THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Joint Standing Committee on Treaties

Report 21

Five Treaties Tabled on 16 February 1999

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CONCLUSIONS AND RECOMMENDATIONS

Treaty on Extradition between Australia and the Republic of South Africa

The Committee supports the *Treaty on Extradition between Australia and the Republic of South Africa* and recommends that binding treaty action be taken (paragraph 2.18).

Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters

The Committee supports the *Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters* and recommends that binding treaty action be taken (paragraph 2.35).

Agreement between Australia and New Zealand concerning the Status of their Forces

The Committee supports the *Agreement between Australia and New Zealand concerning the Status of their Forces* and recommends that binding treaty action be taken (paragraph 2.50).

Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing

The Committee supports the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing* and recommends that binding treaty action be taken (paragraph 2.63).

Agreement between the United States of America and Australia concerning Defense Communications Services

The Committee supports the *Agreement between the United States of America and Australia concerning Defense Communications Services* and recommends that binding treaty action be taken (paragraph 2.74).

CHAPTER 1

Introduction

Purpose of the report

1.1 This report contains advice to the Parliament on the review by the Joint Standing Committee on Treaties (the Committee) of the treaties tabled on 16 February 1999:

- *Treaty on Extradition between Australia and the Republic of South Africa*;
- *Treaty between Australia and Sweden on Mutual Assistance in Criminal matters*;
- *Agreement between the Government of Australia and the Government of New Zealand concerning the Status of their Forces*;
- *Agreement between the Government of Australia and the Government of the United States of America concerning Acquisition and Cross-servicing*; and
- *Agreement between the Government of the United States of America and the Government of Australia concerning Defense Communications Services*.

1.2 The report refers to, and should be read in conjunction with, the National Interest Analysis prepared for each treaty. These analyses are prepared by the government agency responsible for the administration of each treaty and are tabled in Parliament as aids to parliamentarians when considering the proposed treaty action.

1.3 Copies of each of the treaties considered in this report, and the National Interest Analysis prepared for each treaty, can be obtained from the Treaties Database maintained on the Internet by the Department of Foreign Affairs and Trade (www.austlii.edu.au/au/other/dfat/) or from the Committee secretariat.

Conduct of the review

1.4 Our review of each of the treaties considered in this report was advertised in the national press and on our web site (http://www.aph.gov.au/house/committee/jsct/).[1] The submissions received in response to the invitations to comment contained in the advertisements are listed at Appendix 2.

1.5 We also gathered evidence on these treaties at a public hearing on 8 March 1999 and a list of witnesses is at Appendix 3. A transcript of the evidence taken at the hearing can be obtained from a database maintained on the Internet by the Department of the Parliamentary Reporting Staff (www.aph.gov.au/hansard/joint/committee/comjoint.htm) or from the Committee secretariat.

1 Our review was advertised in the *Weekend Australian*, on 20 February 1999

CHAPTER 2

Treaty on Extradition between Australia and the Republic of South Africa

Background

2.1 Extradition treaties are a mechanism for the surrender of fugitive criminals from one country to another. While extradition treaties are not the only means by which a country may request or grant the surrender of fugitive criminals, they are a reliable and effective means of doing so because they create an obligation at international law to extradite.

2.2 Extradition treaties also benefit Australia by making Australia a less attractive haven for overseas criminals wishing to come to Australia to evade justice in their own countries.

2.3 In Australia, extradition is governed by the Commonwealth *Extradition Act 1988*, which enables the Government to negotiate bilateral extradition treaties. Wherever possible, the Government seeks to negotiate extradition arrangements in a form consistent with a model extradition treaty developed under the auspices of the United Nations.

Proposed treaty action

2.4 At present, extradition arrangements between Australia and South Africa operate on a non-treaty basis of reciprocity and are not binding at international law.[1] Given the increasing economic, political and people to people interactions between the Australia and South Africa, the governments of both countries consider that it is desirable to move to establish extradition arrangements in a treaty-status agreement.[2]

2.5 The proposed *Treaty on Extradition between Australia and South Africa* not only replaces the current non-treaty reciprocal arrangements, but also supersedes an extradition treaty negotiated between the two countries in 1995. While the 1995 treaty was signed on 13 December

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1 Christopher Hodges, (Attorney-General's Department) *Transcript of Evidence*, 8 March 1999, p. TR2

