

16 NIA, para. 17.

- 6.17 The Committee understands that it is the responsibility of the Australian States and Territories to have accurate reporting mechanisms for eligible visitors.¹⁷
- 6.18 Some State and Territory health departments have introduced procedures to record data on hospital usage by eligible visitors, but such data is neither comprehensive nor reliable. The NIA claims that availability of such data, in the future, together with Medicare and PBS information, should provide an overall picture of the use of these services by visitors from Norway.¹⁸
- 6.19 The Committee was informed that data on usage of health services in Norway by Australian visitors under the Agreement is not collected by the Norwegian authorities. This is due to Australian usage of the Norwegian health system comprising such a small number of services and cost relative to the Norwegian health budget so that expenditure of human and financial resources to monitor usage under the Agreement is not considered worthwhile.¹⁹ In the absence of such data from Norway, comprehensive cost comparisons are not possible at this time.

Other issues

Travel insurance

- 6.20 The Committee sought information on whether travel health insurance premiums will decrease with the expansion of reciprocal health care agreements.
- 6.21 Mr Burness advised that the reduction of travel health insurance in light of this Agreement would be minimal:
- ... a lot of people would still take out travel insurance, because [Norway] is one country out of many which they would visit where we do not have reciprocal health care agreements. Therefore its impact, in terms of the overall

17 Mark Burness, *Transcript of Hearing*, 23 June 2003, p. 47.

18 NIA, para. 18.

19 NIA, para. 19.

market of travel insurance, I would have thought, was very small.²⁰

- 6.22 The Committee was advised that, unless a traveller was transferring directly to the country with which Australia has an agreement, private health insurance was advisable. Nonetheless, there were some benefits to be obtained from the Agreement:

Let us assume someone is going overseas for six months and for three months they are going to be in Norway. It does mean that they have the option to take out an insurance policy that covers them for the rest of their trip, but not for the time that they are in Norway. In that regard it would assist them as an individual. I presume it also gives a person peace of mind. Insurance, as I said, has pre-existing conditions limits on policies, and all those things are forgone in terms of your access to good and adequate health care whilst you are in that foreign country.²¹

Aged travellers

- 6.23 The Committee was advised that the Agreement is beneficial to aged travellers, particularly in light of the cost of travel health insurance, and exclusion as a result of pre-existing medical conditions:

The process then, as I understand it, was basically to protect Australian citizens overseas in terms of their health costs. That is particularly relevant to people who, for instance, are aged or have significant pre-existing conditions for which they cannot get insurance or cannot get any insurance at all but, in terms of a medical assessment, are perfectly fit to travel. Simply, because they cannot get insurance, they are somewhat entrapped, and this was seen as a very good way of enabling those sorts of people to have the ability to travel overseas, where it was possible.²²

Student visas

- 6.24 As previously mentioned, the Agreement does not apply to students. The Department of Health and Ageing advised the Committee that 1 529 Norwegians arrived in Australia on student visas in 2000,
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20 Mark Burness, *Transcript of Hearing*, 23 June 2003, p. 45.

21 Mark Burness, *Transcript of Hearing*, 23 June 2003, pp. 46-47.

22 Mark Burness, *Transcript of Hearing*, 23 June 2003, p. 46.

representing 9.2 percent of Norwegians entering Australia in that year.²³ The Committee was advised that the Australian Government requires overseas students intending to study in Australia to obtain health cover. On that basis, the Norwegian Government decided that students studying in Norway should also be excluded from this Agreement.²⁴

Consultation

- 6.25 The NIA states that information on the proposed Agreement has been provided to the States and Territories through the Commonwealth-State Standing Committee on Treaties Schedule of Treaty Action. All State and Territory health authorities were specifically advised of the proposed Agreement with the Kingdom of Norway in writing on 20 June 1999, 10 August 2000, 12 July 2002 and 21 March 2003. In addition, the Medicare Eligibility Section of the Health Insurance Commission has been made aware of the proposed Agreement with Norway.²⁵
- 6.26 The NSW Government indicated that while it had no concerns in relation to the Agreement with Norway, it was ‘particularly concerned that States and Territories receive no additional funding to cover the cost of health care provided to overseas visitors.’ The NSW Government also referred to a Commonwealth review of RHCAs in 2001 and indicated to Committee that it would appreciate advice as to the outcome of this review, including an analysis of costs and benefits.²⁶
- 6.27 The Committee noted that no reference had been made in the NIA to consultation with the private sector or industry groups. Mr Burness advised the Committee that:

We have got a very good network with the industry. We have a network with the medical profession, the Pharmacy Guild and the hospital system through web sites, newsletters and information leaflets which we send out giving them

23 Department of Health and Ageing, *Submission 28*, p. 1.

24 Mark Burness, *Transcript of Hearing*, 23 June 2003, p. 46.

25 NIA, paras. 20-22.

26 NSW Government, *Submission 17*, p. 1.

information, but they have basically said: 'We're happy. Let us know when the next agreement is coming onstream through this network'.²⁷

Implementation

- 6.28 The Committee was advised that relevant legislation is in place and no further legislative action by the Commonwealth or the States and Territories is required to implement the Agreement.²⁸
- 6.29 Section 7(1) of the *Health Insurance Act 1973* provides that the Government of Australia may enter into agreements with the Governments of other countries for the purpose of providing health care to visitors to the host country as if they were residents of that country.²⁹
- 6.30 Section 7(2) of the *Health Insurance Act 1973* provides that a visitor to Australia to whom an agreement under section 7 relates shall, subject to the agreement, be treated as an "eligible person" for the purposes of the Act during his or her stay in Australia. This means that, once the Agreement has come into force, the Act applies automatically to visitors covered by the Agreement.³⁰

Entry into force

- 6.31 The NIA states that the Agreement was signed on 28 March 2003. Article 6(3) of the Agreement provides for entry into force on the first day of the third month after the date of the last notification between the parties through diplomatic channels notifying each other in writing that their respective requirements for its entry into force have been fulfilled.³¹

27 Mark Burness, *Transcript of Hearing*, 23 June 2003, p. 47.

28 NIA, para. 12.

29 NIA, para. 10.

30 NIA, para. 11.

31 NIA, para. 3.

Conclusions and recommendations

- 6.32 The Committee is concerned that the limited data collection and monitoring of eligible patients both in Australia and Norway does not provide a realistic picture of the costs incurred by the Agreement.³²
- 6.33 However, the Committee recognises that, although there are few situations in which Australians travelling to Norway could dispense with the need to take out travel insurance, there are significant benefits to people who are ineligible through age or pre-existing medical conditions for travel insurance cover.
- 6.34 The Committee therefore supports the Agreement and urges the Department to implement effective measures for accurate monitoring of usage under the Agreement.

Recommendation 7

The Committee recommends that the Government investigate ways of improving data collection for the purposes of monitoring costs associated with similar agreements.

Recommendation 8

Although reservations are expressed concerning the adequacy of the data collection, the Committee supports the Agreement and recommends that binding treaty action be taken.

32 These same issues were raised in the Joint Standing Committee on Treaties (JSCOT) *Report 50: Treaties Tabled 15 October 2002*, p. 11; JSCOT, *Report 20: Two Treaties Tabled on 26 May 1998, the Bougainville Peace Monitoring Group Protocol and Treaties Tabled on 11 November 1998*, p. 31; JSCOT, *Eleventh Report*, p. 40.

Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

Introduction

- 7.1 The main purpose of the *Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* ('the Convention') is to establish a Commission to manage and conserve highly migratory fish stocks in the western and central Pacific Ocean and to promote their optimum utilisation and sustainable use. Parties to the Convention will become members of the Commission. Obligations under the Convention are consistent with Australia's obligations under the *United Nations Fish Stocks Agreement* ('Fish Stocks Agreement')¹ and the *United Nations Convention on the Law of the Sea* (UNCLOS). The Convention applies to all highly migratory fish stocks except sauries.²

Background

- 7.2 The Western and Central Pacific Ocean is the location of the largest and most valuable fishing resource in the world, and includes a

1 For the Committee's views on this treaty see the Joint Standing Committee on Treaties (JSCOT) *Report 28: Fourteen Treaties Tabled on 12 October 1999*, pp. 5-15.

