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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Friday, 12 July 2002

Members: Ms Julie Bishop *(Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Barnett, Bartlett, Kirk, Mason, Marshall, Stephens and Tchen, and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr Hunt, Mr King and Mr Bruce Scott

Senators and members in attendance: Senators Kirk and Marshall, MrAdams, Ms Julie Bishop, Mr Martyn Evans and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 18 and 25 June 2002.

WITNESSES

Committee met at 9.02 a.m.

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties. Today, as part of our ongoing review of Australia's international treaty obligations, the committee will review 11 treaties tabled in parliament on 18 and 25 June 2002. I understand that some representatives from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us for the entire day's proceedings—I thank them for that—with witnesses from other departments joining us for discussion of the specific treaties for which they are responsible.

To begin our hearing, we propose to take evidence on the proposed agreement between the government of Australia and the government of the Cook Islands relating to air services as well as on the proposed agreement between the government of Australia and the government of the Republic of Chile relating to air services.

[9.04 a.m.]

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

BELL, Ms Lucinda, Executive Officer (Chile), Canada, Latin America and Caribbean Section, Americas Branch, Department of Foreign Affairs and Trade

NIMMO, Mr Rick, Director, Pacific Bilateral Section, Department of Foreign Affairs and Trade

RAPER, Ms Cathy, Director, Canada, Latin America and Caribbean Section, Americas Branch, Department of Foreign Affairs and Trade

WILD, Mr Russell, Executive Officer, International Economic Law, Legal Branch, Department of Foreign Affairs and Trade

SCHRODER, Mr Matthew, Director, Africa, Middle East, Americas, Pacific and Indian Oceans Section, Industry Policy Branch, Aviation and Airports Policy Division, Department of Transport and Regional Services

WILLOUGHBY, Mr Ben, Assistant Director, Africa, Middle East, Americas, Pacific and Indian Oceans Section, Industry Policy Branch, Aviation and Airports Policy Division, Department of Transport and Regional Services

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

Mr Schroder—I will deal with both treaties at the same time because they are basically a standard form agreement and they deal with the same issues, just for separate countries—Chile and the Cook Islands.

CHAIR—Are there any differences between the two agreements?

Mr Schroder—There are slight differences, but basically they have the same purpose and they are meant in the same manner.

CHAIR—And you will point out the differences to us?

Mr Schroder—Yes. The treaties propose to bring into force standard form air services arrangements with Chile and the Cook Islands. The treaties are basically enabling documents,

facilitating the trade in aviation services. As I said, they are standard form documents. We have approximately 57—the number is in the high fifties—agreements of this nature already in effect. Trade in aviation services can only occur in the presence of bilateral enabling agreements of this type.

Both these agreements were concluded between aeronautical authorities in 1999. The treaty texts were agreed and initialled by the heads of both delegations, which were made up of aeronautical authorities on both sides. The treaty texts then went through a process of being agreed to by the relevant ministers and ministries before going through the treaty ratification process.

CHAIR—You said that these are similar to other air services agreements that we have with some 50 other countries. Is there any reason why we have just come to the point of having such an agreement with a country like Chile?

Mr Schroder—Previously, when we have had to get up air services very quickly and have not had the chance to do a full treaty and we did not want to bind the Commonwealth through that process, we had MOUs in place. These were working documents between the aeronautical authorities, to facilitate services in the interim. The reason the Australia-Chile agreement is important now is that Qantas and LanChile, which is Chile's national carrier, have just commenced code sharing services with each other between Australia and Chile.

Then there is the Cook Islands agreement. Australia's approach towards the Pacific has been to allow small Pacific island nations to have access to Australia because they do not have the critical mass to attract services in their own right, but if they can hub in through an Australian city then they can get connections to international services, transcontinental services and the like.

CHAIR—So, prior to this, Qantas and LanChile were not part of a network or an alliance?

Mr Schroder—Qantas and LanChile were members of the oneworld alliance so they did have a broad alliance between them, but previously Qantas was operating its own services into Argentina. Qantas and LanChile had a code sharing service where they met in French Polynesia, exchanged passengers and code shared on each other's services. But the service that Qantas and LanChile are now flying has a LanChile plane flying between Santiago and Sydney, with Qantas selling seats and marketing on the LanChile plane.

CHAIR—How often does that fly?

Mr Willoughby—There are three flights a week.

CHAIR—How many passengers?

Mr Willoughby—It uses an Airbus A340, so that is around 260 seats a flight.

CHAIR—You have mentioned the 50-odd other air service agreements with other countries. Have we encountered any specific problems with those air service agreements that we might encounter with these two?

Mr Schroder—As far as I am aware, no. They are in a fairly standard form. They are based on an ICAO—the International Civil Aviation Organisation—model. There are several thousand bilateral treaties between different countries around the world. The treaties themselves are fairly standard form treaties. From what I am aware—and I have been involved in international aviation for seven years—we have never really had a major issue with the treaties as such.

Mr WILKIE—The agreement talks about a dispute resolution mechanism and a tribunal. How would that tribunal be formed, and what sort of legal standing would it have?

Mr Schroder—I preface my answer by saying it is exceedingly rare that these things do go to that level. The treaty sets out the process that, if there are concerns, the aeronautical authorities should meet and try to sort them out. In my experience, the aeronautical authorities have sorted those out and it has not had to go to an independent tribunal. There was a case back in 1991 between Australia and the US that was about to go to an independent mediator, but the issue was resolved before it got there.

Mr Willoughby—In forming the tribunal, the parties each nominate one arbitrator and agree to nominate a chair for the arbitration. The decision of the arbitrators is binding on the parties, but only to the extent of the treaty.

CHAIR—Where is the arbitration held?

Mr Willoughby—That would be a matter for negotiation once arbitration became an issue.

Mr WILKIE—So there has not been a tribunal established at this stage?

Mr Willoughby—No, it would be done on an ad hoc basis.

Mr MARTYN EVANS—The annex to the treaty refers to the Chile flights as being via intermediate points, particularly New Zealand and French Polynesia. Is it not contemplated that there will be direct flights? Is it to be regarded that they would always be via intermediate points? Or am I misunderstanding the annex?

Mr Willoughby—Note 1 in section 3 of the annex says that points on the routes can be omitted at the airline's convenience, provided that the service originates in their own country and the service terminates in the territory of the party.

Mr Schroder—In the case of the LanChile-Qantas code share, the intention may eventually be that it will directly operate between Santiago and Sydney. There have been problems historically with distances travelled by planes and things like that, so they needed to have stopovers. My understanding from an informal briefing with Qantas is that it may eventually be a Santiago-Sydney direct service, and that is allowed in this because you can omit any points between the countries.

Mr MARTYN EVANS—So, for example, the flight to Buenos Aires went via Auckland, but it is intended ultimately that the Santiago one will be direct?

Mr Schroder—That is a combination of two things: the aircraft technology, which is now at the point where you could have direct services; and the economics of the flight. In some cases for long haul flights, you need to pick up additional passengers in Auckland. That is a commercial decision for the airlines, but they can do that.

Mr MARTYN EVANS—Thank you. I am interested in the implications of free trade agreements. We are discussing free trade with the United States, Japan and various others, and one can ultimately contemplate South America in this context. Given that these agreements are standard templates, as you say, how do we contemplate how the free trade agreements we are discussing generally at this stage with various groups will impact on these standard templates? Clearly, the template is anything but free trade: it contemplates a fairly restrictive regime in terms of, 'We have our aircraft; you have your aircraft and no-one else flies.'

Mr Schroder—That is absolutely correct; these are not the most free agreements that we have. The system of bilateral aviation negotiations and the system of bilateral exchange of rights set up in the Chicago convention back in the forties, has limited that. Under government policy Australia is working through multilateral groups to try to free up that system, but that takes consensus with a number of nations and obviously will take some time. As a general thing for free trade agreements, I know that in the negotiations for a free trade agreement with Singapore the air services are left aside from the agreement. Japan's view has been that, if we had a free trade agreement with Japan, it is likely that air services arrangements would be left aside. That has also generally been America's view as well, so although I do not know about specific countries I would imagine that air services would be set aside. That is the general way it is done.

Mr ADAMS—What other treaties do we have in South America?

Mr Schroder—We have treaties with Argentina, and that is all.

Mr ADAMS—Are there any flights there at the moment?

Mr Schroder—At the moment there are. Aerolineas Argentinas flies between Australia and Argentina. There were Qantas flights into Argentina but they were suspended on commercial grounds.

Mr ADAMS—Is there any restriction on the freight that is carried? This is not just a treaty dealing with passengers, is it?

Mr Schroder—These agreements deal with both freight and passengers, but there is a liberal treatment of freight.

CHAIR—In the memorandum of understanding between the aeronautical authorities of Australia and Chile which is secondary to the treaty, there are arrangements in place that provide open capacity for freight—freight is unlimited under these arrangements.

Mr Schroder—Freight is a relatively uncontentious issue politically, so the government's view has been to try to liberalise freight. We have had a more liberal treatment of freight than passengers. This treaty deals with freight as well as passengers.

Mr ADAMS—Is it unlimited?

Mr Willoughby—Yes.

CHAIR—What is the relationship between the memorandum of understanding that you have just referred to and the actual treaty?

Mr Schroder—The treaty is the head document. That is what gives it force. The MOU is an understanding between aeronautical authorities.

CHAIR—When was that entered into?

Mr Willoughby—On 14 August 1998. Essentially, it is a business document that provides a lower level framework for the airlines to operate under. It sets out capacity limits and provides the way that they can operate their services—for example, through code sharing and other ways.

Mr Schroder—Given that there are often changes of aircraft, commercial changes and things like that, we need to have the MOUs to enable minor changes in the spirit of the treaty and by using the powers of the treaty to basically take care of small commercial changes.

CHAIR—So you have the MOU, which was entered into in 1998?

Mr Willoughby—Yes.

CHAIR—What happened between 1998 and September 2001 when the agreement was signed?

Mr Willoughby—The agreement was initialled at the same time as the memorandum of understanding. We had to get a Spanish translation of the agreement text, which took time. There were also some issues in article 14, the tariffs article, which required amendment to give full effect to the domestic competition laws of both Australia and Chile. Then it required the agreement of ministers, the Executive Council and signature, and now we are here.

CHAIR—This is how long it takes?

Mr Willoughby—Yes.

Mr Schroder—From my experience, sometimes, when you have dual language texts, it takes some time to refine the wording.

CHAIR—The nuances.

Mr Schroder—Whilst texts are generally negotiated in English, the translation of the other language needs to sit correctly with the English, and you are right; there are some nuances and some language issues and you may need to go through the treaties several times. Given that the English version of the text often goes into interim effect, pending the treaty ratification process,

there is not the commercial pressure to push those along. We find that for some countries getting their language text approved by us is not their highest priority.

CHAIR—Was there a memorandum of understanding with the Cook Islands?

Mr Willoughby—Yes, there was.

CHAIR—Did it have a similar time frame, although you did not have to translate it?

Mr Willoughby—Yes, it had a similar time frame.

Mr MARTYN EVANS—Which is the designated airline for the Cooks Islands?

Mr Willoughby—The Cook Islands has not designated an airline.

Mr WILKIE—Do we have many more of these agreements being negotiated that are likely to come before us?

Mr Schroder—Air services agreements?

Mr WILKIE—Yes.

Mr Schroder—Yes, it is a continuous process. We have several in the pipeline now that still need the text to be completed. The United Arab Emirates is an example where we have agreed upon an Arabic text with the English text and that will come before JSCOT. We also have air service talks coming up with Iran, for example. It is possible that an air service text will be negotiated in that agreement and eventually that will go through the process. Also, the ministerial approval for the open skies agreement with New Zealand has just gone through.

Mr Willoughby—That has been passed by EXCO, so it will be signed shortly.

Mr Schroder—That will be coming before JSCOT shortly.

CHAIR—Have there been any amendments to the agreement since it was initialled at the time of the MOU? In particular, I am thinking of the issues that it covers such as security and security regulations. Has that had to change, say, post September 11 or have any amendments had to be made subsequent to the MOU stage?

Mr Schroder—Not on security. On these two treaties, there have not been any amendments on security. Has there been any amendment otherwise, Mr Willoughby?

Mr Willoughby—To the Chilean agreement or to the Cook Islands agreement?

CHAIR—Either.

Mr Willoughby—To the Cook Islands agreement, no. As I said before, there were amendments made to the Chilean agreement regarding tariffs.

CHAIR—That is the only one?

Mr Willoughby—That is the only change.

CHAIR—What was the particular issue about tariffs?

Mr Willoughby—It did not give full extent to the competition laws of both countries. Previously, it said that the contracting parties could only intervene to prevent predatory pricing, to protect consumers from unduly high or restrictive tariffs, or to protect airlines from tariffs that are artificially low. Now the treaty text says intervention by the parties can take place according to competition law including prevention of predatory pricing, protection of consumers from tariffs that are artificially high or protection of airlines from tariffs that are artificially low.

CHAIR—One final thing from me. I do not know that I read the appendix as well as everybody else, but could you explain to me what destinations within Australia will be covered by both these agreements?

Mr Willoughby—It is up to the governments of each country to select points. So Chilean airlines are free to pick up to three points within Australia to which to operate.

CHAIR—Do we encourage them in any way to choose particular points?

Mr Willoughby—No, we do not.

CHAIR—It is purely a matter for LanChile?

Mr Willoughby—It is a commercial decision for the airlines concerned. For example, if they chose to operate to Sydney, Melbourne and Brisbane and they chose Brisbane at the expense of a regional destination such as Cairns, Darwin or even Perth or Adelaide, then—

CHAIR—Even Perth?

Mr Schroder—Not Perth.

CHAIR—If not, why not Perth!

Mr Schroder—If I could clarify this: we are in the process of writing to all our bilateral partners, giving unlimited regional access. 'Regional' in aviation is defined as those points other than Melbourne, Sydney, Brisbane and Perth. The reason we do not give those is because we negotiate those rights to try and get access in other countries. Under this agreement, LanChile, for example, will have unlimited access to all those points, which include Adelaide, Cairns and all the international gateways other than Perth, Brisbane, Melbourne and Sydney. They also have the ability to designate points. LanChile is now operating to Sydney but could designate, for example, Brisbane, Melbourne or Perth.

CHAIR—Thank you very much.

[9.25 a.m.]

BIRD, Ms Sheila, Assistant General Manager, Client and Community Branch, Child Support Agency, Department of Family and Community Services

CAMERON, Mr Gregory John, Acting Principal Legal Officer, Private International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

McGINNESS, Mr John, Acting Assistant Secretary, Information Law Branch, Attorney-General's Department

PESENTI, Ms Sara, Acting Senior Legal Office, Civil Justice Division, Attorney-General's Department

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

CHAIR—Welcome. We will now take evidence relating to the agreement between the government of Australia and the government of the United States of America for the enforcement of maintenance support obligations. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Would somebody like to make some introductory remarks before we proceed to questions?

Mr McGinness—Yes, I have a short opening statement. For many years Australia has had non-treaty reciprocal arrangements with a variety of countries on establishing and enforcing child support and spousal maintenance liabilities. These include arrangements established in the mid-1980s with the US state governments. In 1994 the Joint Select Committee on the Family Law Act in Australia reviewed certain aspects of child support, including overseas child support arrangements. One of the recommendations of that committee was that the scope of the arrangements in place at that time be extended and modernised. Pursuant to that recommendation, Australia entered new child support treaty arrangements with New Zealand in 2000 and also ratified the Hague convention on enforcement of maintenance obligations, which covers child support enforcement arrangements with most European countries.

In 1997 the US Congress passed federal legislation enabling the US federal government to become involved in international child support arrangements. Pursuant to that legislation the US government approached the Australian government in 1997, seeking negotiations on a bilateral treaty on child support enforcement. Discussions were held in Canberra in 1997 and in Washington in 1999, where a preliminary draft of the agreement that is now before this committee was prepared. In preparation for implementation of the treaty, Australia declared the

US a reciprocating jurisdiction for child support enforcement in 2000, under existing child support legislation. The US made the reciprocal declaration under its federal legislation in 2001.

Touching briefly on the benefits the Australian government sees in this treaty, there are three I would mention in particular. The first is that this agreement provides for US authorities to enforce Australian child support assessments. In the past, arrangements were limited to court based orders. In Australia in more recent years child support has been covered by the Child Support (Assessment) Act 1989 and administrative assessments issued by the Child Support Agency, rather than by court orders covering child maintenance, and so it is important for Australia to establish international arrangements that provide for automatic enforcement of these administrative assessments overseas. That is one of the obligations that is included in this US-Australia child support agreement.

The second major benefit of this agreement is that it provides for the establishment in the USA of a federal central authority. In the past, Australia's dealings have been on a state level with US state authorities. Due to resourcing and workload problems for the US state authorities, it has often been a difficult procedure to get Australian maintenance liabilities enforced in the USA. This agreement now provides for a US Central Authority in Washington to pursue cases Australia sends to the USA for enforcement.

The third and final benefit I would mention is that the US federal legislation provides that, where the US government has a treaty arrangement with another country, US federal funds are to be made available to US state authorities to assist them to progress cases received from foreign countries. To the extent that our problems with the USA in the past have been resource problems with the state authorities, we hope and expect that the federal US funds will result in improved performance in enforcement and perhaps less delay in recovering child support and spousal maintenance for Australian payees.

The final matter I want to mention in relation to the agreement is the question of consultation in Australia. The Attorney-General's Department issued an issues paper in 1999 which included a copy of the draft US agreement and canvassed the proposals for implementation of the agreement in Australian legislation and the practical procedures for implementation. That issues paper was circulated to relevant agencies working in the field—legal aid bodies, courts et cetera—plus groups with a policy interest in family law in Australia. In general there was wide support for the conclusion of this agreement and very little in the way of comment about the actual text. Thank you.

CHAIR—To kick things off, I will ask a bit about the history of this. You said earlier that in the 1980s we had arrangements with separate states in the United States: can you tell how many states we had arrangements with and which states those were? Were we able to enforce child support assessments with the states or were we only able to enforce court orders with the individual states?