2 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 1

1995, it did not come into force. The 1995 treaty reflected the requirements of South African law at the time, which obliged the country seeking extradition to provide evidence establishing a *prima facie* case. [3] Since then South Africa's extradition law has been amended to require only a detailed statement of the conduct alleged against the accused person. The proposed new agreement reflects this requirement, which is consistent with the principles underpinning the model extradition treaty.[4]

2.6 The only significant difference between the proposed treaty and the model extradition treaty is the inclusion of a right to refuse extradition if it would be unjust or oppressive (Article 3.2h). The National Interest Analysis for the proposed treaty explains that:

> This ground derives from the Commonwealth Scheme for the Rendition of Fugitive Offenders (a non-treaty arrangement for extradition between Commonwealth countries dating from 1966) and applies to all other Commonwealth countries under Australian extradition legislation.[5]

Obligations imposed by the proposed treaty action

Legal obligations

2.7 The treaty establishes an obligation to extradite between Australia and South Africa. It is expressed in the treaty in the following terms:

> Each Contracting State agrees to extradite to the other, in accordance with the provisions of this treaty, any persons who are wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence.[6]

2.8 The obligation to extradite is qualified by numerous internationally acknowledged exceptions, including that:

- extradition shall not be granted for political or military offences (that is, offences against a military code), or for purposes connected with a person's race, religion, nationality or political opinions;

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3 The former Committee noted, and supported, the 1995 treaty in its *First Report* (August 1996).

4 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 2

5 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 3

6 *Treaty on Extradition between Australian and the Republic of South Africa*, p. 2

- extradition may be refused for offences punishable by death under the law of the Requesting State, unless the Requesting State gives assurances that the death penalty will not be carried out;

- extradition may be refused for offences which carry a punishment of the kind referred to in Article 7 of the International Covenant on Civil and Political Rights (for example, torture or other cruel or inhuman treatment); and

- extradition may be refused if, in the circumstances, it would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.[7]

2.9 The proposed treaty also allows for the surrender of property acquired as a result of the offence, subject to the laws of the requested State and the rights of third parties. [8]

Costs

2.10 The proposed treaty provides that each party must meet the extradition costs incurred in its own territory – that is, the cost of arresting and detaining a person sought for extradition and the costs associated with any extradition proceedings. The cost of transporting the extradited person is to be met by the Requesting Party.[9]

2.11 In Australia, the costs associated with extradition proceedings under the proposed treaty will be met by the relevant Commonwealth agencies from within existing budget allocations.[10]

Proposed date for binding treaty action

2.12 The proposed treaty will be given effect in Australian law by Regulations made under the *Extradition Act 1988*.

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7 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 2

8 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 2

9 *Treaty on Extradition between Australia and South Africa*, p. 9

10 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 2

2.13 The Regulations will not be made until the South African Government has advised the Australian Government that it has complied with all domestic requirements for the treaty to enter into force. It is intended that the treaty will enter into force on a date that coincides with the commencement of the Regulations.[11]

Evidence and comments

2.14 We have indicated our support for the use of the model treaty on a number of occasions over the last three years.[12] Most recently, our support for the negotiation of modernised extradition arrangements was expressed in relation to a proposed extradition treaty with Poland.[13]

2.15 At our hearing on 8 March 1999 we took evidence on:

- the advantages associated with modernised extradition arrangements, which require the provision of a statement of the conduct of the alleged offences rather than the provision of material sufficient to demonstrate a *prima facie* case;[14]

- the effect of Article 2.3 of the proposed treaty, which treats offences against taxation laws as a single category of offence rather than seeking to define the various offences described in the taxation regimes of each country;[15]

- the effect of Article 3.3, which describes the relationship between the proposed treaty and the obligations imposed by any multilateral treaties to which Australia and South Africa are parties;[16] and

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11 National Interest Analysis for the *Treaty on Extradition between Australia and the Republic of South Africa*, p. 1 and p.3

12 See Joint Standing Committee on Treaties, *First Report* (August 1996); *Tenth Report* (September 1997 and *Thirteenth Report* (March 1998).