2 National Interest Analysis (NIA), para. 9.

number of coastal states (including Australia). This area is fished by several distant water fishing nations (DWFNs).³

- 7.3 In 1994 the South Pacific Forum Fisheries Agency convened the first of seven multilateral high-level conferences to promote responsible fishing in the region. The adoption of the *United Nations Fish Stocks Agreement* ('Fish Stocks Agreement') required both coastal states and DWFNs to cooperate on the establishment of regional management arrangements for straddling or highly migratory fish stocks.⁴ The Convention was one of the first regional fisheries management organisations (RFMOs) to be negotiated under the auspices of the Fish Stocks Agreement.
- 7.4 The Convention was developed by delegates of Pacific Island countries and DWFNs during a series of conferences. Australia has been active in the negotiation of the Convention text and in the Preparatory Conferences to establish the Commission.
- 7.5 Greenpeace also observed that Australia had played an important role in the development of the Convention and had been a 'strong driver of many of the important management precedents that exist within the Convention.'⁵

Relationship with other conventions

- 7.6 The present convention lies within a framework of existing international agreements regulating the conservation and management of highly migratory fish stocks. At the most fundamental level, UNCLOS, which is called the 'constitution of the sea', establishes the fundamental principle that States should cooperate to ensure conservation and promote the objective of the optimum utilisation of fisheries resources both within and beyond the exclusive economic zone (EEZ).⁶ The Fish Stocks Agreement provides a framework that elaborates on the obligation to cooperate, by setting out principles for the conservation and management of fish stocks that migrate between the high seas and EEZs and establishes that

3 James Lee, *Transcript of Evidence*, 23 June 2003, p. 52.

4 The Committee reviewed the Fish Stocks Agreement see JSCOT, *Report 28: Fourteen Treaties Tabled on 12 October 1999*, pp. 5-15.

5 Greenpeace, *Submission 18*, p. 1.

6 The EEZ established by UNCLOS provides for sovereign rights over the living and non-living resources of the oceans – including fish stocks – within 200 nautical miles of the baseline of coastal states. The oceans beyond the EEZ are designated as the high seas, where no coastal state has sovereign rights with respect to these resources.

such management must be based on the precautionary approach and the best available scientific information.⁷

- 7.7 DFAT also advised that article 22 dealt with cooperation with other RFMOs, such as the Commission for the Conservation of Southern Bluefin Tuna.

Port Lincoln specifically fishes for southern bluefin tuna. During the preparatory conference processes it was recognised within this that, although southern bluefin tuna occur within this convention area, the parties to the Western and Central Pacific Ocean Tuna Commission recognise that the Commission for the Conservation of Southern Bluefin Tuna is the primary and responsible organisation for dealing with southern bluefin tuna.⁸

Establishment of the Commission

- 7.8 The principal feature of this Convention is that it establishes the 'Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean'.⁹

Functions

- 7.9 Functions of the Commission include:
- determining the total allowable catch or total level of fishing effort within the Convention Area and other conservation and management measures, as well as development of criteria to determine these where necessary;
 - adopting standards for collection, verification and timely exchange and data reporting as per Annex I of the Fish Stocks Agreement;
 - compiling and disseminating accurate and complete statistical data to ensure the 'best scientific information' is available; and

7 See URL:
http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

8 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 62.

9 Article 9(1).

- establishing appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement, including a vessel monitoring system.¹⁰
- 7.10 The Commission will meet annually, or as necessary in accordance with the principle of cost-effectiveness. The location of its headquarters shall be determined by the Contracting Parties, who will also appoint its Executive Director.¹¹
- 7.11 By ratifying the Convention, Australia would become a member of this commission. The Committee was advised that ‘Australia needs to be part of the new commission, as continued access to the high seas and allocation of high seas resources will be dependent upon Australia being a member of the commission’.¹² It has also been put to the Committee that this was even more critical, as ‘there has been a move of fishing capacity by distant water fishing nations from the Northern Hemisphere into the western and central part of the Pacific Ocean’.¹³

Financial Arrangements

- 7.12 According to Article 18, which deals with the financial arrangements for the Commission, the Commission’s budget will be drafted by the Executive Director and must be adopted by consensus. The scheme of contributions to the budget are to be based on an equal basic fee, a fee based on national wealth, and a variable fee that takes into account total catch in the Convention Area, with a discount for developing States or territories fishing their own exclusive economic zones. Any contributor in arrears cannot participate in decision-making by the Commission, unless the Commission is satisfied that ‘failure to pay is due to conditions beyond the control of the member’.¹⁴
- 7.13 Article 19 provides that the records, books and accounts of the Commission, including its annual financial statement must be audited annually by an independent auditor appointed by the Commission.

10 Article 10.

11 Article 9.

12 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

13 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

14 Article 18(3).

Decision-making

- 7.14 The decision-making process of the Commission is treated in Article 20 of the Convention. As a general rule, decision-making in the Commission shall be by consensus, which means ‘the absence of any formal objection made at the time the decision was taken’.¹⁵
- 7.15 In the absence of express provision for decision by consensus, two methods can apply where consensus is not possible. For questions of procedure, a decision requires a majority of those present and voting. Questions of substance shall be decided by a three-fourths majority of those present and voting, provided that such a majority includes:
- A three-fourths majority of the members of the South Pacific Forum Fisheries Agency present and voting; and
 - A three-fourths majority of non-members of the South Pacific Forum Fisheries Agency present and voting; and
 - Providing further that in no circumstances shall a proposal be defeated by two or fewer votes in either chamber.
- 7.16 A question shall be treated as one of substance unless otherwise decided by the Commission by consensus or by the majority required for decisions on questions of substance.

Advisory bodies

- 7.17 The Convention establishes two subsidiary bodies to provide advice and recommendations to the Commission: the ‘Scientific Committee’ and the ‘Technical and Compliance Committee’. The Scientific Committee is established to provide the ‘best scientific information available’.¹⁶ The Technical and Compliance Committee shall:
- Provide information, technical advice and recommendations relating to implementation and compliance;
 - Monitor and review compliance and make necessary recommendations; and

15 Article 20(1).

16 Article 12(1).

- Review and make recommendations regarding the implementation of cooperative measures for monitoring, control, surveillance and enforcement.¹⁷
- 7.18 The Commission may also establish a Secretariat consisting of an Executive Director and other staff.¹⁸
- 7.19 The Committee understands that the Commission will make decisions based on scientific and technical advice from the advisory bodies.