Mr McGinness—Because the law in the USA in the 1980s was state law, it depended on which state you were dealing with. By correspondence we had thought we had established reciprocal arrangements with almost all the US states—about 45 or so of them—but because it was a non-treaty arrangement there was no real legislation in either country covering the reciprocal arrangements. It was somewhat haphazard. Some states took the view that they could

not enforce certain of the liabilities we were sending over. For example, some state laws prevented them enforcing spousal maintenance orders.

CHAIR—Even if it was a court order?

Mr McGinness—Yes. It depended on exactly what the relevant legislation of the US state said. In relation to your question about administrative assessments, again some states would accept those as enforceable liabilities but the law in other states did not allow them to do that. One of the benefits of having a treaty arrangement is that it spells out exactly which liabilities are enforceable and which are not.

Ms Bird—I would like to add that it is only from 1 July 2000 that we were able to send Australian administrative assessments to other countries to enforce. We have only had a two-year opportunity to actually see which states are able to register and enforce assessments rather than court orders.

CHAIR—What do you mean by that? Why were we only able to send assessments from 2000?

Ms Bird—The Australian legislation was changed from 1 July 2000 to enable that to happen.

CHAIR—Prior to that we were not sending administrative assessments to the states in the United States?

Ms Bird—That is correct.

CHAIR—So we were only sending court orders, and even certain court orders were not being enforced?

Mr McGinness—There was always potential for court orders not to be enforced but, because we were sending so few, I cannot in fact recall a case where a US state refused to enforce one of our orders. The other point I should have mentioned is that, although we were not sending administrative assessments over, the procedure was that a payee in Australia who had an assessment would have to go to a court here and get a court order and we would send that over to the USA. So, to that extent, the new arrangement relieves parents in Australia of the expense of obtaining a court order simply to send to the USA.

CHAIR—What form does the assessment take in order for it to be applied in the US? Is it a certificate? Is it something under oath? What sort of documentation do you actually send?

Ms Bird—We send a copy of the child support assessment that the Child Support Agency produces and sends to both of the parents. We send that assessment to the United States together with some other documentation.

Mr MARTYN EVANS—I do not quite understand the role of the new central agency in the United States, given the way the US legal system works. It is not quite the same as we have set up here, is it? What is going to happen when they get our Child Support Agency order in the

mail? Will they have garnishee powers over people's wages and so on in the US, or will they simply pass this on to a state agency and then they will go to a local court and seek a local court order and so on? What is actually going to be the process in the US when they get our administrative order?

Mr McGinness—The arrangement is still being developed in a sense, but my understanding from the US Central Authority is that Australian authorities have the option of either sending the documents to the US Central Authority in Washington or dealing direct with a state authority. You are right that the actual procedure for enforcement, whether it is garnishee or whatever, depends on what the relevant US state has in its legislation. I should say that the US Congress has passed legislation requiring US states to have a certain number of elements in their state child support laws as a condition for getting US federal funding for their child support programs. My understanding is that all US state governments pursuant to that legislation would in fact have quite wide enforcement powers similar to those available to the Australian Child Support Agency in garnishing wages, seizing tax refunds, that sort of thing.

Mr MARTYN EVANS—Is it a right? Are we in a position to assume then that, when we send a valid order to them, it is an inevitable consequence that money will flow in accordance with that order?

Ms Bird—To every extent possible. I think the same thing will happen with cases that come to Australia: we will be able to use all our legislative powers to collect the child support for the United States, as we do in domestic cases; however, there are some cases where we are not successful at the domestic level, and I imagine there will be some cases where we are not successful at an international level either. I think that would work both ways.

Mr MARTYN EVANS—Sure, but that will be because the person who is expected to make the payment is a more artful dodger not because the authorities will fail to act. It will not be because the court or the authorities say, 'Gee, we're not going to bother with this one' or 'We don't like the look of this order'; it will be because the person who is to make the payment changes his name, skips town, goes to Bermuda or whatever. It will be because they fail to deliver not because the system fails to pursue.

Ms Bird—That is correct. Our discussions at a practical level are that we will tend to send the Australian assessments to the particular US state for the state to register and enforce. If we find there are difficulties at that level, then we will contact the central agency, let them know that there is a difficulty in a particular case and ask them to follow that up to make sure there is not anything actually inhibiting the collection of the child support.

Mr McGinness—To add something to that answer: the effect of the US government reciprocating jurisdiction under their federal legislation is to make an Australian liability have the same effect as a liability established by US authorities, so it has the same legal force in the USA.

Mr MARTYN EVANS—Thank you.

Senator MARSHALL—How many Australian claimants are likely to benefit from the arrangements in this treaty?

Ms Bird—The numbers are a little bit difficult. We believe there are about 800 cases in Australia at the moment where the person with the children is living in Australia and the other parent is living in America. We have sent some of those to the US already for collection and some of those are awaiting our action to send over. But we think it is about 800 to 1,000.

Senator MARSHALL—What would be the value of the outstanding maintenance?

Ms Bird—I am afraid I do not have that figure.

Senator MARSHALL—How many US claimants are likely to benefit?

Ms Bird—We think it will be roughly the same number, roughly a one for one type of arrangement. We do not think either country will be overwhelming the other country in terms of the applications that are sent.

Senator MARSHALL—Do we know how many people relocate overseas, generally to avoid paying maintenance?

Ms Bird—We do not have information on any of the motivations as to why people move overseas. We do know, for example, that there are about 3,000 Australian child support payers living in New Zealand. There are about 1,000 in the UK; about 800 to 1,000 in the USA; and smaller numbers in various other countries.

Senator MARSHALL—The agreement does not preclude either country from pursuing international agreements in this respect. Would it be our view that we should pursue an international agreement and what impact would that have on this treaty?

Mr McGinness—Perhaps you could clarify the question for me. Are you talking about another multilateral agreement?

Senator MARSHALL—I think article 2.3 does not preclude either country from entering into international agreements addressing the same issues in the future.

Mr McGinness—I see.

Senator MARSHALL—I am wondering what impact that may have and whether that is a preferred approach that we should be taking to address this whole issue.

Mr McGinness—Certainly Australia has tried to ratify multilateral conventions where it can. In practice though, the USA has not ratified any multilateral agreements in the child support area simply because of the nature of its state arrangements on child support. My understanding is that the Hague Conference on Private International Law is beginning negotiations next year on a new multilateral convention. Both Australia and the USA will be participating in that. So the clause of this agreement you mentioned is important in the sense that, if both countries decided eventually to ratify that new multilateral treaty, that multilateral treaty may well take over from this bilateral treaty.

Senator MARSHALL—Thanks.

Mr ADAMS—In the case where the laws per state differ, are the arrangements similar to ours?

Mr McGinness—Very much so. I think, to some extent, our child support scheme was based originally on some US legislation. So the legislation relating to who is liable to pay child support and the enforcement mechanisms is quite similar.

Mr ADAMS—But they do not organise it through their taxation arrangements?

Ms Bird—Some states do, some states do not. In some states it is either part of their tax system or it is linked to their tax system. In others, it is totally separate.

Mr ADAMS—So if we have a similar culture in this regard why did it take five years to get organised?

Mr McGinness—As I mentioned in the opening statement, we already have non-treaty reciprocal arrangements with most US states so there was not an urgency in that sense. It was a simple process of rewriting Australian legislation to allow us to fully implement this sort of treaty. As we mentioned before, we did not have provision for sending administrative assessments overseas until 2000. The negotiations on the appropriate forms to send back and forward between Australia and the USA have taken some time.

CHAIR—And the US legislation was passed in 2000?

Mr McGinness—I understand that it was in 1997. In 2000, they declared Australia to be a reciprocating jurisdiction.

Mr ADAMS—That is for the administrative assessment on their side as well?

Mr McGinness—That is correct.

CHAIR—To what extent can these assessments be challenged by the recipient of the order or the assessment in the United States?

Ms Bird—At the administrative level, for any child support assessment that we send for enforcement overseas, both parents have the same objection and appeal mechanisms to that Australian assessment as if it were a domestic assessment. So they have full access to all of the administrative provisions to challenge the amount or to initiate changes to the assessment as they would if they were in Australia.

CHAIR—So assuming that the assessment has been made in Australia and that one party is in Australia, that assessment would have been based on that party's version of events. Do you often get evidence or submissions from the party in the United States at the time the assessment is being made in Australia?

Ms Bird—I cannot tell you that on a case by case basis. In general, the process is that we would make an assessment based on the best information available, as we do with a domestic case.

CHAIR—Which is likely, in this instance, to come from one party, and not the party that is going to be the subject of the order.

Ms Bird—It would come from that person, and we would also have access to tax information. It may also be the circumstance that the parents have had an existing child support assessment, and that one of the parents has now left Australia to live somewhere else. So it may well be that it is not a brand-new case of the Child Support Agency but is an ongoing case, and so we already have much of that information from both parents, as well.

CHAIR—Say that it is a brand-new case and somebody comes in to the agency and presents evidence that Joe Bloggs over in the United States is the father, and that he earns X amount. To what extent do you investigate that version of the facts?

Ms Bird—We do not use the income information provided by the person applying for child support. We use information that comes from the tax system.

CHAIR—Do you get it from the US tax system?

Ms Bird—We would initially get it from our tax system. In a lot of these cases, the parent has probably only just gone overseas, but they have been an Australian resident.

CHAIR—Say that it is a US resident.

Ms Bird—If it is someone who has lived over there for a while and we do not have any detailed information in Australia, we would get some indication from the parent of the occupation of the person who is working in the USA. We would then make inquiries as to the likely income for that parent. We would try to contact the parent overseas to get information from him or her as to income, and we would use that information in determining a child support assessment.

CHAIR—So, in reality, you could make an assessment without any input from the other party.

Ms Bird—In reality, yes—as we can with a domestic case.

CHAIR—Right. So when the assessment turns up in the United States to be enforced, what can the party do to challenge that assessment? Do they do it in the United States, or do they have to do it in Australia?

Ms Bird—They can do it in Australia using our administrative processes, totally separate from any court action. It would depend on the issue that they were disagreeing with. If, for example, they said that they were not the father of the child, we would say, 'We believe you are

the parent of the child. You are presumed to be the parent of the child because you were married at the time the child was born.' They might say, 'Yes, that is the case.'

CHAIR—Nice assumption!

Ms Bird—It is a requirement in our legislation. If the parent then wished to challenge that, they could apply—as they would domestically—to the Australian court for a declaration that they were not the father of the child.

CHAIR—They cannot do it in the United States, under this agreement? This is what I am trying to get to.

Mr McGinness—Yes, they can. It depends on what the US state legislation says. Some states require them to litigate in the overseas jurisdiction; but, if their state legislation says they can go to a US court and have parentage determined, the agreement is that Australia would recognise a determination of parentage by a US court.

CHAIR—Who would pay the costs of whatever tests and proceedings and so on had to be entered into?

Mr McGinness—The agreement provides that the country where the father contests parentage is to wear the cost of it. If the person chooses to come to an Australian court and litigate parentage, then the Australian government would meet the cost or would seek a court order that the parents contribute to the cost. But if the father litigates in the USA, it would depend on what the state law in the USA said about who meets the costs.

CHAIR—So on other issues that they could challenge—not just parentage, but the amount, for example—do they have to challenge in Australia, or can they challenge in the US?

Mr McGinness—Again, it depends on what the US state legislation says. If the US state legislation requires them to sort it out in an Australian court, then that is what they have to do. If the state legislation there provides for them to have a right to challenge a registered foreign maintenance liability, they could litigate the matter in a US court, in the same way that an Australian payer could litigate registration of their US liability.

CHAIR—So essentially we are still dealing with potentially more than 51 different jurisdictions—plus Guam, the Virgin Islands and some other territories.

Mr McGinness—Potentially, yes. But I would point again to that overlay of US federal legislation and procedures established by the US government.

CHAIR—What does the Central Authority do in regard to the issues that I have been raising? Does it have a role to play?

Mr McGinness—We have negotiated standard forms that fit both the Australian and the US legislation. The agreement deals with some of the issues by, for example, providing for the automatic recognition of parentage determinations of courts in both countries. The US Cental

Authority sends these standard forms around to the US states so they are familiar with overseas cases and do not have a problem with processing them any differently from the way they would with their US domestic cases. In that sense, there is a coordination mechanism. There is a much better prospect of cases not falling over because we have these new arrangements at a federal level.

CHAIR—You have also mentioned that—I think it is in the national interest analysis—the moneys collected go to the Central Authority, then they are paid to the claimants and there is no service charge. So there is no charge taken out anywhere along the way—not by the states, the Central Authority or in the transmission to Australia?

Mr McGinness—There are certainly no charges taken out by the Central Authority. As to what happens to the money once it reaches the Child Support Agency here in Australia, perhaps my colleague could deal with that.

Ms Bird—There are absolutely no charges at this end. Different states in the US have different rules in terms of what happens to the child support that is collected. For example, in some states the child support does not pass through to the other parent. Some of the child support can be retained against benefits that the states pay to recipients. We could collect child support from a payer in Australia, send it to the Central Authority in the US and, because of the particular provisions of the state, the full amount of child support may not be passed on to the parent in the US.

CHAIR—But we do not take a fee on the way through, if we are collecting from a recipient of one of the orders in Australia?

Ms Bird—Absolutely not. There are no fees whatsoever.

CHAIR—The Central Authority does not collect a fee, but they might at the state level?

Ms Bird—That is correct. It is not a fee as such.

CHAIR—It is a retention of moneys for some other purpose?

Mr McGinness—I think they call it a reimbursement of money they have already paid out to the mother in the USA by way of benefits. I think that New Zealand and other countries have a similar arrangement: they pay first, then collect the child support and reimburse themselves from that.

CHAIR—What other countries do we have such agreements with?

Mr McGinness—We have a treaty with New Zealand. We also have multilateral treaty arrangements with European countries under the Hague convention on maintenance enforcement. There is also a United Nations convention on the recovery abroad of maintenance, which is a different sort of multilateral arrangement, operating in a large number of countries overseas.

Mr ADAMS—These treaties must be growing in respect of globalisation—people moving around and working in many other countries. Is that your experience?

Mr McGinness—Certainly, from the experience of the Attorney-General's Department, not only in the child support area but also in child abduction and child custody cases, it is a growing problem—much more so than in the past.

Mr ADAMS—Are we doing anything multilaterally? Is the United Nations treaty being used to stimulate some discussion on that?

Mr McGinness—At present, most of the debate is focused on a new Hague convention. I think most people would accept that the UN convention which dates from 1956 is not the best model and that the world needs a new multilateral convention. As I mentioned previously, the negotiations starting next year in the Hague will hopefully give us a new, very modern multilateral agreement that would be appropriate to most countries around the world.

Mr ADAMS—You will be able to tack a lot of other things onto that treaty?

Mr McGinness—Certainly, Australia has a number of interests we would like to see reflected in that—in particular, the issue of countries agreeing to enforce administrative assessments as well as court orders and the appropriate arrangements for parentage determination where that is a problem in a particular case.

Mr ADAMS—And visiting?

Mr McGinness—Yes.

CHAIR—I also note in the national interest analysis under 'costs'—going back to that issue, which is something always dear to our hearts—is a saving of expenditure of Australian legal aid funds. Has any estimate been made as to what sort of saving we are looking at here?

Mr McGinness—We do not have any cost estimate. As I mentioned before, the main cost to legal aid before these new international arrangements were set up was in funding parents to go to court to get a court order to send overseas because they could not send the administrative assessment.

CHAIR—So it is not only legal aid funds; some people have paid for it?

Mr McGinness—Yes, people who are not entitled would pay for it themselves. But we were never very clear about exactly how many people were going to legal aid. That depended to a large extent on how many people Family and Community Services insisted go through the process of getting a court order as a condition of retaining their benefits. So there were never any statistics kept by legal aid bodies.

CHAIR—So legal aid have not kept statistics on how many legal aid funded cases there were to deal with maintenance orders in the Unites States, for example, for child support?

Mr McGinness—No. I understand they kept statistics on child support work in general but they did not distinguish between international cases and domestic cases.

CHAIR—We might have to suggest that they do that. It would be of interest. Also, just looking at the treaty itself, article 2, part 1, has a reservation. It says 'a maintenance obligation towards a spouse or former spouse', so this is a spousal maintenance order. Is there still an issue about that because it relies on the states in the United States agreeing to recognise spousal maintenance agreements? Are you telling us that not all do?

Mr McGinness—I think that was a factor of some legislation at the state level in the USA at the time we were negotiating with the US. Not all states were up to speed on reforming their state laws to comply with the federal directions about how their legislation was to be worded. I must say we have not raised that recently with the US state department. If the committee is interested, I could ask for some information about that.

CHAIR—It just leaves a reservation there that might or might not be applicable.

Mr McGinness—That is correct. In an individual case, the Child Support Agency here would have to check with the US Central Authority to ensure that the relevant state where the payer is located in fact does recognise or does have provision for spousal maintenance orders in its legislation.

CHAIR—Would it be too much to ask you to ascertain the differences in each state? Are there states where people in Australia are going to be disadvantaged in seeking to have their maintenance orders or support orders enforced; that, notwithstanding this treaty, the particular vagaries of each state's laws are going to work against a person in Australia trying to have their orders or assessments enforced? Is a list of those states available or is that a research project of mammoth proportions?

Mr McGinness—Hopefully it would not be and we could obtain that information for the committee. I should point out, though, that is not a question of a particular US state singling out Australian payees—

CHAIR—No, I appreciate that.

Mr McGinness—or even international payees.

CHAIR—It is the state of their domestic law.

Mr McGinness—Yes. If domestically they do not have spousal maintenance orders, they are not going to enforce them for other countries. But I will contact the US authorities and see if we can provide that state by state analysis.

CHAIR—It also says they recognise maintenance and obligations arising from a marriage or parentage, including children born out of wedlock. Just in case there are any differences in any states that may or may not recognise all—

Mr McGinness—On that aspect of the article, I can say that that was specifically put in there at the insistence of the US government. But of course all state legislation in the US does provide for maintenance to be collected on behalf of children who are born out of wedlock. They wanted a clear statement in all their international treaties that other countries were going to recognise and enforce those liabilities.

CHAIR—And maybe there are different requirements for paternity suits, for example. I am just wondering if we can have a summary of the major differences in some of the different state legislation so that Australians can be informed of the difficulty that they might face. I think it would be a useful summary.