13 See Joint Standing Committee on Treaties, *Report 19: The Fifth Protocol to the General Agreement on Trade in Services and Five Treaties Tabled on 30 June 1998* (March 1999), p. 22

14 Christopher Hodges and Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR2

15 Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR4

16 Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, pp. TR4-5

- the rationale for Article 2.1, which provides that extradition will not be granted if the period of a sentence remaining is six months or less (the rationale being that to extradite someone for such a short sentence would not be cost-effective and could be unduly oppressive, given that the accused would most likely be in custody for a lengthy period while the extradition was being finalised).[17]

2.16 We also discussed the recent extradition of Phillip Bell from South Africa to Australia. It was argued by witnesses from the Attorney-General's Department that, while the Bell extradition occurred under the current non-treaty reciprocal arrangements, the process would have been smoother if the extradition arrangements were on a firmer, legally binding footing.[18] In the Bell case there was 'some uncertainty' and 'some temporary confusion about what documentation was going to be required'.[19] A treaty status agreement would guarantee extradition and would make clear what documentation was required to support the extradition.

2.17 In a written submission provided after the hearing, the Attorney-General's Department gave answers to questions taken on notice about the number of extraditions that have taken place between Australia and South Africa in the recent past, and on whether the treaty has retrospective application. The answers were:

- *on the number of extraditions*: since 1993 there have been 3 people extradited from South Africa to Australia (with one additional case currently before South African courts), and no extraditions from Australia to South Africa (although 2 requests are currently before Australian courts);

- *on retrospective application*: Article 16 provides that the treaty applies to requests made after it has entered into force, regardless of the date of commission of the alleged offence. Any request for

17 Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR5

18 Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, pp. TR3-4

19 Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR4

extradition is subject to the human rights safeguards described in the treaty.[20]

2.18 The Committee supports the *Treaty on Extradition between Australia and the Republic of South Africa* and recommends that binding treaty action be taken.

Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters

Background

2.19 Treaties on mutual assistance in criminal matters are intended to help combat serious crimes which cross international boundaries. They enable treaty partners to assist each other in the investigation and prosecution of crimes such as drug trafficking and money laundering. They also allow law enforcement agencies to seek assistance in locating, restraining and forfeiting proceeds of crimes that occurred in Australia.[21]

2.20 While it is possible for countries to provide assistance in criminal matters without a treaty level agreement, the negotiation of a treaty provides a reliable and effective basis for such cooperation by establishing a legal obligation to provide mutual assistance. The negotiation of a treaty also enables common procedures and administrative requirements to be established.

2.21 In Australia, mutual assistance arrangements are governed by the *Mutual Assistance in Criminal Matters Act 1987*, which enables the Government to give effect to bilateral mutual assistance treaties with other countries.[22] Wherever possible, the Government seeks to negotiate mutual assistance arrangements in a form consistent with an internationally recognised 'model' treaty.

Proposed treaty action

2.22 The *Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters* proposes to set up a mutual assistance regime to

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20 Attorney-General's Department, *Submission No.1*, pp. 1-2

21 National Interest Analysis for the *Treaty between Australian and Sweden on Mutual Assistance in Criminal Matters*, p. 1

22 National Interest Analysis for the *Treaty between Australian and Sweden on Mutual Assistance in Criminal Matters*, p. 3

allow the Australian and Swedish Governments (and their law enforcement agencies) to assist each other in the investigation and prosecution of criminal matters, including revenue, foreign exchange and customs offences.

2.23 The assistance to be provided includes:

- taking evidence and obtaining statements;
- providing documents and other records;
- locating and identifying persons;
- executing requests for search and seizure;
- locating and restraining the proceeds of crime;
- making persons available to give evidence or assist investigations; and
- serving documents.[23]

Obligations imposed by the proposed treaty action

Legal obligations

2.24 The treaty will establish an obligation, binding in international law, for each party to provide assistance to the other in criminal matters.

2.25 This obligation is qualified by a number of internationally acknowledged exceptions, including that:

- assistance may be refused for political or military offences (that is, offences against a military code);
- assistance may be refused where there are substantial grounds for believing that the request was made for the purpose of prosecuting or causing prejudice to a person on account of their race, sex, religion, nationality or political opinions; and

23 National Interest Analysis for the *Treaty between Australian and Sweden on Mutual Assistance in Criminal Matters*, pp. 1-2

- assistance may be refused where the Requested State considers that granting assistance would seriously impair its sovereignty, security or national interest.[24]

2.26 Unlike other mutual assistance treaties, this treaty does not contain a provision for refusal of assistance in relation to an offence that carries the death penalty. This is because both Australia and Sweden have abolished the death penalty.[25]

Costs

2.27 The treaty provides that the Requested State is to bear all of the costs associated with a request for assistance, except:

- international travel costs, where a person is transported to and from the Requesting State to appear as a witness or assist in investigations;
- attendance expenses of experts; and
- any exceptional expenses arising from a request for assistance.