Participation in the Commission

- 7.20 The Committee considers the ability of Australia to participate in the work of the Commission to be an important consideration in deciding whether or not to recommend ratification.
- 7.21 According to the NIA, 'Parties to the Convention will be members of the Commission and thus able to influence the regional management strategies which are implemented under this framework.'¹⁹ The Committee agrees with the contention that it is in the national interest for Australia to be able to 'participate in the management of fisheries resources important to the Australian fishing industry' and to 'ensure that consistent fisheries strategies are utilised across the Pacific'.²⁰
- 7.22 In his evidence before the Committee, Mr Lee argued that Australia should ratify, and thereby become a member of the new Commission:
- By being engaged we are in the best position to influence, push for and contribute to responsible fishing practices that would benefit the east coast fishing industry.²¹
- 7.23 Because of the entry into force mechanism, Australia would not necessarily prevent the entry into force of the Convention by refusing to become a party. The Department of Agriculture, Fisheries and Forestry Australia (AFFA) advised the Committee that:
- If the convention is ratified and the commission is created and we are not a signatory, then we have obviously missed the boat. Until such time as we are a party we will not be able

17 Article 14.

18 Article 15(1).

19 NIA, para. 6.

20 NIA, para. 7.

21 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

to influence the management, or even leading towards the allocation, of resources if particular stocks are found to be at maximum sustainable yield. By being a party, obviously, we are able to influence that significantly.²²

7.24 Should the Convention enter into force, AFFA raised the possibility of a Pacific grouping exercising influence within the Commission:

As a party within just a Pacific grouping—if the convention is ratified by the Pacific grouping—then certainly the Pacific can aim to establish arrangements that best suit them. That has actually come up in discussion in the margins of the preparatory conferences, where some parties have said, ‘Why should we be bashing our heads against a brick wall on this particular issue when all we’ve got to do is sit back, achieve 13 ratifications, and then we can do whatever we want?’²³

7.25 However, Australia has attempted to facilitate a more cooperative approach:

The convention actually says that we need to do this in good faith. We keep pointing out that we really do need to be trying to do this to cater for all parties involved, and certainly we would like to be there.²⁴

7.26 The Committee has also heard that Australia has been involved in the process from the beginning and that Australia’s ratification ‘would be seen as evidence of Australia’s commitment as one of the original members of the commission’.²⁵

Access to the Convention Area

7.27 In addition to the benefits of participating in the work of the Commission, the Committee is concerned that the Australian fishing industry could lose access to the fisheries of the western and central Pacific Ocean if Australia does not ratify the Convention prior to its entry into force. The Committee notes that Australia has a substantial

22 James Lee, *Transcript of Evidence*, 23 June 2003, p. 66.

23 James Lee, *Transcript of Evidence*, 23 June 2003, pp. 66-67

24 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

25 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

commercial fishing industry in the Western and Central Pacific Ocean.

- 7.28 The Committee has been advised that if the Convention came into force while Australia had not become a party, then the Australian fishing industry would be denied access to the high seas fisheries within the Convention Area because Australia had ratified the Fish Stocks Agreement:

Further, as a party to the United Nations Fish Stocks Agreement, Australia needs to be a member of the commission if it is to be allowed to fish on the high seas in the convention area.²⁶

- 7.29 Therefore, in order to secure access to the Convention Area for the Australian fishing industry, Australia would need to ratify the Convention before it enters into force, notwithstanding the various other concerns that the Committee has in relation to this Convention.

Prospects for entry into force

- 7.30 Given that participation and access rights depend on the entry into force of the Convention, the Committee was interested in the prospects of the Convention entering into force in the near future.

Two-path entry in force mechanism

- 7.31 There are two ways in which the Convention can enter into force. Firstly, the Convention will enter into force 30 days after three States north, and seven States south, of the 20° parallel north latitude deposit their instrument of ratification, acceptance, approval or accession. Alternatively, after 5 September 2003, the Convention will enter into force six months after the deposit of the thirteenth instrument of ratification, acceptance approval or accession (regardless of the States location) or as above, whichever is the earlier.²⁷
- 7.32 When the Committee inquired into the rationale for the 'north-south' mechanism, AFFA advised that:

26 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

27 NIA, para. 4.

...that facility recognises that there are two components to this: the distant water fishing side and the side of the Pacific areas that have the resource in their EEZs.²⁸

- 7.33 The Committee notes that DFAT also referred to the reflection of this 'north-south' dimension in the chamber decision-making procedure of the Commission,²⁹ outlined at paragraphs 1.14 to 1.16 above.

Progress of ratifications

- 7.34 The Committee sought information on the current progress of ratifications in light of the entry into force requirements. AFFA advised that seven nations had ratified the Convention.³⁰ Mr Lee added that:

The Philippines and another three Pacific coastal states, including Australia, are advanced in the ratification process. It now looks increasingly likely that the convention will come into force some time in the middle of 2004, based on 13 ratifications.³¹

- 7.35 When asked by the Committee which other nations were likely to ratify in addition to these four, Mr Lee replied:

We are not sure of the status of Tonga. They have just recently had a change, at the bureaucratic level, within their fisheries department and they are just getting a handle on what this means for them. From the meetings that we have had with delegates from Tonga, they are certainly aware of the benefits to them of joining. They have not actually said that they have started the process.³²

- 7.36 As for the thirteenth country there were three other possibilities:

Niue have some concerns which they would like to have addressed relating to the cost of joining the commission. There is the Republic of Palau and the Republic of Nauru. These are all Pacific parties. They are the ones that have the fish resource either in their EEZs or in the adjacent high seas

28 James Lee, *Transcript of Evidence*, 23 June 2003, p. 66.

29 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 66.

30 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

31 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

32 James Lee, *Transcript of Evidence*, 23 June 2003, p. 56.

area. They recognise the benefits from sustainably managing this resource. That is why it looks likely that it will be ratified based on interest from the Pacific region.³³

- 7.37 Notwithstanding that Tonga has not started the ratification process and other countries have not proceeded very far, significant regional solidarity through the Forum Fisheries Committee makes ratification a realistic proposition:

At the most recent preparatory conference in Fiji, the attitude taken by the members of the Forum Fisheries Committee on how to approach negotiations on the Western and Central Pacific Fisheries Convention was quite enlightening. They stood as a group and pushed issues as a group, and we see no reason why they will not all want to be parties to this and why they will not, if not currently actively working on ratification, shortly begin.³⁴

- 7.38 Of the seven ratifications, none of these were by the recognised major DWFNs; Japan, Korea, China, Taiwan, the United States and the European Union had all not ratified.³⁵ However, the Committee was advised that the United States had flagged with Congress 'that it is something that needs to be addressed in the near future'.³⁶ AFFA described the situation as:

...very much a crystal ball situation. Thirteen ratifications are required for the convention to come into force. The European Union is an observer and Taiwan has special standing within the process at the moment. The European Union and Taiwan will most certainly ratify, as well, as soon as the commission comes into being. Once they have ratified, it is highly likely that China will follow suit, bearing in mind that Taiwan has joined.³⁷

Delay in Australia's proposal to ratify

- 7.39 The Committee noted the delay between the signing of the Convention on 30 October 2000 and proposed ratification and was advised that the history of negotiation of the Convention involved

33 James Lee, *Transcript of Evidence*, 23 June 2003, p. 56.

34 James Lee, *Transcript of Evidence*, 23 June 2003, p. 56.

35 James Lee, *Transcript of Evidence*, 23 June 2003, p. 55.

36 James Lee, *Transcript of Evidence*, 23 June 2003, p. 55.

37 James Lee, *Transcript of Evidence*, 23 June 2003, p. 55.

significant compromising between the DWFNs and the Pacific parties who effectively own the resource:

We have known there was going to be a preparatory conference process continuing the work towards establishing the commission and, along with a number of other parties, we wanted to see the direction which the operational aspects of the convention were going to take and see how others were going to react. Certainly Japan, who are not signatories, did not want to be part of the preparatory conference process for the first two meetings. They then realised that it was probably to their detriment that they did not participate, and they have subsequently re-engaged.³⁸

7.40 Greenpeace submitted that: 'Australia should send a strong signal of support by ratifying the Convention prior to September 2003 when the default mechanisms for ratification come into force'.³⁹

7.41 The two-path nature of the entry into force mechanism has enabled Australia to wait and observe the process of the preparatory conferences:

We never thought that there was any need to hurry into the ratification process, because the interest from the distant water fishing nations was such that they were treading lightly—they were concerned about what this might mean for them. I think they are becoming more and more comfortable as the process goes on, and I guess that is where other countries are coming from too—they are comfortable with the convention text, what it means, and the preparatory conference work that has gone on since then. Certainly that is Australia's position—from a fisheries agency aspect we are very comfortable with the progress that has been achieved.⁴⁰

7.42 While entry into force seems likely, the Committee is concerned at the reluctance of DWFNs not expressing an interest in participating in the Commission through ratifying the Convention. In particular, the Committee remains unconvinced at this stage that major DWFNs such as Japan and South Korea have shown a substantial interest in ratification. However, the Committee recognises that the Commission

38 James Lee, *Transcript of Evidence*, 23 June 2003, p. 65.

39 Greenpeace, *Submission 18*, p. 1.

40 James Lee, *Transcript of Evidence*, 23 June 2003, p. 66.

needs to operate on the basis of consensus and Australia's ratification without consensus having been achieved could result in Australia bearing costs under the Convention without any guarantee of the effectiveness of the Commission.