Mr McGinness—Yes. We will see if can obtain that information. I will just point out, though, that both articles 5 and 7 in the agreement refer to parentage issues arising from international cases and oblige each country to take steps to ensure that parentage is sorted out and that it does not block an application for the collection of child support. There is no problem in asking US authorities what information they have about parentage laws from state to state.

Mr MARTYN EVANS—Do we have an estimated date as to when it will come into force? Do we have a target date? I know that it will not be a black and white fixed date, but what is the expectation?

Mr McGinness—My understanding is that, if the treaty receives a favourable report from this committee, the intention is that it would be signed almost immediately. It is just a matter of whether the US is ready to proceed with it. I suspect it will be in two or three months from now.

Mr MARTYN EVANS—So, if all goes well, it is likely to be in force before the end of the year?

Mr McGinness—Yes.

Mr MARTYN EVANS—It will be in effect by the end of the year?

Mr McGinness—Yes, hopefully.

CHAIR—And the Central Authority in the United States is already set up?

Mr McGinness—That is correct.

[10.10 a.m.]

BARTLEY, Mr Scott William, Manager, Core Rules Unit, Business Income and Industry Policy Division, Department of the Treasury

CAMPBELL, Mr William McFadyen, First Assistant Secretary, Office of International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, Department of Foreign Affairs and Trade

RABY, Dr Geoffrey William, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

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

WALKER, Mr Ian James, Manager, Timor Sea Team, Resources Division, Department of Industry, Tourism and Resources

CHAIR—I welcome witnesses from the Attorney-General's Department, the Treasury, the Department of Foreign Affairs and Trade and the Department of Industry, Tourism and Resources to give evidence relating to the exchange of notes constituting an agreement between the government of Australia and the government of the Democratic Republic of East Timor concerning arrangements for exploration and exploitation of petroleum in an area of the Timor Sea between Australia and East Timor, and the proposed Timor Sea Treaty between the government of Australia and the government of East Timor.

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

Dr Raby—I have an opening statement to make, which we hope will be helpful to the committee and which will give a background to the Timor Sea petroleum developments—in a historical context, there have been a number of agreements between Australia and East Timor that have led to the Timor Sea Treaty—as well as an outline of the Timor Sea Treaty and the relevant other documents involved. If it is acceptable, I will read that.

CHAIR—That would be very helpful.

Dr Raby—Thank you, Madam Chair. The Timor Sea Treaty, signed by Prime Minister Howard and Prime Minister Alkatiri on 20 May 2002 in Dili, and the Timor Sea exchange of notes done at Dili on the same day, provide a legal basis for the orderly development of petroleum resources of the Timor Sea between Australia and East Timor. Australia has significant interests in such orderly development for the benefit of both countries. Firstly, Australia will benefit through direct revenue from the Timor Sea petroleum fields and through infrastructure development and employment creation in Australia. Secondly, Australia has an interest in promoting East Timor's future economic viability, which will be underpinned by Timor Sea revenue. Although the numbers are yet to be firmed up, we are looking at something in the order of $A6 billion over 20 years from the Bayu-Undan project alone.

The resources in the sea are quite massive; the Timor Sea contains substantial reserves. In particular, the Bayu-Undan and Greater Sunrise developments are estimated collectively to contain recoverable reserves of around 11 trillion cubic feet of gas and 700 million barrels of petroleum liquids. At this point I will correct a typographical error in the national interest analysis for the Timor Sea Treaty and exchange of notes. The figure shown there for Bayu-Undan gas reserves was 2.4 tcf. The reserve is, however, 3.4 tcf.

CHAIR—That is in paragraph 11 of the exchange of notes?

Dr Raby—Yes. The error has been corrected. The NIA on the DFAT web site has been amended accordingly.

CHAIR—It is just a typo?

Dr Raby—Yes. Bayu-Undan, containing around $15 billion worth of petroleum, lies wholly within the Joint Petroleum Development Area—the JPDA—between Australia and East Timor. Greater Sunrise, with petroleum resources valued at around $30 billion, has 20.1 per cent of its reserves located within the JPDA and 79.9 per cent located within Australian jurisdiction. We will be distributing the paper so that you will have these figures.

CHAIR—Thank you.

Dr Raby—As for the historical development of the Timor Sea Treaty, the Timor Gap Treaty entered into force in 1991, creating the Timor Gap Zone of Cooperation. Production within the zone of cooperation started in 1998 from the Elang/Kakatua field. In 2000, there was an exchange of notes. This exchange of notes followed the separation of East Timor from Indonesia. Australia and the United Nations Transitional Authority in East Timor, UNTAET, exchanged notes on behalf of the people of East Timor in February 2000. The 2000 exchange of notes effectively continued, mutatis mutandis, the terms of the Timor Gap Treaty. The 2000 exchange of notes ceased to have legal force upon East Timor's independence on 20 May 2002.

In July last year, we reached agreement on the Timor Sea Arrangement. That was in order to ensure a continuing legal basis for petroleum development after East Timor's independence. Negotiations between Australia and UNTAET East Timor resulted in the Timor Sea Arrangement of 5 July 2001, which was the basis for a new Timor Sea Treaty upon East Timor's independence. The Timor Sea Treaty reflects the evolution of those arrangements between Australia and Indonesia initially and then Australia and UNTAET East Timor. The

treaty itself reflects very much the structure of the Timor Sea Arrangement which was, as I said, reached on 5 July 2001.

Turning to the treaty itself, the Timor Sea Treaty will be the fundamental document underpinning the development of the major oil and gas deposits in the Timor Sea between Australia and the newly independent East Timor. Australia and East Timor have competing claims to the resources of the seabed of the Timor Sea. The Timor Sea Treaty enables the commercial development of the resources of a major part of the seabed of the Timor Sea that is referred to in the treaty as the Joint Petroleum Development Area, notwithstanding the competing claims.

When the treaty enters into force, the revenue to governments from oil and gas production in the JPDA will be shared in the proportion of 90 per cent for East Timor and 10 per cent for Australia. In agreeing to that formula, Australia was conscious of the need for East Timor to have a sound economic base. The revenues it will receive as a result of this arrangement will provide a major contribution to that outcome. The JPDA will be jointly managed by Australia and East Timor for the benefit of both countries.

The treaty covers both oil and gas developments. It provides a comprehensive regulatory framework covering matters such as development and production, the marine environment, employment, health and safety of workers, surveillance, security, search and rescue, air traffic services, as well as the application of taxation and criminal law. Upon entry into force, the treaty will be applied retrospectively to 20 May 2002. The treaty provides also for other, more detailed instruments covering mining and taxation matters. The taxation code has been concluded recently and forms an annex to the treaty itself.

On the exchange of notes, it was important to avoid a legal vacuum in the period between signature of the treaty and ratification of the Timor Sea Treaty and to provide a sound legal basis for the continued development of Timor Sea resources. Therefore, an exchange of notes of treaty status has been concluded between Australia and East Timor that will continue the arrangements for the Timor Sea that were in place on 19 May 2002—that is, the terms of the 2000 exchange of notes—until entry into force of the Timor Sea Treaty. It is, essentially, a provisional arrangement until ratification and the entry into force of the treaty. However, it was agreed that East Timor would receive additional revenue on and from the date of independence. Therefore, the exchange of notes brings forward to 20 May 2002 East Timor's ability to collect revenue from its value added tax and some income taxes on a 90-10 basis. Additional petroleum related revenue will be placed into an interest-bearing escrow account and paid to East Timor upon entry into force of the treaty.

Turning now to the unitisation of the Greater Sunrise field, only 20.1 per cent of the Greater Sunrise field falls within the JPDA, with 79.9 per cent of that deposit within exclusive Australian jurisdiction. The treaty provides for the development of that deposit as a single unit, even though it is located in two separate jurisdictions. The conclusion of a separate international unitisation agreement, or IUA, is a matter of high priority for the government, as it is a prerequisite for the development of the Greater Sunrise field. In a separate memorandum of understanding signed on 20 May 2002, Australia and East Timor expressed their commitment to work expeditiously and in good faith to conclude that IUA by the end of this year. We expect that the negotiations on an IUA will proceed in parallel with the process to ratify the TST. The

IUA will be neutral with respect to the type of development that the Greater Sunrise partners—namely Shell, Woodside Petroleum, Phillips and Osaka Gas—eventually decide on.

In conclusion, the Timor Sea Treaty represents a significant step forward in cooperation between Australia and the newly independent state of East Timor. It will be an important element of our bilateral relations and a cornerstone of East Timorese economic stability and viability. A basis in international law is crucial for a fair and mutually beneficial system of development of Timor Sea resources.

CHAIR—As no-one else wishes to make a statement, we will proceed to questions. I am sure there will be quite a number of questions, so perhaps I could start with some of the fundamentals. You mentioned the 90-10 split of revenue under the Timor Sea Treaty and said that we took into account the needs of East Timor as a developing nation. What is the actual rationale of 90-10? Where did that figure come from?

Dr Raby—It came out of the negotiations with East Timor, UNTAET. We started at different positions, and that was the final position we reached through a process of negotiation, bearing in mind East Timor's needs and our claims to the area.

CHAIR—Do we reconsider that to be a fair split?

Dr Raby—Very much so.

CHAIR—Does East Timor?

Dr Raby—Very much so.

CHAIR—There have been some criticisms from some high profile East Timorese about that split. Do you have any comment?

Dr Raby—I think the criticism is not about the 90-10 split as such, although, obviously, there were some who would have wished for 100 per cent. The criticism as such of the arrangement from some NGOs tends to be about the structure of the Joint Petroleum Development Area, where the boundaries exist there, and, specifically, about the fact that the Greater Sunrise field, under those boundaries, is 79.9 per cent exclusively in Australian jurisdiction.

CHAIR—Could you explain for the committee how the JPDA boundaries were drawn? How did that come about historically?

Dr Raby—I will ask Bill Campbell from Attorney-General's Department to answer that.

Mr Campbell—I do not have a copy of the diagram. Maybe I could borrow a copy of the diagram.

Dr Raby—It is in front of the committee.

Mr Campbell—Basically, the area in red represents the old zone of cooperation area A under the Timor Gap Treaty with Indonesia. The major part of the two side boundaries represents the points of equidistance between East Timor and Indonesia.

CHAIR—On the eastern side, the line that goes through the Greater Sunrise and Troubador fields is the equidistant line between East Timor and Indonesia?

Mr Campbell—Yes. The northern part of the boundary is the so-called 1,500-metre isobath. It is the 1,500-metre depth limit, which used to form the top of the old zone of cooperation under the Timor Gap Treaty. The bottom line with an arrow is the median point between East Timor and Australia.

Mr MARTYN EVANS—Which would be the median point under the law of the sea equation, if theoretical—

Mr Campbell—That raises a whole list of issues. But if one were to delimit the boundary, which is on the basis of the median point, that would be the median line.

Mr WILKIE—That would be the line that would be part of the boundary if, in fact, we follow current international practice?

Mr Campbell—I can answer those questions now.

Mr ADAMS—Maybe I could add one, too, if you do not mind, Mr Campbell. Wasn't there something to do with the water column being in a different position in the seabed, which came in relation to fishing?

Mr Campbell—Perhaps if I can just go into a bit of detail on that. I hesitate to go into some detail on the law relating to maritime boundary delimitation, quite frankly, because we still have negotiation of a maritime boundary to come up.

CHAIR—We are looking for a historical perspective as to why we are dealing with this particular area.

Mr Campbell—The reason we are dealing with this particular area is that Australia has had a long-term claim to a continental shelf based on what is called the natural prolongation of its land area out to the edge of the continental shelf. That claim goes to the middle of a deep ocean trench called the Timor Trough, which is quite close to East Timor. In fact, it is the old top of area A under the Timor Gap Treaty with Indonesia and it is above that top line under this treaty here.

CHAIR—How far above?

Mr Campbell—I am not quite sure of the exact—

Dr French—It would be about 15 to 20 nautical miles.

Mr Campbell—On this diagram, it would be about 10 mm above, if I can put it that way.

CHAIR—That is the continental shelf?

Mr Campbell—That is the extent of Australia's continental shelf claim. The law of the sea convention as it is now recognises that you can have a continental shelf on two bases: one being based on 200 nautical miles—that is, a distance criteria—and the other being based on the natural prolongation of the land area out to the edge of the continental shelf, which is what Australia relies upon in this case.

CHAIR—So, essentially, where it drops away.

Mr Campbell—We go to the middle of the trough where it drops away. Indonesia originally made a 200 nautical mile claim, which extends down beyond that median line on this diagram to a point which is actually 200 nautical miles from East Timor now. It might be useful to the committee if we give you a diagram—I do not think we have it here—of the old Timor Gap Treaty, which shows where that bottom claim was.

CHAIR—What would be useful perhaps is an overlay, for historical purposes, of what has happened over the years between Australia and Indonesia, and Indonesia, East Timor and Australia. It would be a map with a lot of lines on it.

Mr Campbell—Having got to that point, Australia has a claim to the edge of the natural prolongation of its land area, that is, the centre of the Timor Trough. I believe that East Timor has claim to the 200 nautical miles from the East Timorese coastline. So that would be the area subject to a permanent delimitation between the two countries. As to what would happen under international law, that is an open question. There are those who would say that international law, in circumstances where there are fewer than 400 nautical miles between the two countries, would tend to adopt a median line. On the other hand, the courts have never had the opportunity to examine a delimitation where there is such a pronounced feature as the Timor Trough. Unless there are more specific questions, that is where I would leave that issue.

CHAIR—Can you just confirm for us the area covered by the JPDA that was first defined in—what year?

Mr Campbell—In 1989 in the Timor Gap Treaty.

Mr WILKIE—On the boundary issue, I note that the IUA says that we will negotiate in good faith on boundaries and the split-up of the Sunrise field. But the foreign minister stated that we do not intend to change the boundaries at all, and I think this has caused a bit of angst amongst the East Timorese. Is there any clarification there on what we are proposing to do?

Dr Raby—What we have agreed in the treaty are the boundaries of the JPDA, and they are fixed in the treaty. I think that is the point the foreign minister is making. He has said on a number of occasions, publicly and privately, that we will negotiate the seabed boundary delimitation in good faith, and we are prepared to do that. But we have our position and we will have to work through both sides' arguments over time in a proper negotiation. He is absolutely

committed to sitting down with East Timor once the treaty is ratified and negotiating in good faith the eventual seabed boundary, wherever that may end up.

CHAIR—So the sequence of events would be that the exchange of notes is in place already without having gone through this treaty process and the treaty would then be ratified—this is theoretically. What about the international unitisation agreement? Where does that fit into the scheme of things? Then where does the permanent seabed delimitation process—

Dr Raby—The exchange of notes, as you said, has happened, and for the treaty itself we would expect it to move forward through this process here roughly on a parallel track with the international unitisation agreement. I think it is fair to say that how we come out on the unitisation agreement would influence the government's view on the process of eventual legislation for the treaty. But if, as we hope and it looks, all this will be done over the next six months, by the end of this year at the latest, then we would be looking at responding to any requests by East Timor to begin a program of work that would lead to the negotiations over the eventual delimitation of the seabed boundary.

CHAIR—What would be required for the international unitisation agreement to be concluded? What is the character of the agreement and who is involved and what happens?

Dr Raby—I will give you a bit of a thumbnail sketch, with other colleagues dealing with the detail of it. Essentially, it arises because you have a resource that straddles two jurisdictions. Usually the most difficult issue in a unitisation agreement is how you share the resource. That has already been achieved in a treaty, and we have the 79.9 to 20.1 split. So we now come down to issues of, basically, providing the framework that will allow commercial development of the Greater Sunrise field to proceed. That deals with a lot of things, including the pricing arrangements for the gas and where the price would be set. A number of these issues will have an influence over the eventual value of the resource to either side. I am not sure whether any of my colleagues wish to add more detail to that.

Mr Walker—To add a little bit to that, because there are two different tax jurisdictions involved, one involving the JPDA side and the other one the Australian side, 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 so on, and the apportionment of these. In addition, the unitisation agreement has to cover a lot of details relating to the administration of the area—for example, what is the applicable law across the field for environment and health and safety and so on—so that industry can operate.

CHAIR—Who are the parties to the agreement?

Mr Walker—Australia and East Timor, is the intention.

CHAIR—So when you talk about working out the laws to apply, it is a question of Australian law or East Timorese law.

Mr Walker—Or, in this case, Australian law or the law applicable in the Joint Petroleum Development Area. This complicates it a little further.

CHAIR—So it is either Australian law plus 10 per cent of 20 per cent or 90 per cent of 20 per cent.

Mr Walker—It does get complex, because obviously in the taxation area you are talking about apportioning the field under different laws. However, when you are talking about some of the other administrative things, it is obviously far more efficient and effective to have a single law covering the whole field. For example, you do not want one set of safety regulations in one part, then a work boat crosses a border and it suddenly has another set of safety regulations. So you look for some things that are totally uniform across the field, but things like the taxation and the fiscal issues relate back to the resource apportionment, hence the law applicable to those differs depending on where the resource is attributed to.

CHAIR—Are you saying that the treaty and the unitisation agreement are inextricably linked in that what applies to one will influence the other?

Mr Walker—Yes. There are very close links between them, because the treaty sets out the laws that apply on the Joint Petroleum Development Area side of it.

Dr Raby—The treaty is the framework in which the unitisation agreement will be developed. The unitisation agreement, if you like, is the detail that provides the answers to the commercial parties in terms of how much tax they pay, where it arises and accrues, in whose jurisdiction various activities take place, plus all the other administrative arrangements—health and safety and so on.

CHAIR—But only to the extent that the JPDA takes in 20 per cent of Sunrise. The treaty makes determinations for that 20 per cent of Sunrise, not the 80 per cent.

Dr Raby—But it also establishes that the 80 is outside the JPDA. It is a very important part of this.