2.28 These expenses are to be met by the Requesting State.[26]

Proposed date for binding treaty action

2.29 It is proposed that the treaty will come into force on the first day of the second month after the exchange of instruments of ratification in Stockholm. Before this exchange can occur, the Australian Government will need to make Regulations under the Mutual Assistance in Criminal Matters Act. The effect of the Regulations will be to provide that the Act applies to Sweden, subject to the terms of the treaty.

Evidence and comments

Previous consideration

2.30 In the last Parliament, the former Treaties Committee expressed its support for mutual assistance treaties with Hungary, Indonesia,

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24 National Interest Analysis for the *Treaty between Australian and Sweden on Mutual Assistance in Criminal Matters*, p. 2

25 National Interest Analysis for the *Treaty between Australian and Sweden on Mutual Assistance in Criminal Matters*, p. 2

26 National Interest Analysis for the *Treaty between Australian and Sweden on Mutual Assistance in Criminal Matters*, p. 2

Ecuador, Hong Kong and the United States.[27] In its *7th Report* (March 1997) the former Committee specifically 'acknowledged the benefits of this type of treaty.'[28]

Evidence presented

2.31 At our hearing on 8 March 1999, we took evidence on:

- the difference between mutual assistance treaties and extradition treaties (which was described in the following terms – 'whereas extradition gets the person, mutual assistance gets the evidence or provides the evidence, often in an admissible form');[29]
- the importance of mutual assistance in criminal matters when seeking to combat international crime, such as drug trafficking and money laundering;[30]
- the options available to the Australian Government should one of its mutual assistance treaty partners reintroduce the death penalty (the options being to exercise its discretionary power under the Mutual Assistance in Criminal Matters Act to refuse to provide assistance, to express its abhorrence of the death penalties sentence in an exchange of diplomatic notes, or, ultimately, to negotiate a protocol to the treaty);[31]
- the evolution of mutual assistance arrangements from the reciprocal process (when the a court in one jurisdiction would recognised the validity of a document produced by a court in another jurisdiction), to the modern process (based on formal

27 See Joint Standing Committee on Treaties, *First Report* (August 1996); *7th Report, Australia's Withdrawal from UNIDO and Treaties Tabled on 11 February 1997* (March 1997); and *Tenth Report* (September 1997).

28 Joint Standing Committee on Treaties, *7th Report, Australia's Withdrawal from UNIDO and Treaties Tabled on 11 February 1997* (March 1997), p. 32

29 Christopher Hodges (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR6

30 Christopher Hodges (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR6

31 Christopher Hodges (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, pp. TR7-8 and Michael Manning (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR8

government to government agreements, which helps enhance the admissibility of the evidence obtained);[32]

- the process of 'passive' application of the provisions of the Mutual Assistance in Criminal Matters Act, which allows the Government to request another country to provide mutual assistance in the absence of formal treaty arrangements;[33] and

- the way in which the mutual assistance procedures with Sweden are expected to work in practice.[34]

2.32 After the hearing, in response to a question taken on notice, the Attorney-General's Department advised us that Australia has mutual assistance treaties in place with 18 other countries. In addition, another five treaties (including the proposed treaty with Sweden) have been signed and are awaiting the completion of domestic procedures before coming into force. A further seven treaties are being negotiated.[35]

Conclusion

2.33 Mutual assistance arrangements can play an extremely valuable role in ensuring that law enforcement agencies can extend their reach beyond national borders. Without such arrangements, the task of investigating and prosecuting criminal behaviour is complicated immeasurably.

2.34 While we recognise that such cooperation can and does occur on a reciprocal basis between governments and their law enforcement agencies, there are clear legal and procedural advantages to be gained by giving these arrangements the firm footing established by a treaty level agreement.

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32 Christopher Hodges (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR8

33 Christopher Hodges (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, p. TR8

34 Christopher Hodges (Attorney-General's Department), *Transcript of Evidence*, 8 March 1999, pp. TR9-10

35 Attorney-General's Department, *Submission No. 1*, p. 1. The 18 countries with whom Australia has mutual assistance treaties are: Argentina, Austria, Canada, Ecuador, Finland, France, Hungary, Israel, Italy, Republic of Korea, Luxembourg, Mexico, Netherlands, Philippines, Portugal, Spain, Switzerland, and the United Kingdom. The five countries with whom such treaties have been negotiated but not yet ratified are Hong Kong, Indonesia, Sweden, the United States and a replacement treaty with the United Kingdom.