Effectiveness of the Commission

Participation of distant water fishing nations

- 7.43 The Committee believes that the Commission would be ineffective without the participation of all relevant parties and supports Ms Kerslake's comments:

You obviously want everybody fishing in the area to be a member, but ... to monitor and control all the vessels you obviously need those most active within the area to participate.⁴¹

- 7.44 It is a matter of considerable concern that no DWFN has ratified at the present time, with the United States the only DWFN to have signed the Convention.

- 7.45 The Committee was advised that although China was the deputy chair of the preparatory conference to the Convention, it was difficult to ascertain whether China would ratify in the near future as the Chinese were not allowed to travel to the most recent meeting in Fiji due to the Severe Acute Respiratory Syndrome (SARS) epidemic.⁴²

Obligations of non-parties

- 7.46 The Committee sought advice as to the effect of the convention obligations for non-signatory fishing nations. DFAT indicated that the effect of the convention on a particular party would depend on what other agreements the relevant party had signed, including the Fish Stocks Agreement:

The United Nations Fish Stocks Agreement does develop a scheme of regional fisheries management organisations and commits signatories to that agreement to create and participate in regional management organisations. There will

41 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 58.

42 James Lee, *Transcript of Evidence*, 23 June 2003, p. 63.

be the relationship as provided in the treaty between members of the commission and another member of the commission and there will be a relationship between members of the commission and UN Fish Stocks Agreement signatories, who have certain obligations under that agreement. Then there will be the relationship between members of the commission and non-parties to any international instruments.⁴³

- 7.47 In terms of securing the compliance of non-parties to the Convention, DFAT advised that while there may be some remedies against members of the Fish Stocks Agreement in terms of rights to arrest, board and inspect vessels on the high seas, these rights would be limited in relation to vessels of non-parties to the Fish Stocks Agreement:

If they are a member of the UN Fish Stocks Agreement, they are treated identically to members of the RFMO in certain situations. There is a lot that can be said about that. Unfortunately, if they are a non-party and if they are fishing on the high seas, there is not a lot you can do. If they are fishing within an EEZ, where most of the fish are, they are obviously in breach, and it is within that party or coastal state's sovereignty to act independently on that. Under UNCLOS [United Nations Convention on the Law of the Sea], the only right you have to arrest, board and inspect a vessel on the high seas is if its nationality is in dispute or it is not flying a flag.⁴⁴

- 7.48 In particular, the Committee was advised that China was not a signatory to the Fish Stocks Agreement:

The Department of Agriculture, Fisheries and Forestry has, at this stage, been unable to ascertain whether or not China is in the process of ratifying the United Nations Fish Stocks Agreement. The Department is pursuing avenues to determine China's position with regard to ratification of the United Nations Fish Stocks Agreement and will advise the JSCOT [Joint Standing Committee on Treaties] once we have confirmation of that position.⁴⁵

43 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 62.

44 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 62.

45 Agriculture Fisheries Forestry Australia (AFFA), *Submission 27*, p. 2.

7.49 While China was cited by AFFA as an example, the Committee also notes that there are other DWFNs in this situation, including the European Community, Japan, Korea and China (all of whom have signed but not ratified the Fish Stocks Agreement as at 11 April 2003) and Taiwan. The United States, like Australia, has ratified the Fish Stocks Agreement.

7.50 DFAT advised that the difference would be in the high seas areas known as the 'doughnut holes':

A large amount of the Pacific ... consists of multiple EEZs with just small amounts between them. Those people that are not signatories to the treaty will still be able to fish on the high seas. Parties to the convention, or members of the commission and other members of the commission, will have some sort of reciprocal boarding and inspection of one another's vessels on the high seas. However, under UNCLOS, the only right, if they are not a party to UN [United Nations] fish stocks or a party to this commission, is if you cannot determine the identity of that vessel in those small high-sea areas.⁴⁶

7.51 The only other way to board would be 'if you seek the authority from the state flying the flag and they give you the authority, as the flag state of that vessel, to board the vessel for fisheries inspection purposes'.⁴⁷

Systems for the monitoring, control and surveillance of vessels

7.52 In relation to the application of systems for the monitoring, control and surveillance (MCS) to vessels in the Convention area, AFFA advised that:

The commission recognises that there is already established within the region a vessel monitoring system operated by the Forum Fisheries Agency, that there are vessel registries and the like also operated by the Forum Fisheries Agency and that it would be appropriate for the commission to investigate the Forum Fisheries Agency as service providers for these particular services rather than developing them themselves at, one assumes, great cost and over a long time.⁴⁸

46 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

47 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

48 James Lee, *Transcript of Evidence*, 23 June 2003, pp. 58-59.

- 7.53 The Committee supports the utilisation of existing surveillance capacity, especially in light of advice from Greenpeace that an absence of surveillance capacity and resources of Pacific island states was ‘an impediment in the policing of EEZs and adjacent waters’.⁴⁹
- 7.54 In relation to Article 26 of the Convention, the Committee sought advice on what Australia was doing to ensure that an agreement with regard to boarding and inspection of fishing vessels was reached within a two-year period.
- 7.55 AFFA advised that the preparatory conferences were looking at the issue boarding and inspection, vessel monitoring systems (VMS) and observer coverage through one of its working groups:

That preparatory conference process is to take us from the time the treaty was signed, to keep moving forward and to prepare the groundwork for setting up the commission... The first stage of negotiations on monitoring, control and surveillance is on the boarding and inspection scheme—that is, to begin the development of such a boarding and inspection scheme as referred to in article 26(1) and (3) about the right to board and inspect vessels on the high seas and to try to have, as closely as possible, the same sort of scheme operating with EEZs as on the high seas.⁵⁰

- 7.56 The Committee was also advised that the definition of what would constitute a boarding party was still being considered:

The definition of what those parties will consist of is still being worked on at this stage—whether it will include any vessel Australia wishes to register, be it a customs vessel or a naval vessel or one of the other vessels operated by the Australian Fisheries Management Authority, and whether the Australian Fisheries Management Authority uses its officers as inspectors.⁵¹

49 Greenpeace, *Submission 18*, p. 1.

50 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

51 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

Flags of convenience ships

7.57 Further to the issue of securing the compliance of non-parties, the Committee was concerned about the issue of jurisdiction and the flags of convenience ships.

7.58 The Committee understands that the Commission would have significant limitations in this regard. As a AFFA representative conceded, the Commission would not have the powers to force 'rogue states' in the fishing sense to participate; however, he did refer to the possibility of exercising bilateral pressure, as is done in the Indian Ocean Tuna Commission:

So work is done to get countries to either become members of the commission or at least to observe the rules and regulations and management arrangements that are put in place by the commission.⁵²

7.59 The Committee is pleased by further developments in this area including work being undertaken by the Japanese and RFMOs worldwide in relation to the 'white listing' of vessels:

Rather than blacklisting a vessel so it just changes its name, you register the well-behaved vessels... The forum's fisheries agency itself in the Pacific area has a vessel register which lists vessels which adhere to the terms and conditions and what are known as the MTCs – minimum terms and conditions – for the Pacific area.⁵³

7.60 DFAT also advised that there will be 'a conference early next year again looking at the worldwide issue of IUU [illegal, unreported and unregulated] fishing and the cooperation that can be undertaken between one regional organisation and another to try to eliminate these vessels altogether.'⁵⁴

Monitoring of stock levels

7.61 The Committee recognises that the monitoring the state of fish stocks will involve cooperation at the national level. This will require information about the available stocks, their distribution and their breeding habits. AFFA advised that in relation to the state of the scientific work being done:

52 James Lee, *Transcript of Evidence*, 23 June 2003, p. 63.

53 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 69.