Ms Irwin—The Timor Sea Treaty has a range of applicable law provisions to regulate various issues on activities that happen within the JPDA—for example, on health and safety of workers, on environmental issues, on governments being responsible for security, on the application of customs and quarantine law, those sorts of things—because you have two jurisdictions there. So the Timor Sea Treaty, in terms of applicable law and regulation across a range of issues, already sets up a number of provisions. The issue with the international unitisation agreement is that there needs to be agreement as to how those issues apply across that field. It may be that some of the sorts of issues that are raised in the Timor Sea Treaty where there is joint jurisdiction between Australia and East Timor—for example, in relation to the application of criminal law—would also apply for an international unitisation agreement.

CHAIR—It will not necessarily be Australian law applying to the 80 per cent of Sunrise outside the treaty.

Ms Irwin—That is a matter for negotiation between Australia and East Timor.

Mr WILKIE—Just to follow on from that, you quote an example from article 12 of the treaty referring to the health and safety of workers:

The Designated Authority may adopt, consistent with this Article, standards and procedures taking into account an existing system established under the law of either Australia or East Timor.

Are East Timor's laws concerning occ. health and safety weaker than ours? Are they established? What would be applicable then in the field?

Ms Irwin—As I understand it, at this stage, East Timor is still developing; it does not have current laws on that issue. I think it has some transitional arrangements in place so that some of its laws at the moment would reflect the Indonesian legal system. But as I understand it, there are not specific health and safety laws there at the moment. Your question raises a significant issue about the administrative structure that is set up under this treaty. One of the key organisational issues set up to administer the treaty will be a designated authority. It will have day-to-day management of a range of significant issues, and one may well be occupational health and safety issues. That would be an issue that the designated authority would have a significant role in developing regulation for.

Mr WILKIE—The words 'may well be' really worry me. If we are dealing with the safety of Australian workers, and even East Timorese workers, that are going to be employed in that area, I would expect that they should be covered by Australian standards. That was just one example.

Mr ADAMS—Is there any guarantee of who is going to work these fields?

Dr Raby—It is a commercial decision for the commercial parties.

Mr ADAMS—So nothing has been written about Australian workers in this treaty?

Dr Raby—As I said, that is not for negotiation between the governments; it is a commercial decision.

Mr WILKIE—It is part of the treaty, actually. I think article 11 refers to Australian and East Timorese workers being given precedence in employment opportunities. It is something I wanted to touch on a little later. We could return to that.

Mr ADAMS—I just wanted to touch on where we as a committee got done over by these letters of exchange. I just wanted more detail on why it was seen that there was a need to go around the normal processes of a treaty. There was plenty of time in coming up to East Timor's independence to have a treaty and then come to this committee. Why don't you think that occurred?

CHAIR—Why didn't the exchange of notes come to the committee?

Mr WILKIE—In July last year the agreement was reached, and on 20 May the exchange of letters took place. I would have thought there was sufficient time for the treaty and even the exchange of letters to have been referred to this committee for comment and investigation prior to any signature.

Mr Campbell—The Timor Sea arrangement that was initialled in July 2001 is basically the same as the Timor Sea Treaty, which is before the committee now. That arrangement has not

entered into force beforehand. Some changes were made between the Timor Sea arrangement and the Timor Sea Treaty—that is, between July last year and this year. In particular, a taxation code was added onto it and the percentages in relation to unitisation were changed from 80-20 to 79.9-20.1. The point I am trying to make is that the Timor Sea arrangement and the Timor Sea Treaty that followed on from it have not entered into force, so this committee does have the opportunity to look at it before it enters into force.

CHAIR—What about the points about the exchange of notes?

Mr Campbell—In relation to the exchange of notes, I think it would be fair to say that the hope of both East Timor and Australia was that the Timor Sea Treaty would be in a position to come into force at the time of East Timorese independence. That did not come about for a number of reasons, but there needed to be negotiations on a number of very important arrangements to go with the Timor Sea Treaty. They include the taxation code, the mining code, the production sharing contracts. They were not complete, and therefore it was not possible for the Timor Sea arrangement to enter into force on independence. It was necessary, when that realisation came about, to negotiate some sort of interim arrangement which would ensure that there was a legal basis for continuity of exploration and exploitation of, and investment in, the Timor Sea pending the ultimate entry into force of the Timor Sea Treaty.

That arrangement was finalised just before independence. It was very important to have a legal basis between independence and the entry into force of the Timor Sea Treaty in the future. If there had been no exchange of notes, there would have been no continuing legal arrangement, because the arrangement with UNTAET ended on independence. So it was a question of timing. It was very important to have this interim legal basis put in place and there simply was not time to bring it before the committee. The time between completing the negotiations for that exchange of notes and independence was very short.

Mr WILKIE—I think even the exchange of notes should have come here for discussion, and that did not occur either. So that has not really explained why we did not get to look at the exchange of notes. The exchange of notes is here now, but it is already signed and in force.

Mr Campbell—The point I am trying to make, if I can just repeat something, is that the legal arrangements that were in place when UNTAET came into play—and we had an exchange of notes with UNTAET to continue arrangements in the Timor Sea—came to an end on independence.

CHAIR—So they had to be extended?

Mr Campbell—They had to be, essentially, extended. That is what the exchange of notes does. If I can just make one other point, I do realise that that original exchange of notes with UNTAET was also treated as an urgent treaty, but it was considered by this committee after it came into force. Essentially, the arrangements that are in force now are the same as the arrangements that were in force under the exchange of notes with UNTAET.

CHAIR—What is the revenue split under the exchange of notes?

Mr Raby—It is 90-10.

Mr Campbell—That is the fundamental difference between the two. In the exchange of notes with UNTAET, the revenue split was 50-50. The revenue split in the exchange of notes now is, in a practical sense, 90-10.

Mr Raby—But some of it is held in escrow, as a—

CHAIR—That is what I am getting at: it is still 50-50, isn't it?

Mr Campbell—Yes.

CHAIR—But we are going to hold 40 per cent in escrow.

Mr Campbell—Essentially, that is the case.

Mr Raby—For some items. There are other—

CHAIR—So it is not a 90-10 split. It is not what the treaty envisages; it is a different scenario.

Mr Bartley—There are actually three elements to the arrangement in the interim period until the treaty comes into force. For East Timor's value added taxes and some income taxes that it withholds on a monthly basis, the exchange of notes allows East Timor to collect on a 90-10 basis effectively from 20 May. The income that is derived from resource taxation on the petroleum is basically divvied up on a 90-10 basis but held in escrow. East Timor does not get access to that until—

CHAIR—None of it? It does not get access to any of the 90 per cent?

Mr Bartley—It does not get access to the extra 40 per cent.

CHAIR—So it gets access to 50 per cent of it?

Mr Bartley—Yes. The extra 40 per cent is held in escrow until the treaty is ratified. Similarly, where they levy income taxes on the income that comes from the production of the petroleum, they also will be held under an escrow arrangement.

CHAIR—That is the same deal; currently it is 50-50 and their extra 40 per cent is being held in escrow?

Mr Bartley—Yes, that is right.

Mr ADAMS—Does that deal with taxation? Is there a royalty on the product or is there a taxation arrangement?

Mr Bartley—The royalty is what I referred to as the resource taxation, and that is held in escrow. The extra 40 per cent is held in escrow.

Mr MARTYN EVANS—I want to ask about the future of this. This treaty will expire at some point in the future, if and when, and I assume when, we reach agreement with East Timor on permanent delineation of the boundaries of the seabed, whether that is on the median line or on some compromise position somewhere in between. Is there some possibility that this would include again some zone of cooperation where we would have joint control over some of the petroleum assets and an agreed split of management and revenue again, or is it envisaged that we would simply have a clean division of the seabed and whatever assets fall on either side of the line would be managed in that way? I know this is the subject of future negotiation, but it does seem to me that Australia has almost as much interest in the management of the petroleum assets as it does in the revenue from the petroleum assets. There are two questions: there is the revenue we get from these things and there is also the management of the petroleum assets as well. Wherever you draw the seabed line out there, it is almost inevitable that you are going to draw it over some substantial piece of gas or petroleum or liquids or whatever. So is some kind of zone of cooperation an option in these kinds of negotiations, or is it a clean seabed line wherever it is drawn? I know we cannot really speculate about that because that is very much down to negotiation, but is that what is likely to happen over some period of time?

Mr Campbell—One point you have raised is probably the answer, and that is that the negotiations have not even started on a delimitation between the two countries. Obviously there are many options open in relation to that negotiation, so it would certainly be speculative on my part to say where it was likely to end up or even at this stage what the government's view would be about various options. The second point I would make is in relation to things like pipelines and even environmental matters, where you have one petroleum installation very close to the jurisdiction of another country. There are some very important general principles under the Law of the Sea Convention that actually deal with those cross-border issues, such as that one country will take measures on its side of the boundary to ensure there is not marine pollution and things like that on the other side of the boundary. But at this stage I think it would be a little speculative to say where it might come out.

Dr Raby—One point to bear in mind in all of this, though, is that both governments are very conscious of the need to provide commercial certainty and predictability. Both governments have a very pragmatic approach in order to allow commercial development to go ahead and to ensure that the companies have the certainty and predictability that they need to make very big investments over long periods of time.

Mr WILKIE—Having said that, in terms of the border theory and the negotiations on the boundaries East Timor is in quite a weak position really, isn't it, because Australia has said, 'You have got no recourse apart from negotiation with us on borders. We are not going to negotiate on borders and in fact we're not going to recognise the International Court of Justice's ability to actually determine boundaries.' I think our international reputation is pretty bad at the moment and I am concerned that we may seem to be a bit of a bully in these negotiations with East Timor internationally, and it goes on to the next treaty we are going to be looking at. Given that we are saying that we want to negotiate but we are not going to accept the International Court of Justice's ruling on maritime boundary issues, I suppose I am concerned that our reputation is not going to be seen as being very good in those terms.

Dr Raby—That is a subjective judgment. What I can say is what I said before: the minister has made it absolutely clear that Australia will negotiate on the seabed boundary in good faith,

and we will certainly do that. We find ourselves in good company on the question of ICJ. It is a measure that is taken with respect to all of the ongoing maritime boundary issues that we have outstanding. We could brief you separately on that if you wish, but certainly as far as the seabed boundary negotiations with East Timor go, all I can say is that we will negotiate in good faith.

Mr MARTYN EVANS—Is the blue line which refers to the 1972 seabed boundary—insofar as it refers to our current boundary with Indonesia on both sides of East Timor, left and right—based on the prolongation of our continental shelf?

Mr Campbell—It is a negotiated boundary which is slightly less than the claim that we made in those negotiations with Indonesia, but it is based upon natural prolongation.

Mr MARTYN EVANS—The rough basis of it is the continental shelf type?

Mr Campbell—That was the basis that we put forward in the negotiations, but it was a negotiated boundary.

Mr ADAMS—Has Indonesia had any comments in relation to these boundaries?

Mr Campbell—In relation to which boundaries?

Mr ADAMS—In relation to the Timor Sea and East Timor.

Mr Campbell—I believe Indonesia sees the area of the old zone of cooperation and the area of JPDA as a matter between Australia and East Timor.

Mr ADAMS—Have they said anything about the 1972 seabed boundary?

Mr Campbell—I am not certain of that, but it is an agreed boundary and we would expect it to stay where it is.

CHAIR—Is area A on this second map that we received—attachment 2, Timor Gap Treaty Boundaries—the JPDA?

Mr Campbell—That is exactly right.

CHAIR—Can you tell me about areas B and C? What do they represent?

Mr Campbell—Under the old Timor Gap Treaty with Indonesia there were three areas. Area A was an area very much like the JPDA, where there was joint development and control of the area. Area B, which I believe is at the bottom, was an area administered pursuant to Australian law, but under the Timor Gap Treaty 10 per cent of the revenue from that area would go to Indonesia. Likewise, area C at the top was totally under the control of Indonesia, but 10 per cent of the revenue from that would go to Australia. I could be corrected by my colleagues there, but I do not think there was ever any transfer of revenue in relation to areas B and C.

CHAIR—And area A was divided 50-50?

Mr Campbell—The production from that area was shared 50-50.

CHAIR—We have been informed this morning, courtesy of *ABC News Online*, that East Timor's parliament has passed legislation outlining a claim that extends 200 nautical miles from its coastline. That would therefore claim 100 per cent of Sunrise, and, as we know, 80 per cent of that is currently in Australian jurisdiction. I assume it is true that the East Timor parliament has done that?

Mr Campbell—The East Timorese parliament has given some initial approval to legislation establishing the maritime claims and boundaries of East Timor.

CHAIR—Essentially, it is their claim?

Mr Campbell—It is a general piece of legislation which one would have to apply to the area we are talking about here. In other words, it is legislation that establishes the so-called territorial sea baseline from which all its maritime zones are measured: its 12 nautical mile territorial sea; 200 nautical mile exclusive economic zone; 24 nautical mile contiguous zone; and, in relation to the continental shelf, 200 nautical miles or to the natural prolongation of its land area. It is a standard piece of maritime legislation, similar to our Seas and Submerged Lands Act, under which they set out their general maritime areas. The report that I think was on *AM* this morning referred to this as being East Timor's claim in relation to the Timor Sea. The point I am making is that one would have to apply that piece of legislation to the Timor Sea to see exactly where their claim is, but certainly, based on that legislation, the claim has the potential to go down to 200 nautical miles, which is the bottom of area B on that diagram. In fact, as I understand it the legislation has not quite finished going through the processes of the East Timorese parliament. I can be corrected, but we are yet to receive any letter or notification from East Timor about how they would apply that legislation to this particular area.

CHAIR—Also, how does that legislation fit with the treaty that we have before us and the negotiations that are currently ongoing between Australia and East Timor in relation to treaty unitisation?

Mr Campbell—If I can put it this way, it fits the same way that our Seas and Submerged Lands Act fits. The Timor Sea Treaty, as I think was set out in the NIA, is a provisional arrangement recognised in article 83 of the United Nations Convention on the Law of the Sea pending the permanent delimitation of the boundary. Both of those pieces of legislation fit in with that structure.

CHAIR—There seems to be a tension here between what has been negotiated and agreed in relation to the boundaries of the JPDA, which specifically exclude 80 per cent of Sunrise, and then the—

Mr Campbell—My recollection of the ABC report is—

CHAIR—I am not suggesting that it was absolutely accurate. It was a short statement.

Mr Campbell—This amounted to a claim by East Timor to these areas and that area. I am saying that it is a general piece of maritime legislation and—

CHAIR—There is nothing remarkable about it per se.

Mr Campbell—Nothing remarkable about it per se, but we are yet to hear from East Timor about how it would apply that legislation to this area, although there were statements made beforehand that East Timor would be looking for a greater maritime area than it currently has.

Dr Raby—This has been anticipated from statements since independence by East Timorese leaders. It is a perfectly normal approach for them to take. The key point with the treaty, though, is that it is about setting up through the Joint Petroleum Development Area a practical way to enable commercial development of the resources to proceed while these bigger questions of eventual seabed delimitation are worked through.

Mr WILKIE—There is potential for East Timor to join with Indonesia and put forward a joint claim on equidistance, isn't there?

Mr Campbell—In relation to areas outside the JPDA where the 1972 seabed boundary is noted on the diagram, we have an agreement with Indonesia which fixes that boundary. We would expect that boundary to stay where it is. That would be the Australian government position.

Mr ADAMS—The information we have received says that there has been consultation with the states and territories. That has occurred with respect to this treaty?

Dr Raby—Yes.

Mr ADAMS—And industry?

Dr Raby—Yes.

Mr ADAMS—Nobody—the states and territories—has any difficulties with this treaty?

Dr Raby—Not that we are aware of. It may be that people would wish for something more perfect.

Mr ADAMS—I know, but there are no burning issues?

Dr Raby—Not that we are aware of.

CHAIR—Did any particular state or territory government come up with suggested changes?

Dr Raby—Not that I am aware of.

Mr Walker—I am not aware of any.

CHAIR—Can you go through the three-tiered administrative structure quickly to give us some understanding of how that is intended to operate with the designated authority, the joint commission and the ministerial council?

Ms Irwin—The three tiers work on the basis that the designated authority has responsibility at the day-to-day level for managing operations in the Joint Petroleum Development Area. When the treaty comes into force, the idea under the current arrangements is that there would be a joint authority that would have equal numbers of Australian and East Timorese representatives that would be responsible for managing the area. For the first three years of the entry into force of the treaty, that organisation would take the role of the designated authority. However, around the three-year period, that organisation would become part of either the East Timorese government or an East Timorese statutory authority.

Sitting above the designated authority is a joint commission. The joint commission would have basically a two to one representation of East Timorese to Australians. They essentially have an oversight role of the designated authority and have to approve various activities of the designated authority, including its budget. Sitting on top of the joint commission is a ministerial council. The ministerial council would have equal numbers of Australian and East Timorese representatives, and it would then have a broader global view of activities in the area. There are specific annexes in the treaty: annex C sets out the specific activities that the designated authority is responsible for, and annex D sets out the specific activities that the joint commission is responsible for.

CHAIR—If there is an equal number of ministers on the ministerial council from each country, how is it intended to resolve any disputes?

Ms Irwin—There is a dispute settlement provision in the treaty itself so, in the first instance, you would seek to resolve dispute through negotiation. However, annex B—I think—provides for arbitration if necessary.

CHAIR—Which body would arbitrate such a dispute?

Mr Campbell—There is an annex to the treaty which sets up a mechanism for establishing a three-person arbitral tribunal.

CHAIR—Is that under article 23?

Mr Campbell—I am not quite sure of the article.

Ms Irwin—Yes, that is right.

Mr Campbell—Article 23 and annex B of the treaty. If there were a disagreement in the joint commission, notwithstanding that there will be more East Timorese representatives on the joint commission, it would still be open to either party in the joint commission to refer that disagreement to the ministerial council. Then it would be up to the ministerial council—with equal membership—to try to resolve that disagreement. If there could not be resolution of that disagreement in the ministerial council, it would go to the arbitration mechanism.

CHAIR—But, as there are more East Timorese commissioners than Australian ones, if there were a dispute at the joint commission level, the majority would rule, would it not?

Mr Campbell—No, because in the treaty, notwithstanding that difference in representation, either side can refer a matter of disagreement to the ministerial council for resolution.

CHAIR—Which is then fifty-fifty representation?

Mr Campbell—Which is then fifty-fifty representation.

CHAIR—If they cannot agree, it would go to international arbitration?

Mr Campbell—It would go to the three-person arbitral tribunal.