2.35 The Committee supports the *Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters* and recommends that binding treaty action be taken.

Agreement between Australia and New Zealand concerning the Status of their Forces

Background

2.36 A Status of Forces Agreement (SOFA) is an internationally recognised method of regulating matters arising from the presence of one country's visiting forces in the territory of another country. Australia has SOFA arrangements with the United States of America, Papua New Guinea and Singapore. A SOFA agreement has also recently been negotiated with Malaysia.

2.37 Although Australia has a long-standing, close and very significant defence relationship with New Zealand, the two Governments have never concluded a SOFA of general application.[36]

Proposed treaty action

2.38 The proposed *Agreement between Australia and New Zealand concerning the Status of their Forces* will facilitate a range of bilateral defence activities by establishing standard conditions for the presence of New Zealand and Australian visiting forces in relation to jurisdiction, claims, immigration requirements and customs duties.

2.39 While the proposed agreement reflects the tradition of close and friendly relations between Australia and New Zealand, and caters for the large number of Defence Force personnel on exchange at any one time, the terms of the agreement are not exceptional compared to other SOFAs.[37]

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36 National Interest Analysis for the *Agreement between Australia and New Zealand concerning the Status of their Forces*, p. 1

37 National Interest Analysis for the *Agreement between Australia and New Zealand concerning the Status of their Forces*, p. 2

Obligations imposed by the proposed treaty action

2.40 The proposed agreement describes the rights and obligations of visiting forces. The terms of the agreement are extensive and cover such matters as:

- exemption from visa and passport requirements;
- authorisation to operate telecommunication systems;
- procedures in relation to criminal jurisdiction and the investigation of offences;
- the waiver of government to government claims for damage arising out of, or in the course of, the performance of official duties and for damages for injury or death while engaged in the performance of official duties; and
- a duty to respect local laws.[38]

2.41 While there are no substantial foreseeable direct financial costs associated with the proposed agreement, the agreement does provided that, in certain circumstances, the parties may be entitled to seek reimbursement of the costs of settling claims.[39]

Proposed date for binding treaty action

2.42 The proposed agreement will come into force on an exchange of notes between the parties confirming that all domestic requirements to give effect to the agreement have been met.

2.43 In Australia's case, it will be necessary to amend the *Migration Regulations*, the *Customs Regulations* and the *Sales Tax (Exemptions and Classifications) Act 1992* before binding treaty action can be taken. These amendments are in the process of being made. It is not expected that the New Zealand Government will be in a position to taken binding action for at least 18 month, as substantial changes to New Zealand's visiting forces legislation are required to give effect to the agreement.[40]

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38 National Interest Analysis for the *Agreement between Australia and New Zealand concerning the Status of their Forces*, pp. 2-4

39 National Interest Analysis for the *Agreement between Australia and New Zealand concerning the Status of their Forces*, p. 4

40 National Interest Analysis for the *Agreement between Australia and New Zealand concerning the Status of their Forces*, p. 1 and p. 5

Evidence and comments

Evidence presented

2.44 At our hearing on 8 March 1999 we took evidence on:

- the closeness of the defence relationship between Australia and New Zealand and the convergence of our strategic interests;[41]
- the level and frequency of visits and exchanges between Australian and New Zealand Defence Ministers, Defence officials and Defence Force personnel;[42]
- the nature of the ANZUS alliance following the New Zealand Government's decision not to allow nuclear powered vessels from the United States to visit its ports;[43]
- the decision by successive Australian governments to ensure that defence relationship between Australia and New Zealand is sustained and developed independently of any tensions in the ANZUS alliance;[44]
- the decision by governments in New Zealand to reduce defence spending by 30 per cent since 1990;[45] and
- the administrative and bureaucratic advantages associated with negotiating a SOFA of general application, rather than continuing to negotiate SOFA-type provisions for every personnel exchange program or joint exercise.[46]

2.45 We also received a written submission from Robert Downey arguing that:

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41 Robert Allan (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR11

42 Robert Allan (Department of Defence), *Transcript of Evidence*, 8 March 1999, pp. TR11-12

43 Robert Allan (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR12

44 Robert Allan (Department of Defence), *Transcript of Evidence*, 8 March 1999, pp. TR12-13

45 Robert Allan (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR12

46 Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR13, p. TR14 and p. TR17

> Australia is wholly responsible for its own Defence and … treaties of mutual commitment engender, at best, only a false sense of security.[47]

2.46 In response, witnesses from the Department of Defence argued that Australia is responsible for its own defence, but within the framework of our alliances with other nations.