54 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 69.

There are already extensive scientific arrangements in place for the central and western Pacific fish stocks. There is an informal body under the auspices of the Secretariat of the Pacific Community, called the Standing Committee on Tuna and Billfish, constituted by the majority of Pacific Island countries and including all of the Forum Fisheries Agency members. In many cases their participation is subsidised by a range of distant water fishing nations and, of course, Australia and New Zealand. This body has been very effective. It has operated for 15 years—in fact the 16th meeting is taking place in Mooloolaba in July—and has been very successful in providing information on stock status and ensuring that cooperative research takes place throughout the central and western Pacific region.⁵⁵

7.62 The Committee was advised of the work of the preparatory conference for the commission to establish scientific arrangements for the commission and for the central and western Pacific region in the long-term:

The design of the scientific processes is actually fairly complex and somewhat controversial due to the need to ensure that scientific advice is independently derived and objective but at the same time allows participation by national entities. One of the main issues under discussion now is the relative importance of input from national scientists as opposed to independent scientists operating on a purely objective basis. Other arrangements are well under way, and we hope to have a process in place similar to that currently existing under the Standing Committee on Tuna and Billfish.⁵⁶

Integrating national programs

7.63 AFFA advised that extensive cooperative research was already being carried out throughout the central and western Pacific region, predominantly under the auspices of the Secretariat of the Pacific Community and the Pelagic Fisheries Research Program.

55 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 59.

56 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 59.

7.64 The Oceanic Fisheries Programme of the Secretariat of the Pacific Community, which has a wide-ranging membership, was established in 1980 'to provide member countries with the scientific information and advice necessary to rationally manage fisheries exploiting the region's resources of tuna, billfish and related species'. The ongoing expenses of the Programme are currently funded by extra budgetary contributions from Australia, France and New Zealand, and a contribution from the core budget of the Secretariat. AusAID also provides funds for specific projects.⁵⁷

7.65 The Pelagic Fisheries Research Program (PFRP) was established in 1992 to provide scientific information on pelagic fisheries to the Western Pacific Regional Fishery Management Council, which manages fisheries in the United States EEZ, for use in development of fisheries management policies.⁵⁸ The Committee was advised that: 'Total funding available for projects can be in the order of up to one million US dollars annually'.⁵⁹ A list of the current and recently completed projects can be found on the PFRP website.⁶⁰

7.66 The Committee was also advised that the Standing Committee on Tuna and Billfish was consolidating the national efforts into a single assessment:

A stock assessment of fishery research takes into account a wide range of information. This information is gathered from a range of independent national programs; nevertheless it can be consolidated effectively, and the standing committee body ensures that that consolidation does take place. I do not envisage at this time that there is any need for a higher level of funding to ensure effective research. The stock assessments for the central and western Pacific region are probably some of the best for tuna research currently carried out in the world.⁶¹

Scientific basis for conservation measures

7.67 In principle, the Committee supports the establishment of a Commission to manage the fish stocks of the central and western

57 AFFA, *Submission 27*, p. 10.

58 The term 'pelagic' generally refers to fish that live in the near-surface waters of the ocean, often far from shore. AFFA, *Submission 27*, p. 3.

59 AFFA, *Submission 27*, p. 3.

60 <http://imina.soest.hawaii.edu/PFRP/>

61 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 60.

Pacific Ocean. Nonetheless, the Committee is concerned about an apparent conflict between the principles that the Commission will follow in adopting conservation measures. On the one hand, Article 5(b) requires the adoption of conservation measures to be 'based on the best possible scientific evidence'. On the other hand, Article 5(c) imports the precautionary approach is not clearly defined in the Convention text. Article 5(c) appears to qualify Article 5(b), thereby clouding the term 'best possible scientific evidence' with an ill-defined precautionary approach.

- 7.68 The Committee notes that there are widely acknowledged issues of definitional uncertainty relating to the precautionary approach. Evidence from a AFFA representative reflects the Committee's concern:

Certainly, that is a complex issue. In terms of dealing with the precautionary approach in all areas of endeavour, it would certainly be a minefield... this wording in section (c) is somewhat ambiguous in that it provides an open range and may not necessarily allude to that precautionary approach activity relating to tuna alone.⁶²

- 7.69 The Committee is not satisfied that this issue has been adequately resolved by this Convention. Article 5(c) of the Convention applies the precautionary approach '...in accordance with this Convention and all relevant internationally agreed standards and recommended practices and procedures'. The relevant precautionary reference point, which is contained in Annex II states that this is:

An estimated value derived from an agreed scientific procedure ... which corresponds to a state of the resource and/or of the fishery and can be used as a guide for fisheries management.⁶³

- 7.70 The Committee has no objection to the concept of a precautionary approach, which shifts the emphasis of the management of fish stocks from exploitation to the recognition that knowledge of these stocks is still largely deficient. However, the Committee is concerned about the vagueness of the standard adopted in the Convention, particularly the meaning of the phrase 'in accordance with this convention and all relevant internationally agreed standards and recommended practices

62 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, pp. 60-61.

63 *Transcript of Evidence*, 23 June 2003, p. 60.

and procedures'. The Committee has been advised of past efforts to clarify the practical aspects of the precautionary approach in relation to highly migratory fish stocks:

Specific conferences have taken place in relation to tuna resources and highly migratory fisheries resources which have dealt with the application of the precautionary approach to management of those resources. Hopefully, those would be the ones that would be applied.⁶⁴

- 7.71 The Committee believes that it would be premature for Australia to hold the expectation that 'hopefully' the results of these conferences would be adopted by the Commission as definitive version of 'all relevant internationally agreed standards and recommended practices and procedures'. It is a matter of concern that this issue has been left largely unexplored in the treaty text.

Impact of the Convention

East coast tuna industry

- 7.72 Mr Lee told the Committee that membership of the Commission would place Australia in the 'best position to influence, push for and contribute to responsible fishing practices that would benefit the east coast fishing industry'.⁶⁵ The East Coast Tuna Boat Owners Association however raised concerns about the costs of implementing the Convention and whether any compensation measures will be put in place to help them cover their costs.⁶⁶

- 7.73 AFFA advised that:

...as for the level of the costs, no dollar values have yet been spoken of, so it is very difficult to say that it will cost industry X or 10 times X. We just do not know. But from our reading of it, our understanding of the way the commission will pan out is that the costs will not be a significant impost in any way on the east coast tuna industry.⁶⁷

64 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 60.

65 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

66 James Lee, *Transcript of Evidence*, 23 June 2003, p. 69.

67 James Lee, *Transcript of Evidence*, 23 June 2003, pp. 69-70.

- 7.74 The Committee notes that the cost of implementation was raised as an issue in its previous report on the Fish Stocks Agreement by fishing industry representatives. On that occasion, their concerns related to the imposition of costs additional to existing domestic fishing compliance costs.⁶⁸

Recreational fishing

- 7.75 The Committee is aware of concerns that recreational fishing catches may be considered part of the Convention and sought information on the extent of this fishing. The Committee was advised by AFFA that:

There has recently been a national recreational fishery and Indigenous fisheries survey that seeks to determine levels of catch for a range of recreational species, including yellowfin tuna and striped marlin—which are important target species for the recreational fishers off the east coast. The catches are extremely low compared to those catches taken by the Australian commercial industry, and almost minuscule or microscopic as far as the western and central Pacific Ocean is concerned. Also, the majority of fish are caught and then released...⁶⁹

State Governments

- 7.76 The Committee was advised that there would be some impact on the State governments. The Tasmanian Government noted that the implementation of the plans would require State cooperation. The Victorian Government however commented that there was likely to be a limited impact on Victorian fisheries. The Queensland Government observed that ‘determining national allocations could be difficult but should not impede ratification process’.⁷⁰

- 7.77 The Committee notes comments by the NSW Government that:

Given the potential impact on commercial, recreational, and fisheries conservation interests, however, NSW considers that implementation of the Convention by the Commonwealth

68 JSCOT, *Report 28: Treaties Tabled on 12 October 1999*, p. 12.

69 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 68.