CHAIR—Where are those three from?

Mr Campbell—Australia and East Timor would appoint one arbitrator each. Then there are some fairly standard provisions on the selection of the third arbitrator. If Australia and East Timor cannot agree on the third arbitrator, either country ultimately can request the President of the International Court of Justice to select the third arbitrator.

CHAIR—If the president is a citizen of Australia or East Timor, you get somebody else to do it?

Mr Campbell—You get somebody else to do it.

Mr WILKIE—I wanted to move on to the employment issue in article 11. I see that it is not actually Australian and East Timorese workers; it is just East Timorese. I suppose I would like to see something there about Australian workers. In terms of employing East Timorese nationals in particular in relation to article 11, you made the comment, Dr Raby, that who they employ is really a commercial decision of the producers. What teeth then does article 11 have in trying to get East Timorese nationals employed in the gas fields? I am particularly concerned because my information is that in the interim arrangements with the exchange of notes that took place last year, even up until this case, there was a provision to enable East Timorese workers and Australian nationals to be employed. According to my information, none have been and the employees being taken on by the companies have been European. Although it is in writing, I am concerned that article 11 will have no validity whatsoever. How can we ensure that article 11 in particular is complied with?

Dr Raby—I might invite my colleague from DITR to respond to that.

Mr Walker—One of the major ways in which we have attempted to address this is through starting with the appropriate training activities, basically to bring some East Timorese people to a point where they have the skills to be able to apply for jobs that might be generated in the area. There is quite a deal of activity going on in this. One of these is a committee on training and education, which is chaired by Prime Minister Alkatiri and has membership from the Northern Territory government, the Commonwealth and industry. There are also commercial arrangements between Phillips and East Timor to undertake additional such training, with the aim of increasing employment opportunities for East Timorese in the oil and gas industry.

Mr WILKIE—I would not mind seeing the previous agreement and checking whether that did have provision for Australian workers as well as for East Timorese workers. Can anyone tell me whether that was the case?

Mr Walker—By that agreement, you mean the treaty with—

Mr WILKIE—I think it was the one with Indonesia.

Mr Campbell—The previous agreement with Indonesia had provisions for the employment of Australian and Indonesian workers.

Mr WILKIE—Can someone tell me why Australian workers are not included in this treaty?

Mr Campbell—They are not precluded by this treaty. It says, 'to facilitate, as a matter of priority, training and employment opportunities for East Timorese nationals and permanent residents.' It does not preclude Australians from being employed in the area.

CHAIR—Returning to the timing of all this, the exchange of notes continues until the entry into force of the Timor Sea Treaty and it is really a holding position, but everybody's rights and obligations are in place. What is the impetus then to ratify the treaty?

Dr Raby—From the East Timorese side, revenues which they would like to have access to are accumulating in escrow.

CHAIR—How are they held in escrow? Who has got them? Where are they?

Mr ADAMS—What is the structure?

CHAIR—How does it work?

Mr Walker—Under the interim arrangements, the resource taxes are collected by the joint authority. The joint authority holds trust accounts for these moneys and makes disbursements to governments as required.

CHAIR—So they do not have to wait for the treaty in order to get—

Mr Walker—I would expect that they would be setting up a special trust account to hold the 40 per cent that is being held in escrow.

Dr Raby—The real pressure for moving forward with this is that tremendous commercial developments, which depend on a legal framework being put in place to give them the certainty they need to commit these large funds for investment, are just sitting there.

Mr WILKIE—Wouldn't that happen now under the current arrangement?

Dr Raby—No. The current arrangement, being temporary, does not include a unitisation agreement, for example, which would enable Greater Sunrise to go ahead. Certainly, the

companies interested in Bayu-Undan want to see a treaty that is ratified and that enters into force.

CHAIR—So the completion of the unitisation agreement is very significant?

Dr Raby—It is absolutely essential if Greater Sunrise is to go ahead.

CHAIR—So you would not want one to occur without the other? You would not want to ratify the treaty without the unitisation agreement being in place?

Dr Raby—We want both these elements to move forward in parallel in the shortest possible time.

CHAIR—But there is nothing in the treaty that requires the unitisation agreement to be completed at the same time?

Dr Raby—No, not at all, but a memorandum of understanding was signed—obviously, that is subtreaty status—in Dili on 20 May, and it has both governments committing themselves to expeditiously concluding a unitisation agreement.

CHAIR—Are you saying that that was with a view to them being completed at the same time?

Dr Raby—That would be an expectation, but the point is that we think that basically both can be accommodated within the same time frame.

Mr WILKIE—Even now, given the legislation that East Timor passed this week?

Dr Raby—Yes. We have had very positive comments from the East Timorese leadership about their commitment to moving this unitisation agreement forward very quickly.

Mr WILKIE—When you say 'very quickly', what time frame are you looking at?

Dr Raby—Before the end of the year, which is consistent with the memorandum of understanding that was signed on 20 May in Dili. The date set down in that MOU was 31 December. We hope that it can be done earlier than that, but certainly the indications we have are that there is a commitment on the East Timorese side to have this done by 31 December at the latest, and obviously we are committed to that as well.

CHAIR—What is the imperative on the part of East Timor to sign the unitisation agreement?

Dr Raby—They have the same interest that we have in the commercial development of the region.

Mr WILKIE—I have had information that Phillips are saying that they really want to come online in 2006. If the treaty and the IUA are held up until the end of December, is that going to affect those plans?

Dr Raby—I think it is fair to say that Phillips certainly want this done sooner rather than later. But they will have to make a judgment about how the negotiations are going and where we will end up towards the last quarter of this year.

Mr MARTYN EVANS—Do we know where all this gas is going to be used? We have a lot of gas on the North West Shelf, and other countries such as Malaysia have a fair bit of gas.

Mr Walker—It is probably best if I address this in terms of the two specific projects that are being discussed. Firstly, for the Bayu-Undan project, Phillips plans to start producing natural gas from Bayu-Undan, pipelining it to Darwin, where it will be converted into LNG, and then selling that LNG to the Japanese market. The commercial negotiations to enable that to happen are well advanced. The case of the Greater Sunrise field is, however, more complex. There are two development options being considered. Shell, one of the joint venture partners, has proposed developing the field using floating LNG technology—this is something that has not been done anywhere in the world to date—and then selling the gas to the US west coast market. However, there are counterproposals for Greater Sunrise, for bringing that natural gas onshore and using it to supply the Australian domestic gas market. The joint venture partners are currently undertaking a review of the domestic market to see whether they can achieve the volumes and price levels that they would need to make that feasible.

Mr ADAMS—Who owns the new technology that you just talked about?

Mr Walker—Shell.

Mr ADAMS—Developed where?

Mr Walker—I am not certain of that, but it was certainly not in Australia.

CHAIR—So it is one option or the other, is it? The US market or the Australian domestic market?

Mr Walker—They are the two options that are on the table as of now. Somebody may yet develop a new option.

Mr WILKIE—Mr Walker, would they pipe that gas down?

Mr Walker—Under the floating LNG proposal, there would be no pipeline from the Greater Sunrise field to Australia; the natural gas would be exported direct from the production point to the LNG markets.

Mr WILKIE—I am thinking of the natural gas domestic market.

Mr Walker—In the natural gas domestic market, you have to bring very large quantities of gas ashore to make this commercially feasible, and that would require markets in southern and eastern Australia, as well as potential markets in the Northern Territory, in order to get to the necessary volumes.

Mr ADAMS—Are any Australian public interests run over this, when it is being negotiated, or is it just left up to the private sector's business interests and what serves them best? Is bringing it ashore, employing Australian workers, interchanging technology or any other such thing, brought into consideration when we negotiate these treaties?

Mr Walker—In terms of the treaty itself, that does not really impinge on the development options, except to ensure that the treaties, the international unitisation agreements, are written in ways which do not preclude any development options. As you say, there are obviously benefits if the gas can be brought ashore commercially, but we are talking about very large investments. It is something that the commercial sector has to make decisions about, on commercial grounds.

Mr ADAMS—Somebody has to make the decision on the public interest of the country of Australia: that is my task, and that is why I am asking the question. That is my task on this committee, and I am looking at whether the process has given that consideration, and I am really being told that it has not, and that is what I will accept from your answer.

Mr Walker—There has been a lot of detailed consideration of the relative merits of onshore versus offshore. You will have seen a lot of things, particularly from the Northern Territory government, which is obviously very interested in seeing onshore development take place. At the end of the day, the actual decision to invest will have to be made by industry; what they are currently exploring is whether one option is economically feasible or not, or whether in fact neither is, perhaps.

Mr ADAMS—What about the Australian component of input into building a platform? Or will the platforms be built in Indonesia or somewhere else and floated in? Is there any opportunity for Australia? Have we negotiated anything in this, in the interests of Australia?

Dr Raby—What we are dealing with with this treaty is not an issue of industry policy. This is a legal instrument that is permissive. It is intended to allow all sorts of things to happen. Those things that you are describing may or may not be accommodated within this. That it is permissive—nothing is precluded—is the point I want to make. The treaty is about the legal framework. The industry policy is another issue but it is not an issue that is addressed with this treaty. However, the treaty does not preclude any number of industry policy outcomes.

Mr ADAMS—But it does not put anything into it.

Dr Raby—No, it creates a legal framework for commercial development to proceed. How that is structured is a matter of government policy and, ultimately, a matter for commercial decision of the partners.

Mr ADAMS—But in the process of not excluding anything happening it could also write certain things into it as well. That would have been possible, would it not?

Dr Raby—I am not sure. It is to do with the legal framework between East Timor and Australia.

CHAIR—We would not want it writing in what options they should pursue in development.

Mr ADAMS—I am talking about what is to the benefit of East Timor in getting some skills and what is in the interest of Australia in getting some technological change or technological wins.

Dr Raby—That is a question you will have to direct to the government. We have negotiated the treaty, but the parameters for that are obviously set by the government. You will need to address that to government.

Mr ADAMS—I accept that.

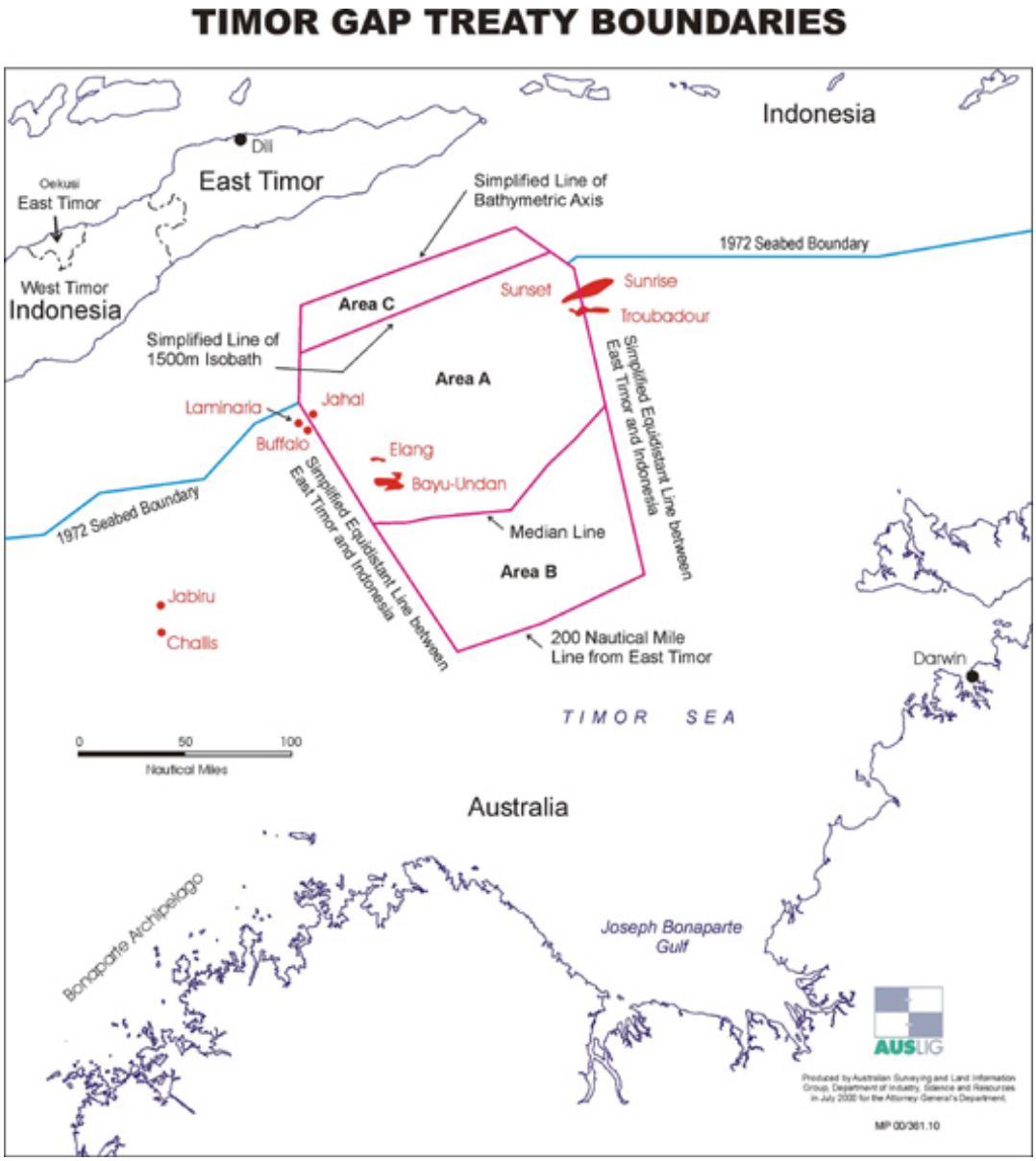
Senator MARSHALL—Do other countries, when negotiating these sorts of treaties, seek to put in those industry policy type issues, as you describe them?

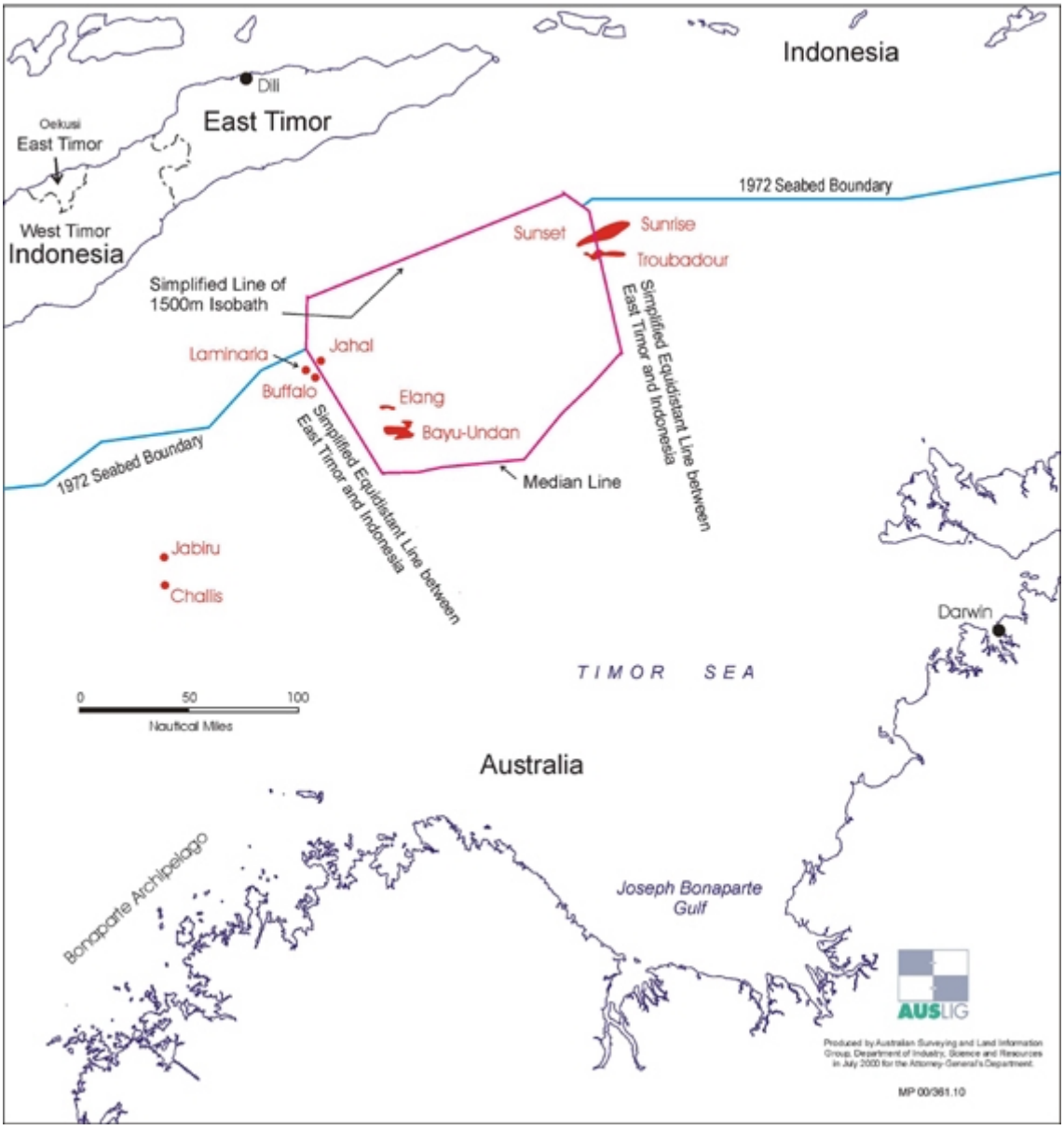
Mr Walker—Not in any of the international unitisation agreements and things that I have seen, no.

CHAIR—Thank you for your time this morning. This may not be the last time that we ask you to appear before the committee. It depends on how the public submissions proceed.

Is it the wish of the committee that the Auslig maps—I think that is the best way to describe it—of the Timor Sea provided by the Department of Foreign Affairs and Trade and the Timor Gap Treaty boundaries map provided by the Department of Industry, Tourism and Resources be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The maps read as follows—





Mr WILKIE—Mr Campbell, could I ask for a copy of the wording for the previous treaty that we had—

Mr Campbell—In relation to employment.