> … our defence forces cannot act in isolation as effectively as in cooperation with other defence forces … we have extensive defence relationships throughout the region and throughout the world … these relationships are very important in terms of supporting Australia's defence capability.[48]

Conclusion

2.47 Australia's longstanding and close defence relationship with New Zealand is an essential dimension of the uniquely close relationship between the two nations.

2.48 While the defence relationship has prospered in the absence of a formal SOFA, and no doubt could continue to do so, there are sound administrative reasons to establish a standard scheme describing the rights and obligations of visiting forces.

2.49 Australia's national strategic interests are well served by the maintenance of a network of defence relationships and alliances. Although agreements on the status of visiting forces are of little strategic value in themselves, they do help secure some of the key elements in a healthy and mutually supportive defence relationship – the exchange of personnel and the participation in joint exercises.

2.50 The Committee supports the *Agreement between Australia and New Zealand concerning the Status of their Forces* and recommends that binding treaty action be taken.

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47 Robert Downey, *Submission No. 1*, p.1. Mr Downey also made submissions along similar lines is respect of two other proposed treaties considered in this report the *Agreement between Australia and the United States concerning Acquisition and Cross-servicing* and the *Agreement between the United States and Australia concerning Defence Communications Services.*

48 Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR15

Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing

Background

2.51 Acquisition and cross-servicing agreements are commonly negotiated between the United States of America and its defence partners to establish procedures to facilitate the reciprocal provision of logistic support, supplies and services to the military forces of one party by the other party.[49] These agreements provide for the reciprocal provision of supplies and services such as spare parts, food, fuel, repairs and transport services, when forces are deployed in the field. They do not cover, or provide for, the routine peacetime procurement of military goods and services.[50]

2.52 In 1998 the United States had 32 acquisition and cross-servicing agreements in place and a further 10 agreements under negotiation.[51]

Proposed treaty action

2.53 The proposed *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing* will replace an acquisition and cross-servicing agreement signed by the parties in August 1990. The 1990 agreement was signed during the Gulf War and amended in January 1991 to give it broader effect.

2.54 Both agreements are intended to enable the reciprocal provision of logistics cooperation in 'combined exercises, training, deployments, operations or other cooperative efforts and for unforeseen circumstances and exigencies.'

2.55 The proposed agreement is substantially the same as the 1990 agreement and is being remade only to accommodate some minor changes to United States domestic legislation and make clear that the arrangements are binding at international law.[52]

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49 National Interest Analysis for the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing*, p. 1

50 Kenneth Heldon (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR18

51 Kenneth Heldon (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR18

52 National Interest Analysis for the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing*, p. 1

Obligations imposed by the proposed treaty action

2.56 The proposed agreement describes in some detail the conditions and administrative framework for the transfer of logistic support, services and supplies. The principal obligation imposed by the proposed agreement is to require each party to make best efforts, consistent with national priorities, to satisfy requests from the other for logistic support, services and supplies.[53]

2.57 The proposed agreement specifically excludes the transfer of weapons and major items of equipment, such as guided missiles, naval mines and torpedoes and nuclear warheads.[54]

2.58 The provisions in the proposed agreement relating to the payment for support, services or supplies, either in cash or in kind (that is, by providing support, services or supplies of equal monetary value) replicate those in the 1990 agreement. Accordingly, there are no additional financial costs associated with the proposed agreement.[55]

Proposed date for binding treaty action

2.59 The Agreement will come into force on an exchange of notes between the parties as soon as practicable in 1999.[56]

Evidence and comments

Evidence presented

2.60 At our hearing on 8 March 1999 we took evidence on the following matters:

- the hierarchy of military logistic support agreements in place with the United States (involving the 1989 *Agreement concerning Cooperation in Defense Logistic Support*, the 1990 agreement,

53 National Interest Analysis for the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing*, p. 2

54 National Interest Analysis for the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing*, p. 2

55 National Interest Analysis for the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing*, p. 2

56 National Interest Analysis for the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing*, p. 1

and the various non-treaty status implementing arrangements negotiated under the 1990 agreement);[57]