70 Attachment 2, tabled with the NIA and Treaty text, p. 1.

must include multi-lateral consultation on any proposed allocation mechanism for fish stocks.⁷¹

- 7.78 The Committee also understands that the NSW Government desires that there be consultation with States and Territories in relation to implementation of the Convention before the Convention enters into force.⁷² The Committee supports these proposals for additional consultations to the extent that they will promote the implementation of the purposes of the Convention.
- 7.79 When comments were invited by the Government on 14 March 2003 regarding Australia's proposed ratification of the Convention only positive feedback supporting the treaty action was received.⁷³

Fishing entities

- 7.80 Taiwan is not a party to the Convention; it is treated as a 'fishing entity' involved in the work of the Commission, as per Annex I to the Convention.⁷⁴ DFAT advised that:

A fishing entity is an entity on the international plane other than a State which takes on international responsibility for the fishing vessels listed in its register. The participation of such entities in the work of regional fisheries conventions is recognised in paragraph 3 of Article 1 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.⁷⁵

- 7.81 DFAT also informed the Committee that:

The negotiating process was obviously quite a difficult one, given the participation of both China and Chinese Taipei throughout. Several versions were developed during that MHLC [Multilateral High Level Conference] process. But the overriding principle here is the conservation and management of the fisheries resource. Taiwan is a major

71 NSW Government, *Submission 17*, p. 2.

72 NSW Government, *Submission 17*, p. 2.

73 Attachment 2, tabled with the NIA and Treaty text, p. 2.

74 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 57.

75 DFAT, *Submission 23.2*, p. 1.

worldwide fishing nation and, insofar as working towards conservation and management, there is a requirement to recognise the need to involve Chinese Taipei in that form. The mechanism that was used, as mentioned, is annex I, which deals with fishing entities. Taiwan is not actually classed as a party to the treaty; it is a fishing entity.⁷⁶

- 7.82 The Committee was concerned about possible involvement of private Taiwanese interests involvement in situations of illegal fishing, including funding these operations. In the Committee's view it is important to have Taiwan involved as part of this Convention for the purpose of monitoring to protect migratory fish stocks.
- 7.83 The Committee was also concerned that the definition of a 'fishing entity' might permit unintended bodies becoming a signatory entity.
- 7.84 DFAT reassured the Committee that: 'The formulation is written in such a way as to only provide for participation by Taiwan.'⁷⁷

Catch documentation

- 7.85 The Committee was interested in whether there had been any discussion in relation to certifying fish that are taken from the western Pacific and central Pacific as a means of tracking the sale of illegal fish.
- 7.86 The Committee was advised that this matter had not been raised because the species Australia is fishing in the convention area are not of significant value. Since they tend not to be sold as individual fish they are very difficult to track using a catch documentation scheme. However, in relation to highly valuable fish:

Regional fisheries management organisations are now implementing catch documentation schemes to keep tabs on significantly valuable fish resources. Certainly, as part of a scientific program, catches are recorded and data is collected on volumes. If it were seen that there was a need to introduce a catch documentation scheme for a particular species under the jurisdiction of this commission, then I am sure the

76 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 57.

77 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, pp. 61-62.

commission would investigate that and implement such a catch documentation scheme.⁷⁸

- 7.87 While tuna and billfish would come under the commission, the majority (1.2 million tonnes out of last year's total catch of 1.9 million tonnes) is skipjack tuna, which goes almost entirely into cans and provides 60 per cent of the world's canned tuna.⁷⁹ The Committee was advised that illegal fishing was not an issue with skipjack tuna, which had become almost uneconomic to fish:

Several years ago, the value per tonne was about \$US550 and it was almost impossible to break even under those circumstances. Certain measures by the industry have resulted in an increase in value to the order of \$US800 to \$1,000 per tonne. Nevertheless, that is not adequately lucrative to incite illegal, unregulated or unreported fishing. There is a significant fishery for yellowfin tuna of about 475,000 tonnes and for bigeye tuna of about 115,000 tonnes. These fish predominantly go to the sashimi markets in Japan and certainly there would be a potential for illegal fisheries to catch these animals.⁸⁰

- 7.88 The Committee was also advised of a catch documentation scheme in place under the auspices of the Indian Ocean Tuna Commission in relation to bigeye tuna, which had been primarily driven by Japan to prevent overfishing, and that a similar documentation scheme would occur in the Pacific.⁸¹

Subsistence fishing

- 7.89 The Committee was interested in what 'subsistence fishing' entailed under the Convention and what parameters were used in determining its meaning.
- 7.90 AFFA informed the Committee that the words 'subsistence, small-scale and artisanal' were not defined in the Convention text and that subsistence fishing had been defined on a case-by-case basis:

78 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

79 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

80 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

81 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

In the absence of a formal definition of subsistence fishing it will be up to the Commission (created by the Convention) to decide what fishing activities are defined as subsistence, small-scale or artisanal and those that are defined as commercial.⁸²

7.91 As a guide, the type of fishing will be defined by:

- The size, construction and method of powering a fishing vessel,
- The species of fish caught,
- The sophistication of the equipment used to catch fish,
- The volume and storage of the fish caught and the method by which it is disposed, and
- The geographical area in which the fishing is conducted.⁸³

Costs

7.92 AFFA advised that the cost to Australia of membership had yet to be resolved. DFAT also advised that while operational costs relating to monitoring, control and surveillance will be borne by industry, government will need to bear some of the costs of participation as there are direct benefits to Australia as a whole from being engaged:

Once fully established, it is possible that Australia's annual contribution will be upwards of \$130,000, but it could be greater in the initial years when the distant water fishing nations are still yet to join. It should be noted that many of the obligations imposed by the convention are already being met through the current activities of the Australian Fisheries Management Authority and the Department of Agriculture, Fisheries and Forestry.⁸⁴

7.93 The Committee appreciates the reasons for costs being difficult to ascertain at this stage. The Committee is, however, concerned that while a budget contribution formula would have to be developed

82 AFFA, *Submission 27*, p. 1.

83 AFFA, *Submission 27*, p. 1.

84 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

before the Convention was ratified,⁸⁵ it has received no evidence that suggests that this issue has been resolved.

- 7.94 Further, given the dearth of ratifications by DWFNs, the Committee is concerned that Australia would have to bear a much larger cost than the estimated \$130,000 per year. The Committee considers that Australia should seek a contribution from DWFNs to the operating costs of the Commission should the Convention come into force, as DWFNs stand to benefit from the conservation activities of the Commission and it would not be in the spirit of the obligation to cooperate for them not to contribute.

Consultation

- 7.95 The Committee noted the process of consultation as set out in the Annex to the NIA and is satisfied that the extent of consultation has been adequate.

Implementation

- 7.96 The Committee was advised that Australia's obligations under the convention would be implemented through the Fisheries Management Act:

Australia is in the process of implementing a management plan for the long-line sector of the east coast tuna and billfish fishery. Once implemented, the management plan will clearly state how the fishery is to be managed and will be the vehicle by which Australia's obligations under the convention would be applied.⁸⁶

- 7.97 Implementation will require minor amendments to the Fisheries Management Act and the Committee was advised that discussions are in progress between DFAT, AFFA and AFMA on the preparation of that legislation.⁸⁷

85 Attachment 2, tabled with the NIA and Treaty text, p. 1.

86 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

87 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 58.