Mr WILKIE—In relation to employment, for Australia and East Timor.

Mr Campbell—I have got it here.

CHAIR—Thank you.

[11.28 a.m.]

CAMPBELL, Mr William McFadyen, First Assistant Secretary, Office of International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, Department of Foreign Affairs and Trade

RABY, Dr Geoffrey William, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

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

CHAIR—I welcome witnesses from the Attorney-General's Department and the Department of Foreign Affairs and Trade to give evidence in relation to the Australian declarations under articles 2871 and 2981 of the United Nations Convention on the Law of the Sea 1982 and the Australian declaration under paragraph 2 of article 36 of the Statute of the International Court of Justice 1945. As you were all witnesses in the last hearing I will not go over the warning about not giving false and misleading evidence. I am sure that you are all aware that these are regarded as proceedings of the parliament and should be treated accordingly. Would somebody like to make some opening remarks about this particular international instrument?

Mr Campbell—Before making some opening remarks, I note that the tabling of these treaties was anticipated in a letter sent to you on 24 March of this year, stating that the declarations had been lodged but that they would be tabled before the committee as soon as possible thereafter. They were lodged early, on the basis of the sensitive nature of the action, which is probably something that we will get into afterwards. Having stated that, we welcome the opportunity to explain to the committee these two instruments: the declarations relating to dispute settlement under the United Nations Convention on the Law of the Sea, which I will refer to as the Law of the Sea convention, or UNCLOS; and Australia's new declaration of acceptance of the jurisdiction of the International Court of Justice, which I will refer to as the ICJ.

Before moving on to the two declarations, I would like to make a preliminary point about international adjudication and arbitration in general, and that is that most if not all dispute settlement by international courts and tribunals is based upon the consent of the states appearing before them. That consent can be given in a variety of ways, as I will mention in relation to the ICJ. However, in the absence of its consent, a state cannot be taken before an international court or tribunal. In the absence of such consent by a state, no other state has the right to bring a dispute between the two of them before an international court or tribunal. The point I make is that consent is fundamental to international adjudication and arbitration.

CHAIR—So you cannot have a unilateral referral of a matter to the court?

Mr Campbell—That is exactly right. Moving on to the UNCLOS declaration, which was made on 22 March, Australia gave its consent to dispute settlement in relation to the interpretation and application of the Law of the Sea convention when it ratified that convention in 1994. Indeed Australia, together with New Zealand, utilised the dispute settlement proceedings under UNCLOS when both countries took Japan to an arbitration over southern bluefin tuna in 1999. While all parties to UNCLOS accept dispute settlement under the convention, the convention allows states parties certain choices, and those choices are both as to the means of dispute settlement and also as to the exclusion of certain forms of dispute from dispute settlement. The declaration made by Australia recently under the convention relates to those two choices.

The purpose of the first part of the declaration was to nominate the International Tribunal for the Law of the Sea and the ICJ as preferred means of dispute settlement under UNCLOS. The NIA sets out the other means that were the subject of that choice, and I will not go into them now. UNCLOS also enables countries to exclude specified forms of dispute from dispute settlement, and one of those express exclusions referred to in UNCLOS relates to the determination of maritime boundaries. Under its declaration, pursuant to that provision, Australia has excluded maritime boundary disputes from compulsory dispute settlement under the Law of the Sea convention. That action was taken in line with the government's view that maritime boundaries are best resolved through negotiation rather than by resort to an international court or tribunal. As a matter of statistics, of the 29 states parties to UNCLOS that have actually nominated preferred dispute resolution mechanisms, 11 have made similar exceptions in relation to maritime boundary disputes.

Moving on to the International Court of Justice, or ICJ, declaration, as is explained in the NIA, a state can accept the jurisdiction of the International Court of Justice in three ways. The first way a state can do this is by entering into an agreement with another country to refer a particular dispute to the International Court of Justice; that is referred to technically as a compromis.The second mechanism is that, in a treaty on a particular subject, a state might agree that the ICJ will have jurisdiction over disputes arising under that treaty—and the example I just gave of the declaration under the UN Convention on the Law of the Sea is an example of that. In other words, we have agreed under the UN Convention on the Law of the Sea that the ICJ can be used for the resolution of disputes under that treaty. The third form of consent is that under article 36.2 of the statute of the ICJ—commonly known as the optional clause—a state may lodge a declaration with the Secretary General of the United Nations, accepting the jurisdiction of the court in relation to any other country making a similar declaration: that is, there is an element of reciprocity. In making such a declaration, a state is entitled to place conditions or exceptions on its acceptance. If there is a dispute between two states, both of whom have lodged declarations under the optional clause that covered the dispute, then the ICJ has jurisdiction over it.

Australia's previous declaration in 1975 under the optional clause was an open declaration; it only included one qualification. The declaration made by Australia in March this year inserted a number of further qualifications. Those qualifications bring about a consistency with the declaration I just referred to under UNCLOS, which excluded maritime boundary disputes. They also bring about some commonality with qualifications that have been adopted by a number of other countries in relation to their ICJ declarations.

The four qualifications are set out in the NIA. In short, the first qualification is where we have agreed with another state to utilise another dispute resolution mechanism in relation to a particular dispute; in that case, that other means will be used and not the ICJ. That exception was contained in the previous declaration. The second qualification concerns maritime boundary disputes between Australia and another state, or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute. The effect of that exception, combined with the UNCLOS declaration, is to preclude compulsory dispute settlement of Australia's maritime boundaries.

I will give a bit of background about our boundaries. We have some of the largest maritime areas in the world, and we also have some of the longest maritime boundaries. It is the view of the government that the maritime boundaries, as I mentioned earlier, are best resolved by negotiation and not through resort to third party dispute settlement. All the current maritime boundaries that we have settled with other countries have been agreed by negotiation. Negotiation allows the parties to work together to reach outcomes acceptable to both sides for the long term.

The third qualification is where another state accepts the jurisdiction of the ICJ only for the purpose of a particular dispute. That reservation ensures that only countries that have the same broad acceptance of the jurisdiction of the ICJ can take Australia to the international court under the optional clause. The final qualification is in relation to cases where less than 12 months has elapsed since another state accepted the jurisdiction under the optional protocol. This is designed to protect Australia from litigation by countries that have accepted the jurisdiction of the ICJ for the sole purpose of bringing proceedings against Australia. Again, it relates to that issue of long-term acceptance of the jurisdiction.

Notwithstanding those qualifications, Australia still accepts the jurisdiction of the International Court of Justice in relation to most disputes. There has been quite a lot of reporting that Australia has withdrawn from the ICJ jurisdiction; that is simply not the case. Australia has put on some further qualifications, but it has not withdrawn from the jurisdiction. Indeed, as pointed out in the national interest analysis, Australia is in the minority of only one-third of United Nations members who accept ICJ jurisdiction under the optional clause. Of the 190-odd United Nations members, only 63 have made a declaration under the optional clause to accept the jurisdiction of the court. Of those 63 states, a majority—that is, 46—have placed some qualifications on their acceptance. If I could make a slight explanation, I think the NIA refers to 61 states as having accepted the jurisdiction of the ICJ.

CHAIR—Yes, it does.

Mr Campbell—It is very much a matter of reading some declarations and documentation. Some of those relate to declarations that were previously made in relation to the Permanent Court of International Justice prior to 1945. We have had a careful look at it and are fairly sure that the figure is 63. The other point I would make is that the web site containing those declarations is updated only every so often; it is not updated from day to day. We cannot be sure that the figure is exactly right at the moment, but it would be fairly accurate. I will conclude by saying that, consistent with its obligations under the UN charter, Australia is committed to the peaceful settlement of disputes. In this respect, the ICJ and the dispute resolution mechanisms under UNCLOS will continue to play an important role.

CHAIR—One of the exceptions applies where the parties agree to other peaceful means of dispute resolution. Take me through that scenario. What happens when Australia and another party agree to some other means of dispute resolution which does not resolve the dispute?

Mr Campbell—There would be no resort to the International Court of Justice in those circumstances.

CHAIR—There could not be, or there would not be?

Mr Campbell—There would have to be a separate agreement to take it to the International Court of Justice in those circumstances.

CHAIR—So Australia could go back on its exceptions at any time?

Mr Campbell—It is always open to Australia to agree with another country to take a particular dispute to the International Court of Justice. That was the first type of referral that I mentioned: under a so-called compromis, we reach a specific agreement to take a matter to the International Court of Justice.

CHAIR—In broad terms, we have accepted the jurisdiction of the ICJ since 1975?

Mr Campbell—We have accepted the jurisdiction of the ICJ virtually since its inception, which was around 1947. We accepted the jurisdiction of the Permanent Court before that.

CHAIR—So what was the point of the date of 1975?

Mr Campbell—That was the date our previous declaration was made, but before that there was another declaration in 1954. Prior to that, Australia made a declaration in relation to the Permanent Court in 1940.

CHAIR—But this is the first time we have made an exception or declaration with respect to maritime boundaries?

Mr Campbell—No. In fact, the 1954 declaration made reservations in relation to certain maritime matters.

CHAIR—What was the difference between that reservation and this current declaration?

Mr Campbell—The current declaration is certainly more comprehensive in its dealing with maritime boundaries, but bear in mind that the maritime boundaries in 1954 fundamentally related to the territorial sea only. The continental shelf was just developing at that stage; there was no concept of an exclusive economic zone. Of necessity, our current declaration is much broader.

Mr WILKIE—Have we ever been taken to court about boundaries?

Mr Campbell—Yes, we have.

Mr WILKIE—What was the outcome? Can you tell us about the case or cases?

Mr Campbell—The case in fact concerned the Timor Gap Zone of Cooperation that was agreed under the Timor Gap Treaty with Indonesia. Portugal took Australia to the International Court of Justice alleging, amongst other things, that the Timor Gap Treaty was illegal because the occupation of East Timor by Indonesia was illegal. However, Portugal could not take Indonesia to the court, because Indonesia had not accepted jurisdiction under the optional clause. The argument put by Australia in that case, relying upon some earlier authority called the Monetary Gold Case, was that Indonesia was what is known as 'an indispensable third party' to that action and the action could not sensibly be decided in the absence of Indonesia's presence before the court. Ultimately, that was the basis on which the court said it would not exercise jurisdiction over the matter, and that was where the matter was left.

Mr WILKIE—Is that the only case?

Mr Campbell—That is not the only case where Australia has been before the International Court of Justice.

Mr WILKIE—I mean over the maritime borders.

Mr Campbell—That is the only case that I can recall over maritime boundaries. There was another semi-maritime matter, and that was when Australia took France to the International Court of Justice in the mid-1970s over atmospheric nuclear testing in the Pacific, which had a maritime aspect to it.

Senator MARSHALL—You mentioned earlier that some other countries may be waiting for this process, to take us to court on some of the boundary issues. I thought you indicated that some other countries had ratified that agreement on the basis that they may be able to use that in some disputed boundary issues with us, unless I misunderstood.

Mr Campbell—I do not think I suggested that.

Senator MARSHALL—I am sorry. Do we have any unresolved boundary issues?

Mr Campbell—We have a number of unresolved boundaries—when I say 'unresolved', I mean boundaries yet to be agreed with other countries. As I think is set out in the NIA, we have maritime boundaries with seven countries. We have agreed our maritime boundaries with Indonesia, although the 1997 treaty, which is the final treaty we negotiated with Indonesia, is yet to enter into force. We have some unresolved continental shelf boundaries beyond 200 nautical miles with France that we are yet to resolve, both in relation to New Caledonia and its possession of Kerguelen, which is near Heard and McDonald Islands in the Southern Ocean. We also, of course, have an unresolved boundary with East Timor, but we have provisional arrangements in place. At the present time we are involved in maritime boundary negotiations with New Zealand, where we have maritime boundaries on four fronts, including between our Antarctic possessions. We also have unresolved boundaries with France and Norway in relation to where they abut the Australian Antarctic Territory. They are the unresolved ones.

CHAIR—This declaration was clearly pre-emptive, so who are we assuming is going to begin an action against Australia with regard to a sea boundary delimitation?

Mr Campbell—I cannot really get into the motives of why the declaration was made. There was no actual threat that I have seen in any newspapers, or things like that, about Australia being taken to court over its maritime boundaries. There were certainly a deal of writings and papers being given by academics saying that it was a possibility East Timor would take Australia to the court over its maritime boundaries.

CHAIR—We had not thought of a declaration prior to this? We had not thought it necessary to make this exception prior to 2002?

Mr Campbell—We have been considering for some time the question of the declarations under UNCLOS, which have really been outstanding since we became a party to it in 1994, both in relation to the forum for dispute settlement and in relation to the question of which exceptions under UNCLOS we would adopt. The government has now made that decision.

Mr MARTYN EVANS—In relation to the International Court of Justice, what is the status of the jurisdiction acceptance by countries like the United States and the major European Community powers? Have they more or less unreserved acceptance of the jurisdiction?

Mr Campbell—It might be useful if we provide to the committee the list of declarations made by the countries. We can do that very easily.

Mr MARTYN EVANS—Certainly the major ones would be helpful.

Mr Campbell—We will provide that list to you. The United States, France, China and the USSR do not accept the jurisdiction of the international court. France and the United States used to accept the jurisdiction under the optional clause. Most of the European countries, I think, have made a declaration under the optional clause. Not all of them, but many, have qualifications to it. For example, in our region New Zealand accepts the jurisdiction of the international court with qualifications, some of which relate to resources in its maritime zones. Indonesia does not accept the jurisdiction of the court under the optional clause although—as I mentioned earlier—it made a specific agreement with Malaysia to take a dispute over sovereignty of certain islands to the international court. That was heard by the court in June.

Mr MARTYN EVANS—That would be quite useful. Thank you.

Mr WILKIE—This is not a question; it is more a statement, but you may wish to comment on it. I would think you could understand that the international community might say to Australia, 'You've had this in place since 1940. You've never had a judgment made against you and two months before East Timor—the only country likely to take action against you—you've suddenly decided to exclude this from the court's jurisdiction.' A cynic might say that it has been done to prevent East Timor taking us to court and, therefore, it is in Australia's international interests.

Mr Campbell—There are a number of points I can make or repeat. Firstly, East Timor has said that it is keen on negotiation as a means of resolving these disputes. Secondly, this applies

to all our maritime boundaries; we are not just talking about our maritime boundaries with East Timor; we do have unresolved boundaries. Thirdly, it is the view of the government that maritime boundaries are best resolved by negotiation and not by resort to international arbitration or courts. To repeat another point: all our current boundaries with other countries have been negotiated.

Finally, the question of the acceptability of the boundary to both countries is very important, given that maritime boundaries remain in place for a very long period. You are much more likely to get acceptance of that boundary, and less tension over time, if it is done by agreement as opposed to an international court or tribunal. There have been cases—I can think of one instance—where countries have had a boundary resolved by arbitration and ended up with a very odd result which may not have been in the interest of either country. The case I am thinking of is a boundary that was set by arbitration between Canada and France in relation to some French possessions very close to the coastline of Canada. These islands ended up with an exclusive economic zone which was 200 nautical miles long and 10½ nautical miles wide. That made it very difficult in relation to regulated fisheries in the area. The fundamental point is that the government believes that maritime boundaries are best resolved by negotiation.

CHAIR—Do you know whether East Timor as a nation has accepted the jurisdiction of the International Court of Justice?

Mr Campbell—East Timor is not yet a member of the UN. Although it has applied for UN membership, it has to be approved in about September.

CHAIR—It has not entered into any international instruments of that nature because it is not yet a member of the UN.

Mr Campbell—It is not yet a member. If you are a member of the UN, it follows that you are also a party to the Statute of the International Court of Justice. Once East Timor became a party to the Statute of the International Court of Justice, if it wanted to, it could make a declaration under the optional clause of that statute.

CHAIR—Currently it has no status to refer a matter to the ICJ, anyway.

Mr Campbell—No, it does not. Let me put it this way: it is our view that they do not.

Mr WILKIE—But they may have in the future.

Dr Raby—The expectation is that they will join the UN in September.

CHAIR—Currently, as it stands today, they do not have standing to refer a matter to the ICJ?

Mr Campbell—No.

Senator KIRK—With respect to these maritime boundary disputes that we will now be negotiating directly with the other country, what will occur if agreement simply cannot be

reached? Is there an international arbitration process that we can agree to enter into if the ICJ is unavailable?

Mr Campbell—It is still the government's view that they are best resolved by negotiation, but it is always open to the two countries to agree specifically to refer a particular matter, including a maritime boundary delimitation, to either a special arbitral tribunal, like I mentioned in relation to the St Pierre and Miquelon matter, or they could agree to refer it to the International Court of Justice, if they wanted to. Also, there is still a measure under the United Nations Convention on the Law of the Sea, which I think is mentioned in the NIA, to the effect that if both countries are a party to the Law of the Sea Convention, either of those parties could refer the matter to a conciliation commission under the convention. That conciliation commission could look at it but the views or decisions of that conciliation commission would not be binding on either country.

CHAIR—Under the UNCLOS declaration, if Australia is involved in a dispute with a country that has not accepted either of our two preferred dispute resolution mechanisms, then there is this default mechanism of an arbitration panel?

Mr Campbell—That is right.

CHAIR—What are the advantages or disadvantages of a panel such as that?

Mr Campbell—I think they are referred to in part in the NIA. One of the reasons that Australia adopted the International Court of Justice and the International Tribunal for the Law of the Sea is that, firstly, Australia has knowledge of both of them, has been before them and has seen how they operate and, secondly, they are both standing tribunals and Australia has already contributed to their costs. If we take a matter or somebody else takes us to the ICJ or the International Tribunal for the Law of the Sea, we do not have to bear the costs of the tribunal and the judges. The other issue is that they are there, ready and available—

CHAIR—With established rules of procedure.

Mr Campbell—They can take matters quite quickly. That situation is as opposed to, for example, an annex 7 arbitration tribunal under the Law of the Sea Convention, of which we have had experience in the southern bluefin tuna case. It takes some time to establish the tribunal. There is quite a lengthy process of negotiation with the country with which you are in dispute over some other substantive issue as to who is going to be appointed to the tribunal and things like that. The other issue is that the countries involved in the dispute have to bear the costs of the running of that tribunal and the payment of the judges. They have to agree on how it is going to be organised.