- the origins of the move to replace the 1990 agreement (we were told by witnesses from the Department of Defence that the impetus for change came from the United States Government, not the Australian Government);[58]

- the reasons why the United States Government wished to replace the 1990 agreement (the reasons being, first, to reflect changes that had been made to the US domestic law that empowers the US Government to make such agreements and describes the scope and operation of the agreements; and, second, to make clear that the agreement is of treaty status. Defence officials said to us that the Australian Government, unlike the US Government, considered that the 1990 agreement was in fact a treaty-level agreement.);[59]

- the standard nature of the provisions in all of the acquisition and cross-servicing agreements put in place by the United States Government (we were told that there is little scope for varying the terms of these agreements: 'It is primarily a United States document and it is used between the United States and all countries with whom they see the need to have reciprocal support.');[60] and

- whether there was expected to be a commercial advantage to one party or the other as a result of the proposed agreement (we were told that while 'it is more likely that the United States has spent more in Australia than vice versa [under the arrangements to date]', the agreement provides for reciprocal support not profit making and that, in any event:

> … in the defence context, obtaining logistic support for an operation is more important … [and] over the fullness of time we

57 Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, pp. TR18-19

58 Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR19

59 Kenneth Heldon (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR18 and Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR20

60 Kenneth Heldon (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR22

> would imagine there may be some evening out [of the flow of money].[61]

Conclusion

2.61 It is clear that the Australian Government has had little influence over the terms of the proposed agreement. In essence, it is a standard form agreement that the United States Government is seeking to put in place with all of its major defence partners.

2.62 Nevertheless, we do not object to the agreement. Indeed the Australian Defence Force has as much to gain from the agreement as does the United States military. Agreements such as this are one part, albeit a small administrative part, of our wider defence relationship with the United States. To the extent that they clarify our mutual understandings, expectations and requirements, they are useful.

2.63 The Committee supports the *Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing* and recommends that binding treaty action be taken.

Agreement between the United States of America and Australia concerning Defense Communications Services

Proposed treaty action

2.64 The proposed *Agreement between the United States of America and Australia concerning Defense Communications Services* describes the division of responsibilities between the two countries for the provision, operation and management of defence communication services. The proposed agreement is to replace an equivalent agreement that was signed in November 1989 and expired in November 1994.

2.65 The communication services provided for in the proposed agreement include the use of leased commercial facilities (satellites and landline circuits) and associated hardware to permit on-line connections between the Australian and United States defence communication systems.

2.66 The proposed agreement will be reviewed annually and any non-substantive changes (such as changes to the technical, operational or

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61 Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR24

funding arrangements) may be agreed by the relevant authorities without renegotiation of the Agreement. The relevant Australian authority is the Department of Defence.

2.67 The National Interest Analysis for the proposed agreement describes the agreement as 'non-controversial in nature' and raising 'no international defence policy issues'.[62]

Obligations imposed by the proposed treaty action

2.68 The agreement requires the parties to:

- carry out and bear the cost of procurement, installation, operation and maintenance of the equipment required to provide the services described in the agreement;
- acquire and bear the cost of any services that are required (such as leasing circuits); and
- consult with each other before releasing publicly any information about the arrangements and activities done under the agreement.[63]

2.69 The costs of operating the communications system described in the agreement are apportioned as follows:

- the United States pays for trans-Pacific trunk and circuit link charges;
- Australia pays for trunk lease and circuit charges in Australia and between Australia and New Zealand;
- the parties share in the operating cost of the system, with the cost for each party calculated by assessing the percentage of system capacity used by each party; and
- any spare communications capacity in the system is made available to both parties on an equitable and user-pays basis.[64]

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62 National Interest Analysis for the *Agreement between the United States of America and Australia concerning Defense Communication Services*, p. 1

63 National Interest Analysis for the *Agreement between the United States of America and Australia concerning Defense Communication Services*, p. 2

64 National Interest Analysis for the *Agreement between the United States of America and Australia concerning Defense Communication Services*, pp. 1-2

Proposed date for binding treaty action

2.70 The agreement will enter into force on notification from Australia that all domestic requirements to give effect to the Agreement have been fulfilled.[65]

Evidence and comments

Evidence presented

2.71 At our hearing on 8 March 1999 we took evidence on:

- the nature of the communication services described in the agreement – which witnesses from the Department of Defence explained in the following terms:

> … the agreement is about the interconnection of messaging systems … primarily for the exchange of information in support of intelligence, indications and warnings, planning and preparation for operations and exercises, and the day to day routine administration of each other's element in the other country; [66]

- the daily volume of messages on the system (we were told that Australia sends '1 500 messages a day, each about half a page, each way, with the ability to go to double that for intense periods');[67]

- the annual cost to Australia of the system, which amounts to $10 000;[68]

- the impetus for the original 1989 agreement and the new proposed agreement (we were told by Defence witnesses that the United States Government was keen for these arrangements to be binding at international law);[69] and

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65 National Interest Analysis for the *Agreement between the United States of America and Australia concerning Defense Communication Services*, p. 1

66 Colonel James Hendrickson (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR25

67 Colonel James Hendrickson (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR26

68 Colonel James Hendrickson (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR26

69 Colonel James Hendrickson (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR25; and Peter Bleakley (Department of Defence), *Transcript of Evidence*, 8 March 1999, pTR27

- the fact that the communication system involves New Zealand, but that Australia pays for the trans-Tasman connection.[70]

Conclusion

2.72 We note that the proposed agreement is substantially the same as the expired 1989 agreement on the same subject.

2.73 We note also that the communication services described in the agreement involve the expenditure of only $10 000 per year. This is a small price to pay for an agreement that clearly is in our national strategic interest and is consistent with Australia's policy of sustaining a significant and diverse defence relationship with the United States.

2.74 The Committee supports the *Agreement between the United States of America and Australia concerning Defense Communications Services* and recommends that binding treaty action be taken.

ANDREW THOMSON MP

Committee Chairman

13 May 1999

70 Colonel James Hendrickson (Department of Defence), *Transcript of Evidence*, 8 March 1999, p. TR26

APPENDIX 1

EXTRACT FROM RESOLUTION OF APPOINTMENT

The Joint Standing Committee on Treaties was reconstituted in the 39th Parliament on 9 December 1998.

The Committee's Resolution of Appointment allows it to inquire into and report upon:

(a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;

(b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

  (i) either House of the Parliament, or

  (ii) a Minister; and

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

APPENDIX 2

LIST OF SUBMISSIONS

Treaty on Extradition between Australia and the Republic of South Africa

1 Attorney-General's Department

Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters

1 Attorney-General's Department

Agreement between Australia and New Zealand concerning the Status of their Forces

1 Robert Downey

Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing

1 Robert Downey

Agreement between the United States of America and Australia concerning Defense Communications Services

1 Robert Downey

APPENDIX 3

WITNESSES AT THE PUBLIC HEARING

Monday, 8 March 1999

Department of Foreign Affairs and Trade

David Mason, Executive Director, Treaties Secretariat

Attorney-General's Department

Mark Zanker, Assistant Secretary, International Trade and Environment Law Branch

Treaty on Extradition between Australia and the Republic of South Africa

Attorney-General's Department

Christopher Hodges, Principal Government Lawyer

Michael Manning, Senior Legal Officer, International Branch, Criminal Division

Treaty between Australia and Sweden on Mutual Assistance in Criminal Matters

Attorney-General's Department

Christopher Hodges, Principal Government Lawyer

Michael Manning, Senior Legal Officer, International Branch, Criminal Division

Agreement between Australia and New Zealand concerning the Status of their Forces

Department of Defence

Robert Allan, Executive Level 2, International Policy Division

Peter Bleakley, Director of Agreements, Defence Legal Office

Dr David Lloyd, Legal Officer, Directirate of Agreements, Defence Legal Office

Lieutenant Scott Ritchie, Legal Officer, Directorate of Agreements, Defence Legal Office

Agreement between Australia and the United States of America concerning Acquisition and Cross-servicing

Department of Defence

Peter Bleakley, Director of Agreements, Defence Legal Office

Kenneth Heldon, Director, International Logistics, National Support Division, Australian Defence Headquarters

Lieutenant Scott Ritchie, Legal Officer, Directorate of Agreements, Defence Legal Office

Agreement between the United States of America and Australia concerning Defense Communications Services

Department of Defence

Peter Bleakley, Director of Agreements, Defence Legal Office

Colonel James Hendrickson, Director, Information Policy and Plans

Lieutenant Scott Ritchie, Legal Officer, Directorate of Agreements, Defence Legal Office