- 7.98 The need for State cooperation in implementing of Australia's approach to regional fisheries management was noted by AFFA and the Tasmanian Government.⁸⁸

Concluding remarks and recommendations

- 7.99 The Committee supports the intentions of the convention in establishing the Commission. The Committee agrees that the ability to participate in the work of the Commission and to retain access for Australian fishing vessels to the Convention area are both valid reasons to support the ratification of the Convention. However, the Committee's inquiry has revealed a number of concerns in relation to the effectiveness of the Commission.
- 7.100 First, the Committee is concerned that the fact that there have been no ratifications by the DWFNs may undermine the work of the Commission. The Committee is particularly concerned by this because the cooperation and involvement of all affected nations is essential to the successful management of the fish stocks in the Convention Area. Nonetheless, the Committee's view on this point is that Australia should be one of the first thirteen ratifying nations so as to ensure that the Australian fishing industry is not denied access to the Convention Area.
- 7.101 Secondly, the precautionary approach has not been defined with sufficient clarity in the treaty text. The Committee believes that this could undermine the implementation of effective conservation measures by the Commission.
- 7.102 Thirdly, the Committee is concerned that a number of DWFNs have not yet signed or ratified the Fish Stocks Agreement, which is the framework agreement under which the present Convention is to operate. The Committee has been advised that this limits the Commission's ability to secure the compliance of the vessels of non-members. The Committee is concerned about the fact that Australian vessels would be subject to different obligations to the vessels of the DWFNs who had not ratified the Fish Stocks Agreement. If this state of affairs were to continue for a great length of time it would undermine the authority of the Commission. Therefore, the

88 Attachment 2, tabled with the NIA and Treaty text, p. 1.

Committee urges the Government to encourage those countries that are yet to sign and/or ratify the Fish Stocks Agreement to do so as soon as practicable.

- 7.103 Fourthly, the Committee is concerned that Australia would bear a large proportion of the costs of running the Commission until the DWFNs join.
- 7.104 The Committee considers that while these four concerns are substantial, they do not outweigh Australia's interest in signing the Convention so as to ensure Australia's participation in the work of the Commission and continued access to the fish stocks of the western and central Pacific Ocean for the Australian fishing industry.
- 7.105 Despite recommending ratification, the Committee considers that a far greater contribution from DWFNs is required before the present state of 'cooperation' can be considered meaningful. This is because the entry into force of the Convention would mean that DWFNs would still have access to the Convention Area despite not having ratifying either the Fish Stocks Agreement or the Convention or making a commitment to providing a financial contribution to the work of the Commission.
- 7.106 The Committee therefore recommends that the Government encourage and support through the preparatory conferences the aim of ensuring that countries that are proposed as members of this body ratify the Fish Stocks Agreement.

Recommendation 9

The Committee supports the Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and recommends that binding treaty action be taken.

Recommendation 10

The Committee recommends that in future international Treaty negotiations of this kind, Australia seek to give preference to more rigorous language of the kind contained in Article 5(b) 'best possible scientific evidence' in contrast to the ill defined terms of Article 5(c) 'precautionary approach' with the consequent definitional and commercial uncertainty that this ill defined term carries at the international level.

Recommendation 11

The Committee recommends that Australia support and encourage through the preparatory conferences the aim of ensuring that countries that are proposed as members of this body ratify the Fish Stocks Agreement.

Exchange of Notes for the Financing of Certain Education and Cultural Exchange Programmes

Introduction

- 8.1 The purpose of the *Exchange of Notes, done at Canberra on 7 April – 27 May 2003, Amending the Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America for the Financing of Certain Educational and Cultural Exchange Programmes of 28 August 1964* (the Fulbright Agreement) is to amend one provision of the Fulbright Agreement. The amendment establishes that members of the Board of Directors of the Australian-American Fulbright Commission may serve an extra year of appointment from one to two years.

Background

- 8.2 The Fulbright Agreement came into force on 28 August 1964. It established the Australian-American Educational Foundation to carry out the Agreement. The Foundation, now commonly known as the Australian-American Fulbright Commission (AAFC), is recognised by the Governments of Australia and the United States of America (USA) as a bi-national organisation created and established to facilitate the

administration of an educational and cultural programme.¹ The aim of the program is to further strengthen international co-operative relations between the countries.

Proposed treaty action

- 8.3 The proposed treaty action concerns an amendment to Article 5 of the Fulbright Agreement.
- 8.4 Article 5 establishes a Board of Directors to run the AAFC. The Board consists of ten Directors, specifically five citizens of the USA (at least two of which are to be officers of the US Foreign Service establishment in Australia) and five Australian citizens (two of which are to be officers of the Government of Australia). The principal officer in charge of the Diplomatic Mission of the USA to Australia (Chief of Mission) and the Prime Minister of Australia are honorary Chairmen of the Board, and a chairman with voting power is selected by the Board from its members.²
- 8.5 The five American Directors can be appointed and removed by the Chief of Mission, and similarly the Australian members of the Board can be appointed and removed by the Australian Prime Minister.³
- 8.6 The term of appointment of Board members is one year from 31 December, following the date of appointment.⁴
- 8.7 The proposed amendment, which is described as 'relatively minor', provides for an extension of the term of the members of the Board of Directors of the AAFC.⁵ Specifically, it is proposed that members of the Board serve from the time of their appointment for two years, as opposed to the current one year.

1 National Interest Analysis (NIA), para. 7.

2 Article 5.

3 Article 5.

4 Article 5.

5 Colin, Milner, *Transcript of Evidence*, 23 June 2003, p. 48.

Rationale for Amendment

- 8.8 The NIA presents a number of reasons for extension of the term of office of members of the Board of Directors. It argues that the amendment would increase the efficiency of the Foundation's operations, which in turn would 'increase the Foundation's capacity to enhance Australia-US educational linkages'⁶.
- 8.9 The NIA states that there has been 'reasonably extensive' use of Article 5 for re-appointment of board members.⁷ It argues that the range of academic and governmental agencies that the AAFC deals with, the complexity of the issues involved, and the frequent need to take a longer term perspective, have made the re-appointment of board members (by Australia and the USA), a more practical alternative to new appointments.⁸ The NIA further argues that 'with re-appointments, experienced Board members are able to perform their duties more effectively and efficiently', and that there is more continuity across issues.⁹
- 8.10 Furthermore, the NIA states that the proposed amendment would create greater certainty of appointment, encourage greater interest and involvement from members of the Board, and would be more practical and less time-consuming administratively.¹⁰

Consultation

- 8.11 The proposed treaty action amending Article 5 originated from the Board of Directors in May 1999.¹¹ In accordance with Article 13, the amendment is based on the exchange of notes between the Department of Foreign Affairs and Trade (DFAT) and the United States Embassy in Canberra. The correspondence took place in the period between April and May 2003.

6 NIA, para. 18.

7 NIA, para. 6 and David Ray, *Transcript of Evidence*, 23 June 2003, p. 49.

8 NIA, para. 11.

9 NIA, para. 11.

10 NIA, para. 12.

11 NIA, para. 14.

Costs

- 8.12 The Committee was advised that it is anticipated that there will be minor financial savings in administrative costs to the Department of Education, Science and Training due to the appointments to the Foundation being less frequent. There will be no foreseeable additional financial costs due to the Amendment taking effect.¹²

Implementation

- 8.13 The amendment provides that it will come into effect on a date to be specified by the Australian Government through the diplomatic channel.¹³ It is proposed that the amendment come into force before the next round of appointments to the board of directors.
- 8.14 The NIA foresees the implementation of the proposed treaty action as having minimal affects on Australia's rights and obligations under the treaty, and that it would not require legislative change.

Conclusions and recommendation

- 8.15 The Committee agrees that there are benefits to be gained by extending the term of office of members of the Board of Directors to two years and therefore supports the amendment.