CHAIR—It is very expensive.

Mr Campbell—There are substantial practical advantages in going to the ICJ and the International Tribunal for the Law of the Sea.

CHAIR—Why did we have to go to an arbitral tribunal under annex 7?

Mr Campbell—Because neither Japan, New Zealand nor Australia for that matter made a choice of tribunals under UNCLOS. We did have to go to the default mechanism, which was an annex 7 tribunal. Although we sought interim measures against Japan, the convention allows that those interim measures be heard by the International Tribunal for the Law of the Sea.

CHAIR—Is that in part why this declaration is being made?

Mr Campbell—In part, the declaration was held off because we wanted to see how the International Tribunal for the Law of the Sea operated, not just in relation to our own case but generally. It came into being only about two years after the convention entered into force. We just wanted to see how that operated before Australia decided whether or not to accept its jurisdiction. We did have experience before it. That is partly the basis on which the choice was made.

CHAIR—Thank you very much for your assistance this morning. It is very much appreciated.

Proceedings suspended from 12.02 p.m. to 1.04 p.m.

BRIEN, Mr Joshua, Legal Officer, Office of International Law, Attorney-General's Department

CHIDGEY, Ms Sarah, Senior Legal Officer, Criminal Law Branch, Attorney-General's Department

McDONALD, Mr Geoffrey, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

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

CHAIR—I resume our ongoing review of Australia's international treaty obligations. I now call witnesses from the Attorney-General's Department and the Department of Foreign Affairs and Trade to give evidence relating to the International Convention for the Suppression of the Financing of Terrorism. Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do any of you wish to make any introductory remarks before we proceed to questions?

Mr McDonald—Yes. Financing is vital to organise terrorist activities. It affects both the extent and seriousness of these activities. The terrorist attacks of 11 September 2001 were very well planned and resourced and they highlighted the need for measures to be taken to prevent the financing of future attacks. Indeed, it is now very easy to be clinical about this and forget what happened on September 11. Three thousand people lost their lives in a very short period of time. What we are dealing with here is addressing some of the things that go into preventing that sort of thing from happening and ensuring we have an ability to trace those who made such an activity possible.

In the *New York Times* just the other day, an article outlined some information on the September 11 attack given by Dennis Lormel from the Federal Bureau of Investigation. Now the dust has settled it is quite clear that there were large amounts of money moving around in relation to that attack. The article says:

> While the F.B.I. has found that $325,000 flowed through the 14 SunTrust accounts before the Sept. 11 attacks, investigators believe that the hijackers had access to a total of $500,000 to $600,000.

Investigators are still trying to gain a more complete picture of the sources of funding. They even feel that there are some sources of funding that they have not yet sorted out.

What we are looking at with this convention is to address a very real problem that was quite relevant to the September 11 attack. The aim of the convention is to prevent acts of terrorism by depriving terrorists and terrorist organisations of the financial means to commit those acts. In general terms, the convention obliges state parties to the convention to criminalise the provision and collection of funds for the purpose of committing terrorist acts and to cooperate with other

parties in the prevention, investigation and prosecution of terrorist financing. The convention's significance was reinforced in September 2001 with the United Nations Security Council resolution 1373. Resolution 1373 imposes international legal obligations on members of the United Nations, requiring them to take several of the measures provided for in this convention. Resolution 1373 also calls on states to ratify the convention. To date, 40 countries have become parties to the convention, including the United Kingdom, the United States and Canada. The convention requires state parties to make it an offence to:

... provide or collect funds with the intention or knowledge that those funds should be used ... to carry out—

offences established under specified international instruments or to carry out—

any other act intended to cause death or serious bodily injury to a civilian for the purpose of intimidating a population, or compelling a government or an international organisation ...

State Parties are also obliged to make it an offence to participate in, organise, direct, or contribute to, the commission of such an offence.

… … …

State Parties are obliged to identify, detect and freeze or seize any funds used or allocated for the purpose of committing the Convention offences, as well as the proceeds derived from such offences. Identified funds and proceeds are to be subject to forfeiture.

State Parties are obliged to investigate allegations that a person on their territory has committed a Convention offence and, if the outcome of the investigations so warrant, to take measures to ensure that person's presence for the purpose of prosecution or extradition ...

The Convention provides for the Convention offences to be treated as extraditable offences between State Parties to the Convention ...

The Convention obliges State Parties to cooperate with each other in relation to investigations, extradition and mutual legal assistance concerning the Convention offences.

It also provides guarantees concerning fair treatment of alleged offenders.

The Suppression of the Financing of Terrorism Act 2002, which gives effect to the convention, was passed by the parliament on 27 June. The act inserts a new offence in the Criminal Code directed at persons who provide or collect funds reckless as to whether those funds will be used to facilitate a terrorist act. The maximum penalty for the offence is the maximum that applies to terrorism offences—imprisonment for life. The act will amend the Charter of the United Nations Act 1945 to introduce new higher penalty offences for using or dealing with the assets of specified persons and entities involved in terrorist activities and making assets available to those persons or entities. The amendments to the act will supersede the existing offences in the Charter of the United Nations (Antiterrorism Measures) Regulations 2000.

To ensure these offences can be effectively detected and investigated, the act requires financial institutions, security dealers, trustees and other cash dealers to report suspected terrorist related transactions to the director of the Australian Transaction Reports and Analysis Centre. In addition, the act streamlines the procedures for disclosure of financial transaction reports information to foreign countries, enabling the transaction centre, the Australian Security

Intelligence Organisation and the Australian Federal Police to disclose the financial information that they get directly to foreign countries and foreign law enforcement and intelligence agencies. This is to get the information out there quickly. One of the things with September 11 is that it revealed just how slow some of the processes are. We always have that with bureaucracy, which you will be well aware of, but it is something that applies basically to all large organisations, and it certainly was shown to be a problem on that occasion. There were some indications of material that probably could have been picked up if processes were quicker. So that provision is designed to get a bit more instantaneous with the information.

The convention provides an important framework for international assistance and cooperation in the suppression of terrorist financing. As well as making our own antiterrorist efforts more effective, Australia's ratification of the convention will assist international efforts to ensure that those who plan or engage in acts of terrorism are deprived of the funds they require to carry out their criminal enterprises. Ratification will also demonstrate our commitment to cooperating with global counterterrorism measures. Quite a deal of our work with other countries in the last six months has been in pursuit of those aims. I might also say that my colleague Sarah Chidgey is one of the main people who worked on the legislation and has a lot of detailed knowledge on that.

CHAIR—Just so that we can get it straight on the definition of a terrorist act or terrorist organisation, how is that defined under the convention? Under the convention, how do you determine what is a terrorist organisation?

Ms Chidgey—Article 2 of the convention sets out the offences that state parties to the convention are obliged to give effect to. That deals with acts which are defined in the treaties listed in the annex to the convention and includes a range of treaties: the Convention for the Suppression of Unlawful Seizure of Aircraft, civil aviation treaties and treaties on the taking of hostages and the protection of nuclear material et cetera. It goes on to talk about other acts which cause death or serious bodily injury to civilians with the purpose of intimidating a population or compelling a government.

CHAIR—I am not talking about a terrorist act; I am talking about a terrorist organisation. The national interest analysis says that the purpose of the convention is to suppress acts of terrorism by depriving terrorists and their organisations. How do you determine what is a terrorist organisation under this convention?

Mr McDonald—I thought you said 'terrorist act' at the beginning, but it is the organisation—

CHAIR—Yes, it is the organisation I was concerned with. We can come back to terrorist acts.

Ms Chidgey—It is my understanding—and Peter might have something to add—that the convention itself does not define what is a terrorist organisation as such; it would just be entities which take part in the acts that are listed in article 2, which are acts described in those treaties or which involve death or serious bodily injury to civilians.

CHAIR—Mr Scott, perhaps you can clear this up; you know the definition of a terrorist organisation has been an issue. Here we have a convention that specifically deals with the

financing of organisations and not so much with the financing of acts. Perhaps you can clarify this for us.

Mr Scott—The purpose of the act is to suppress the availability of funds to terrorists and terrorist organisations. The way it does that is by establishing offences and then providing obligations on state parties to freeze funds which are associated with those offences. The act itself, in terms of its operation, does not need to define 'terrorist organisation' because all you need is the individual who has committed the offence or the corporate entity that has committed the offence, as set out in article 2. So, once that offence or an attempt at that offence has been committed, the mechanisms apply for the state parties to freeze those assets. There is a direct nexus to an offence under article 2 in relation to the freezing of assets.

CHAIR—So you would have to determine that an individual who committed an act has been financed in a particular way?

Mr Scott—The offences in article 2 relate to that financing; they do not relate to committing specific acts. The acts that article 2 relate to are the financing of specific acts, so the financing is the offence.

Mr ADAMS—I think there are proscribed organisations in other countries. I do not think we are going to proscribe. Can we bring back to Australia an Australian who has been involved in funding terrorism overseas and try him under this?

Mr Scott—The convention provides for the jurisdiction to do so.

Ms Chidgey—The new offence for the financing of terrorism that has just been inserted into the Criminal Code has unlimited geographical jurisdiction and would apply to Australian nationals who fund terrorist acts overseas.

Mr ADAMS—So it is unlimited from an Australian point of view.

Mr McDonald—We have the benefit of having legislation and looking at the convention at the same time. The legislation itself is in a setting where we have a definition of terrorist act in another context. To have a consistent scheme, we are using that definition, though in this convention there is not really an equivalent to that, and it is much the same with the proscribed organisations.

Mr Scott—It is important to draw a very clear distinction between the obligations that this convention would impose upon Australia in relation to criminalising the financing of terrorism and the obligations which appear under Security Council resolution 1373, which provides for an obligation on Australia to freeze terrorist assets.

CHAIR—These are proscribed terrorist organisations under the United Nations Security Council requirements?

Mr Scott—Yes. Security Council resolution 1373 does not provide for a definition of the terrorists, the terrorist entities or the terrorist assets. Those assets need to be frozen. It leaves that to the determination of states. That is why in Australia we developed not the proscription

system but the system whereby the Minister for Foreign Affairs gazettes the names of persons who are known to be terrorists and entities that are known to be terrorist entities.

CHAIR—This is based on the Security Council's list?

Mr Scott—Based on the Afghanistan Committee of the Security Council, in part, and in the other part based on nominations made by other states of terrorist entities known to them. The mechanism under Security Council resolution 1373 is a cooperative mechanism whereby states are required to cooperate with each other to ensure that terrorist assets, irrespective of the location of the terrorists themselves, are frozen. This convention, on the other hand, talks about the situation where an individual provides, or tries to provide, money with the purpose of having that money support a terrorist act. The kind of terrorist act is defined in two ways. The first way is the offences which exist in the existing counter terrorism instruments, of which there are nine, and which create terrorist acts. The second way is a general act, which is to kill, maim or to destroy property with the intention of thereby persuading or intimidating a population or forcing a state to do or not to do something. The purpose here, of course, is that the offence is not the committing of that terrorist act; the offence is giving the money to allow that terrorist act to be committed, and that is what this convention deals with. Mr Speaker there are two separate regimes relating to terrorist financing which our legislation is in compliance with.

CHAIR—Under the terms of this convention what are the Australian government's obligations with regard to the financing of organisations that are deemed to be terrorist organisations by other countries? I think it was Senator Schacht who gave the example that some Australians might have funded the Irish Republican Army or the ANC or something like that. What is the obligation on Australia to investigate, even extradite, individuals who have financially supported such organisations?

Mr Scott—If the organisation has committed a terrorist offence that is an offence under any of the existing conventions or an offence as outlined in article 2, paragraph 1(b) and that money was given for that purpose, then that person would indeed be subject to the offence provisions of this act.

Mr WILKIE—How would you define that as being for that purpose, Mr Scott? It would be pretty hard. Quite frankly, looking at article 2, which says 'unlawfully and wilfully', I cannot imagine anyone saying that they have done that. How would you prove it?

Mr Scott—I think the same way that you would need to prove any other criminal intent in a criminal action. Article 2 contains those knowledge based elements of the offence for the very reason of preventing somebody being found to be liable for a terrorist financing event when they thought they were giving money to a charity or they thought they were giving money that would go to charitable purposes rather than terrorist purposes.

Mr WILKIE—Following on from the chair's question, would not that leave the way open for false prosecutions and just letting the court decide whether in fact they had provided that money for an illegal act?

Mr McDonald—From a criminal law perspective these sorts of matters are proved on a regular basis in the courts and, of course, there are many pieces of evidence that go together in providing inference that a person intended to do something, ranging from the mode of operation through to interceptions of what they were saying, statements, witnesses and so on. There are many aspects but clearly you do have to have some sort of control like that.

CHAIR—How direct does the connection have to be between the act of giving money and the terrorist act? For example, you said, Mr Scott, that you would not want to capture people who thought they were giving to a charity. If I give some money to the al Qaeda benefit fund for children or something, and I believe, because I am very naïve, that that is where it is going, yet as a matter of fact it ends up in their terrorist kitty, where will the burden of proof lie?

Ms Chidgey—Again that is a question of evidence on the circumstances, and that would be evidence that the defendant would put forward, that it was their belief that the money which they were providing was being used for other purposes, even though it may in fact have been used for a terrorist act.

Mr McDonald—The prosecution, if it did not believe that person—and of course there is a whole criminal prosecution, a whole process—

CHAIR—But it would still be beyond reasonable doubt.

Mr McDonald—That is exactly right, but the question of the incredible nature of that possible charity clearly would be something that would be taken into account.

CHAIR—It does not even have to be that extreme.

Mr ADAMS—Last night on television I saw on *Four Corners*—

Mr McDonald—Yes, I saw that.

Mr ADAMS—That was a prime example where the family is alleging that the chap, who has been held now for some time, was only doing something which they thought was to do with human rights. He is being held overseas without his rights as an Australian citizen being observed. What we are talking about here is one thing, but the reality is what we saw last night.

Mr McDonald—You did not necessarily see any of the evidence that might be involved in the matter last night.

Mr ADAMS—I think that is what the story was about.

Mr McDonald—It might have been presented that way. The fact is—just like any other case where there are allegations—that people's views about the facts are different, and the job of the police is to investigate the facts and do some fact-finding. It is easy for different people to express different views about what they thought the situation was or was not. However, this convention, and of course the offences, require the prosecution—and it is a long-held requirement—to prove that people did knowingly do something. If the response of someone

who is in the frame for allegations is that they did not do it or they did not intend to do it or did not know, then that is something the prosecution has to overcome. It will sometimes be hard, sometimes be easy: it depends on what the facts are and what evidence is available. A television interview is a long way away from the actual court proceedings that might occur in relation to a particular case. I am talking generally; not about a specific case, because it is not open for me to comment on specific cases.

Mr WILKIE—If you look then at some organisations such as the ANC or the PLO or even, in the past, the National Council of Timorese Resistance or the IRA, obviously they are not always out collecting for the Red Cross. If someone donates to those organisations which have in the past been known to do things that are not always above board, could they be charged?

Mr McDonald—It depends very much on the evidence that the police have in relation to what the intentions and the knowledge of the person were in the particular circumstances. Really it is no good talking about specific organisations—about whether a person could be charged with respect to a specific organisation. You really have to look at the facts of the individual case. I know that is a fairly usual answer from lawyers. Of course, with any organisation that is involved in these sorts of activities where you know the money will be going to these activities then you have a difficulty. You do not have to have a fancy name for the organisation either: it could be some organisation we have never heard of before.

CHAIR—Can we just take another example. The national interest analysis says that implementation of the convention will require an amendment to the Financial Transactions Reports Act, and that there is an obligation on financial institutions and the like to report suspected terrorist related transactions. What are we expecting of financial institutions and security dealers and the like in terms of identifying suspicious acts in relation to terrorism? What expectation do we have of these institutions?

Mr Scott—We are already in very close contact with the financial institutions in relation to implementing the existing measures against terrorist assets. But speaking more broadly, those kinds of duties in relation to 'know your client' and monitoring client based transactions are already both domestic and international obligations on our banking sector financial institutions in the context of money laundering.

CHAIR—What sorts of transactions then arouse suspicion?

Ms Chidgey—That would be a judgment for them to make. The way the provisions work is that, if they have any reasonable grounds to suspect that a transaction they are dealing with relates to terrorism, they have an obligation to report it. I might also add that this builds on an existing obligation that cash dealers have to report suspected Commonwealth offences. So in many ways, because these terrorism offences will be Commonwealth offences, it does not extend their existing obligations. It makes it clearer to them that they have a specific obligation in relation to terrorism offences.

CHAIR—But clearly, there is a difference between, say, suspected social security fraud and something like money being channelled somewhere overseas for the purposes of committing a terrorist act somewhere, some time.

Mr McDonald—I think the better sort of offence that is a similar example is the money laundering offence. Of course, money laundering connects to some other serious offence. These terrorist act offences are—I will not say 'just another' serious offence like murder—quite serious existing offences. You can have money laundering in relation to any of those offences under current law. Of course, we have had these suspect transactions being reported for well over a decade and the institutions are familiar with them. An example would be an organisation that was well known in the media for having committed terrorist acts and that organisation was not known for its benevolent activities or whatever. If there were large amounts of cash moving through accounts in an organisation of that nature—

CHAIR—They are hardly going to call the account the name of the organisation though, are they?

Mr McDonald—Sometimes that does happen. Clearly, we are operating in a situation where, if it can happen or if it does happen, we at least have provisions in place to deal with it. The reality is, as with any criminal offence, it is very hard to prove. It always has been and probably always will be. You just have to ask prosecutors and police.

Mr ADAMS—Mr McDonald, that is great! I know you have a faith in the law which some of us would expect lawyers to have; some of us on the political side are a bit more cynical. A lot of things have changed since September 11. There are organisations like the ANC, which I think had a military arm. I certainly gave money to the ANC, because I was against apartheid. What is a terrorist and what isn't a terrorist?

Mr Scott—In relation to the specific question of the definition of the concept of terrorism per se, as all the other existing counter-terrorism conventions deliberately avoid defining a generic concept of terrorism, this convention focuses, firstly, on the specific kinds of crimes that are committed with a terrorist intent and, secondly, on general offences involving killing or maiming, or the destruction of property, with the intention of intimidating a population or persuading a government to do or not do a particular act.