12 NIA, para. 17.

13 NIA, para. 4.

Recommendation 12

The Committee supports the views expressed in the National Interest Analysis and the Exchange of Letters amending the Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America for the Financing of Certain Educational and Cultural Exchange Programmes, and recommends that binding treaty action be taken.

**Julie Bishop MP
Chair**

August 2003



Appendix A - Submissions

- 1 Phillips Fox
- 2 Australian Patriot Movement
- 2.1 Australian Patriot Movement (Supplementary)
- 2.2 Australian Patriot Movement (Supplementary)
- 2.3 Australian Patriot Movement (Supplementary)
- 2.4 Australian Patriot Movement (Supplementary)
- 2.5 Australian Patriot Movement (Supplementary)
- 2.6 Australian Patriot Movement (Supplementary)
- 2.7 Australian Patriot Movement (Supplementary)
- 2.8 Australian Patriot Movement (Supplementary)
- 2.9 Australian Patriot Movement (Supplementary)
- 2.10 Australian Patriot Movement (Supplementary)
- 2.11 Australian Patriot Movement (Supplementary)
- 3 Ms Margaret Pollock
- 4 Woodside Energy Australia
- 5 Global Exchange
- 6 Oxfam Community Aid Abroad
- 7 East Timor Institute for Reconstruction Monitoring and Analysis

- 8 East Timor Independent Information Centre for the Timor Sea
- 9 The Association of Australian Ports and Marine Authorities
- 10 Australians for a Free East Timor
- 11 Australia East Timor Association in New South Wales
- 12 Mr Matthew Coffey
- 13 Geoffrey McKee and Associates Pty Ltd
- 14 Mr Robert Peters
- 15 Northern Territory Government
- 16 Queensland Government
- 17 New South Wales Government
- 18 Greenpeace Australia Pacific
- 19 Australian Capital Territory Government
- 19.1 Australian Capital Territory Government (Supplementary)
- 20 Legislative Council of Tasmania
- 20.1 Legislative Council of Tasmania (Supplementary)
- 21 Tasmanian Government
- 22 South Australian Government
- 23 Department of Foreign Affairs and Trade
- 23.1 Department of Foreign Affairs and Trade (Supplementary)
- 23.2 Department of Foreign Affairs and Trade (Supplementary)
- 24 Department of Premier and Cabinet, Government of Western Australia
- 25 Mr Robert King
- 26 Department of Family and Community Services
- 27 Department of Agriculture Fisheries and Forestry - Australia
- 28 Department of Health and Ageing



Appendix B - Witnesses

Monday, 16 June 2003 - Canberra

Attorney-General Department

Mr Stephen Bouwhius, Acting Assistant Secretary, Office of International Law

Australian Maritime Safety Authority

Mr David Baird, General Manager, Australian Search and Rescue

Department of Employment and Workplace Relations

Ms Jean Ffrench, Director, International (ILO) Section

Mr Phillip Knight, Assistant Director, International (ILO) Section, Workplace Relations Policy and Legal Group

Department of Family and Community Services

Mr Roger Barson, Assistant Secretary, International Branch

Mr Peter Hutchinson, Director, Agreements, International Branch

Department of Foreign Affairs and Trade

Ms Lucy Charlesworth, Director, European Union Section

Mr Alan Fewster, Executive Director, Treaties Secretariat, Legal Branch

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

Mr Phillip Stonehouse, Director, India and South Asia Section

Ms Margaret Twomey, Assistant Secretary, Northern, Southern and Eastern European Branch

Mr Russell Wild, Executive Officer, International Law and Transnational Crime Section, Legal Branch

Department of Transport and Regional Services

Ms Clare Guenther, Policy Officer

Mr Andrew Tongue, First Assistant Secretary, Transport Security Division

Mr Jim Wolfe, Assistant Secretary, Maritime Security

Department of Treasury

Mr Raphael Cicchini, Senior Adviser International, Superannuation, Retirement and Savings Division

Mr Nigel Murray, Manager, International Superannuation, Retirement and Savings Division

Monday, 23 June 2003 - Canberra

Attorney-General Department

Mr Greg Manning, Principal Legal Officer, Public International Law Branch, Office of International Law

Ms Rebecca Irwin, Assistant Secretary, Public International Law Branch, Office of International Law

Australian Fisheries Management Authority

Mr David Alden, Manager, Eastern Tuna and Billfish Fishery

Mr Leslie Roberts, Manager, Eastern Tuna and Billfish Fishery

Department of Agriculture Fisheries & Forestry

Dr John Kalish, Program Leader, Fisheries and Marine Sciences,
Bureau of Rural Sciences

Mr James Lee, Acting Director, International Fisheries

Department of Education, Science and Training

Mr David Ray, Europe, Americas, Japan and Korea Unit

Department of Foreign Affairs and Trade

Mr George Atkin, Assistant Secretary, Pacific Islands Branch, Pacific,
Africa and Middle East Division

Mr Alexander Brooking, Director, Northern, Central and Eastern
Europe Section

Mr Alan Fewster, Executive Director, Treaties Secretariat, Legal
Branch

Ms Emma Kerslake, Executive Officer, Pacific Regional Section,
Pacific Islands Branch, Pacific, Africa and Middle East Division

Ms Kathy Klugman, Director, East Timor Section

Mr Peter McColl, Director, United States Section, Americas Branch

Mr Colin Milner, Director, International Law and Transnational
Crime Section, Legal Branch

Mr Chris Moraitis, Senior Legal Adviser

Mr Mark Scully, Executive Officer

Mr Andrew Serdy, Executive Officer, Sea Law, Environmental Law
and Antarctic Section

Department of Health and Ageing

Mr Mark Burness, Director, Medicare Eligibility Section, Medicare
Benefits Branch

Mr Craig Rayner, Assistant Director, Medicare Eligibility Section,
Medicare Benefits Branch, Medicare Eligibility Section

Department of Industry, Tourism and Resources

Mr John Hartwell, Head, Resources Division

Mr Ian Walker, Manager, Timor Sea Team, Resources Division

Department of the Treasury

Mr Michael Buckley, Manager, Business Income Division, Resources
and Environment Tax Unit Business Income Division



Appendix C – Parties consulted

State and Territory Governments

The Hon Clare Martin MLA, Chief Minister of the Northern Territory

The Hon Dr Geoff Gallop MLA, Premier of Western Australia

The Hon Steve Bracks MLA, Premier of Victoria

The Hon Jim Bacon MLA, Premier of Tasmania

The Hon Michael Rann MLA, Premier of South Australia

The Hon Robert Carr MLA, Premier of New South Wales

The Hon Peter Beattie MLA, Premier of Queensland

Mr Jon Stanhope MLA, Chief Minister of the Australian Capital Territory

The Hon Michael Polley MLA, Speaker, Legislative Assembly, Tasmanian Parliament

The Hon Don Wing MLC, President, Legislative Council, Tasmanian Parliament

The Hon Peter Lewis MLA, Speaker, Legislative Assembly, South Australian Parliament

The Hon Ron Roberts MLC, President, Legislative Council, South Australian Parliament

The Hon Judy Maddigan MP, Speaker, Legislative Assembly, Victorian Parliament

The Hon Monica Gould MLC, President, Legislative Council, Victorian Parliament

Mr Wayne Berry MLA, Speaker, Australian Capital Territory Legislative Assembly

The Hon Fred Riebeling MLA, Speaker, Legislative Assembly, Western Australian Parliament

The Hon John Cowdell MLC, President, Legislative Council, Western Australian Parliament

The Hon John Aquilina MP, Speaker, Legislative Assembly, New South Wales Parliament

The Hon Dr Meredith Burgmann MLC, President, Legislative Council, New South Wales Parliament

Mrs Loraine Braham MLA, Speaker, Northern Territory Legislative Assembly