In relation to previous organisations which used various mechanisms to pursue political goals, you are right in suggesting that the tolerance for that kind of behaviour—that is, the use of violence against civilians and against property which is the public arena for civilians—has dramatically decreased. That does not mean that the political pursuit of human rights, good governance, the end of oppression and so on are not just as vigorous in the international arena, including by the government of Australia; it means that using violence against civilians as a tool for such a campaign will not be tolerated in any circumstances. If money that was contributed by an individual to the ANC was intended to be used, and was used, to set up a bomb that would kill civilians in order to pursue that goal, that would indeed be covered by this convention. That kind of conduct, irrespective of how noble the goal and the political motivation behind it, is no longer tolerated and was never really tolerated in the first place by either the international community or the conscience of right-thinking people.

In relation to the question you asked earlier about the role of the financial institutions in identifying what is a suspicious transaction, there are two points to make. Firstly, international standards and best practice have been developed in the international community, most particularly by a group of financial intelligence units called the Egmont Group. They exchange infor-

mation on what kinds of transactions are suspicious and what is the best way to track and follow them. At any one time there are only so many ways that the illicit origin or illicit destination of funds can be hidden. Financial institutions find out what these mechanisms are and distribute that information amongst themselves and that assists them in determining whether particular transactions are suspicious.

Secondly, the mechanism as we operate it in Australia provides for transactions when they are suspicious to be reported to AUSTRAC. AUSTRAC has a supercomputer that literally searches all of these transactions, seeking out anomalies and elements that would particularly suggest that there is something suspicious involved. That information is collated, analysed and sent to the police. So the financial institutions themselves do not bear the burden of determining what particular crime is being committed. That burden is partly undertaken by AUSTRAC, in analysing the reports that come in from the financial institutions, and the crime is finally determined by the Australian Federal Police. The mechanism as we operate it in Australia is considered state of the art for this kind of suspicious financial transaction reporting.

Mr ADAMS—Thank you, Mr Scott.

CHAIR—Are there penalties attached to the failure of the institutions or the cash dealers to report transactions that would fall within this suspected terrorist category?

Mr Scott—Yes, there are.

CHAIR—What are they?

Mr Scott—They are the refusal or failure of a natural or legal person obliged to report transactions under the Financial Transactions Reports Act. To fail to make a report is an offence. The maximum penalty for that offence, in the case of a natural person, is two years imprisonment and/or a maximum fine of 120 penalty units. A penalty unit is currently valued at $110. The maximum penalty in the case of a legal person, such as a corporation, is 600 penalty units.

It is also an offence to intentionally make false or misleading statements, including through omission, in relation to reporting all the various accountancy and transaction obligations that apply under the act. The maximum penalty for this offence is five years imprisonment and/or a maximum fine of 300 penalty units in the case of a natural person, and 1,500 penalty units in the case of a legal person.

Conducting transactions deliberately so as to avoid the reporting requirements under the act is also an offence which is punishable by that same penalty. Knowingly making an incomplete report of a transaction that has to be made under the act, or knowingly keeping incomplete records that must be kept under the act, is also an offence. It attracts a maximum penalty of 10 penalty units in the case of a natural person or 50 penalty units in the case of a legal person.

CHAIR—So they can penalised for a mere omission—an unwitting omission?

Mr Scott—They can be for an intentional omission but not for an accidental omission.

CHAIR—So intention is still required?

Mr Scott—Yes. It is always intention.

Mr McDonald—It is still the criminal system.

Mr ADAMS—If that person is making a gain—their intention has not been for terrorism; it has to been to make a financial gain—would that be a defence?

Mr Scott—In relation to reporting the suspicious transactions?

Mr ADAMS—Yes.

Mr Scott—Yes, it is. As we explained, the point of suspicious transactions is not for the financial institution itself to know what about the transaction is suspicious; it is for the financial institution to report it so that it can be put into the larger mix of analysis of all transactions to see whether there are connections. If financial institutions start making judgments about whether or not they should make reports on elements that they are obliged to report on under the act, that would completely undermine the system. Consequently, it is not for the financial institution itself to determine that it does not think it needs to make a report it is obliged to make. There are circumstances in which it has the role of choosing whether the report is a suspicious one that should be reported, but the act also provides for compulsory reporting of certain transactions.

CHAIR—So, in other words, there would be a tendency to over-report, not under-report?

Mr Scott—I cannot answer that, because that obviously relates to the policy of the financial institutions themselves.

CHAIR—Is that the experience—that they tend to report a great deal more?

Mr McDonald—I do not think you could express an opinion on that. In a way, they have a knowledge of all the transactions that are coming past them, so to some extent it would be very hard to give an estimation.

CHAIR—There is no analysis done—for example, that they have reported 100,000 transactions and 10 of them have ended up being in the suspicious category?

Mr Scott—Our experience is that the financial institutions themselves that we have spoken to in the context of terrorist asset freezing, and also in the context of money laundering more broadly, recognise that illicit transactions of any kind—particularly money laundering transactions or transactions which are designed to conceal either the origin of funds or the destination of funds—are dangerous to the financial sector, because they improperly inflate or deflate the true value of financial transactions that are passing through them and consequently render the marketplace vulnerable to the financial institutions. They therefore have a vested interest in participating fully in the transaction system and, albeit that it represents a certain burden to them in reporting requirements, our anecdotal experience of dealing directly with certain banks has

been that they undertake this gladly on the basis that it actually protects them in certain circumstances from what might be damaging financial transactions being put through their systems.

CHAIR—Was there consultation with the financial institutions industry in relation to this convention?

Mr Scott—Prior to our tabling the convention we were dealing very closely with the financial sector in the general context of terrorism financing. The likelihood of Australian ratification of this instrument and consequently the efforts to try to tailor our implementation of Security Council Resolution 1373 with what would become our obligations under this convention were we to ratify it were always a part of those consultations with the banking sector. I do not recall the banking sector representing a view on whether we should or should not ratify this treaty.

CHAIR—Were they consulted?

Mr Scott—They have been consulted with regard to what the impact of the treaty will be in relation to them.

CHAIR—It does not say that in the national interest analysis.

Mr Scott—That is partly due to the fact that the consultation with the sector has been in the context of the identical obligations that appear under UN Security Council resolution 1373—in particular, the elaboration of the schemes by which the private sector would implement these instruments. Certain consultative mechanisms have actually been set up since the drafting of this NIA. They include the establishment of a number of working groups by the financial sector in order to improve the exchange of information between the Commonwealth and the cash dealers financial sector in relation to IT compatibility. That will facilitate their capacity to implement not only this convention but also the obligations under resolution 1373.

Mr ADAMS—I think this is a very important area. All of the illegal money that is sloshing about out there in the world—not only for terrorism but with respect to illegally won money—goes through that sector. I am sure there are some good, ethical people there, but we know from the last few weeks that there are also some pretty bad people running some large corporations in the world. So I would like to investigate this a little bit more and look for some more evidence.

CHAIR—Mr Scott, could you expand a little bit on the working parties that have been set up subsequent to this?

Mr Scott—The working parties have been set up in the context of implementing the terrorism asset freezing obligations that pre-existed this convention but will be part of the implementation of this convention should Australia ratify it. The working group has been set up by the Bankers Association. We recently held a large consultation in Canberra with the banking and financial sector in the context of terrorism asset freezing.

CHAIR—But presumably it would cover this as well.

Mr Scott—It would cover the asset freezing elements of this. Also covered in the discussions were those reporting requirements that exist. AUSTRAC is a part of the interdepartmental working group that coordinates with the financial sector. As a consequence of this consultation, it was decided that the financial sector itself would establish working groups to coordinate on what would be the best kind of IT interface with the Commonwealth and between themselves in relation to facilitating the process of screening for suspicious and terrorist accounts and so on.

Mr ADAMS—Is there legislation coming into the parliament from this treaty?

Ms Chidgey—It passed through both houses of parliament on 27 June, and both the amendments to the Financial Transaction Reports Act and the financing of terrorism offence have now taken effect.

CHAIR—The legislation reflected the convention.

Ms Chidgey—Yes.

CHAIR—There is mention in the NIA about the dual criminality rule as inhibiting international assistance in investigating and prosecuting the financing of terrorism in this country. Can you explain what that is and why you think it inhibits international investigations?

Mr McDonald—In this area we are basically looking at a system which is not new for Australia, as we mentioned earlier. We have had money laundering type offences and investigation of those for 10 or 15 years. However, there are many countries—and we are doing quite a bit of work with those countries—that do not have adequate money laundering legislation and therefore would not have the same types of offences that we have. Clearly, this convention is about ensuring that all countries have similar arrangements, provisions, reporting and so on.

Through the criminal law branch of Attorney-General's, and also working with Foreign Affairs, we have done quite a lot of work in our region to assist countries to improve their laws in these areas. Certainly, this is not like murder, where you find the same offences everywhere in the world. For many countries, this is a new concept. In some cases, the discussions start with, 'What is money laundering?' and then go on from there.

Mr ADAMS—What are the penalties for cash dealers who do not report suspicion?

Mr Scott—The other element about dual criminality, the absence of which is an impediment to international cooperation, is that most extradition and mutual legal assistance schemes operate on the basis of dual criminality—that is, if we seek to extradite somebody back to Australia from a foreign country, that country generally will not do it if the offence we want to try that person for is not an offence in the country they are currently in. Similarly, those similar kinds of provisions can also apply in the context of providing mutual legal assistance to criminal proceedings. As a consequence of that, a convention which provides for a common offence amongst a number of state parties ensures that each state party has the same criminal offences in relation to the subject matter covered by the convention. That means that it is much easier for there to be cooperation in the investigations and prosecutions of those offences amongst those countries.

Mr ADAMS—Were you saying a minute ago that the cash dealer could get 15 years?

CHAIR—No, it was not that much.

Mr Scott—It depends on the offence.

Mr ADAMS—For not reporting? The only obligation on the financial system is to report, which I think is suspicious.

Mr Scott—A simple failure to report has a maximum penalty of two years for an individual and/or a fine of 120 penalty units.

CHAIR—It is more if it is wilful.

Mr Scott—Yes. The offences get more serious as you start getting actual fraudulent activity, such as intentional misleading or the intentional falsifying of reports and so on. It is a compulsory scheme and failure to participate in it or abuse of it will attract criminal penalties.

Mr McDonald—I congratulate Mr Scott for explaining what I was saying a bit more clearly.

Mr ADAMS—He has had a lot of experience.

Mr McDonald—Yes. The point I was getting at is that, where you have countries that have the same types of offences, you do not have a problem with this dual criminality issue. However, where you have a newer offence, such as money laundering, you have these problems. The point of the convention is to ensure that everyone has the same sorts of offences.

Mr WILKIE—I see that resolution 1373 was passed in September 2001 and the convention comes into effect in April this year, but only 26 countries have actually signed up to it. Why is that?

Ms Chidgey—It is 40 to date; the number was 26 at 10 April.

Mr Scott—The number now is 40, and that illustrates an almost exponential increase in the rate of ratification of this convention.

Mr WILKIE—How many other countries have indicated that they intend to sign up to it?

Ms Chidgey—There are 132 signatories at the moment.

Mr Scott—That is usually a pretty good indication that those countries intend, in due course, to ratify the convention.

CHAIR—Not always.

Mr WILKIE—Is the United States one of them?

Mr Scott—The United States has already ratified it.

Mr WILKIE—Do they have legislation in place to extradite one of their citizens if they are found to be financing terrorist acts overseas?

Mr Scott—Knowing the United States' practice and particularly the advice and consent requirements through their Senate, the presumption is that they would have the legislation in place. Also, the United States' treaty making system is such that the making of the treaty itself becomes part of US domestic law when it has gone through the advice and consent process in the Senate. As a consequence, even if it had not passed a specific act, which I imagine it would have done, the United States would consider itself bound under domestic law also to implement these systems—the obligations under the convention.

CHAIR—As the legislation has passed through our parliament, subject to the recommendations of this committee, there is nothing to prevent Australia from taking binding treaty action?

Mr Scott—No. Once this committee has made its findings—

CHAIR—There is no other issue outstanding?

Mr Scott—I do not believe so.

CHAIR—Amendments to any other acts?

Ms Chidgey—There are regulations that need to be made under the Extradition Act, but they can be done rapidly and will be ready to be in place for ratification.

CHAIR—And the Financial Transaction Reports Act?

Ms Chidgey—Those amendments have already commenced as part of the Suppression of the Financing of Terrorism Act, to enable the reporting of suspected terrorist related transactions.

CHAIR—Is there anything that you think is missing in this bill? Are there any obstacles to international collaboration in the investigation and prosecution of offences relating to the financing of terrorism that this convention has not been able to anticipate or cover or that are still there? Does anything come to mind?

Mr Scott—The negotiation of the convention and the final adopted text obviously represented a compromise. Several states had sought to have far less stringent rules put in place and some states sought to have far fewer safeguards about the intent of the person providing funds. In the end I would suggest that it was the best possible balance, particularly given that the convention was negotiated prior to September 11, when there simply was not the same degree of international concern about terrorism financing. In subsequent events, it has been proven that this convention very adequately does two things that were required of it—that is, create the offence and the cooperation mechanisms that are required but, at the same time, properly safeguard the innocent or mistaken provision of funds to persons who turn out to be

terrorists and, secondly, to provide adequate safeguards in relation to cooperation that would enable states to ensure that they are not forced to cooperate with other states that are using this convention as a tool of oppression in relation to certain people.

CHAIR—So whether or not certain states might have taken a different attitude had this been negotiated post September 11, in the post September 11 environment do you believe that this convention does adequately cover the scenario that transpired post September 11?

Mr Scott—I do. In addition to that, it is worth pointing out that certain states that were quite reluctant or that had decided they would not be in a position to ratify this convention because of the nature of their financial sectors and banking laws have, as a result of the consequences of September 11—because that was how strong this convention was when drafted—subsequently amended their domestic financial arrangements in order to be able to ratify the convention. As a consequence of that, not only has this adequately covered the field in relation to terrorists financing offences, it has also dramatically improved the environment for detecting and enforcing laws against money laundering involving countries that had hitherto had very secretive and closed financial sectors.

CHAIR—What sorts of countries?

Mr Scott—One country that needed to make certain amendments to its banking laws in order to ratify was Austria.

CHAIR—Has Austria now ratified?

CHAIR—By making some of the previously closed banking systems more transparent?

Mr Scott—Yes.

Mr McDonald—As well, it gives a familiarity of the financial sector in a particular country with this sort of mechanism. In the way that in Australia we now have had a culture of compliance with these requirements for over 10 years, clearly this has been a great vehicle for that.

Mr WILKIE—I see that the convention really relates to the financing acts of individuals or organisations. What is in place for dealing with states? What would do the same thing? They would not be covered by this convention, would they?

Mr McDonald—States are made up of individuals. You have seen individuals from states dealt with in relation to all sorts of criminal activities, whether they be war crimes or other things; clearly, the same thing can occur under this sort of arrangement. Offences under our criminal code, of course, would cover corporations.

Mr Scott—The convention itself covers offences committed by legal entities. Legal entities can include statutory bodies of states. There was some debate as to whether a legal entity could in any circumstance be considered a state, like a government. On that point, there are two ongoing difficulties. One is that, naturally, in negotiating these instruments, the negotiations have taken place amongst the states, and the offences that are being discussed here are highly

political because of the context of terrorism. In that context, there was certainly no desire to make specific reference to states because, if that had been done, it would not have been possible to actually adopt a convention at all.

CHAIR—So that was one of the compromises?

Mr Scott—That was one of the compromises, but it does not necessarily weaken the convention, because the point to bear in mind again is that, in relation to transjurisdictional transactions, sovereign state immunity is always going to be an issue. The question of sovereignty is one that all countries are going to be determined to raise in relation to their own acts. There are only a very few offences that attract what is known as the principle of universal criminal jurisdiction, which makes an individual criminally responsible for the act of a state. At this time, the offence would need to also be one such offence; it would also need to amount to a crime against humanity or to genocide or to a war crime.

CHAIR—Is that because of the universal jurisdiction of the International Criminal Court?

Mr Scott—That has been in existence for several years. The International Criminal Court is a fundamental restatement of that principle. The point to bear in mind is that, where a state is responsible for a terrorist act or where a state is financing a terrorist act, you are talking about an act of state. Other rules of international law will step in and apply in those contexts, of course, in the relationship with an act of aggression against that state or a violation of the territorial integrity of another state. There are mechanisms in the international community to deal with those kinds of violations by states, such as the United Nations Security Council and the International Court of Justice. So there are sufficient mechanisms in the international community to deal with states that either fund or commit terrorist acts. Probably the best example of an enforcement by the international community against a state for those kinds of actions is what happened in relation to Afghanistan. The United Nations Security Council's resolutions which penalised Afghanistan not just for the behaviour of the Taliban in that territory but also for the Taliban's role in supporting Al-Qaeda in committing terrorist acts elsewhere in the world are a good demonstration of the fact that the international community can deal with a state that tries to use either its funds or its influence to have terrorist acts committed elsewhere in the world.

CHAIR—This is confined to the acts of individuals or entities?

Mr Scott—Yes.

CHAIR—As there are no more questions, I thank you very much for your time this afternoon and for your assistance. I now call witnesses from the Department of Foreign Affairs and Trade and the Department of Defence to give evidence relating to the amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.

[2.07 p.m.]

DIETRICH, Captain Edwin Stewart, Director Joint Operations, Royal Australian Navy, Strategic Command Division, Department of Defence

MERCER, Mr Todd Norman, Executive Officer, Arms Control and Disarmament Branch, Department of Foreign Affairs and Trade

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

SHANNON, Mr Peter James, Assistant Secretary, Arms Control and Disarmament Branch, Department of Foreign Affairs and Trade

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

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

Mr Shannon—Yes. I thought I might begin by outlining precisely what is being proposed here and then by giving some background to the conference at which the proposal was made and a short summary of what the implications are for Australia. What we are looking at is an amendment to article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. We will use, as shorthand, the 'convention on certain conventional weapons' or 'CCW'.

The proposal is that article 1 of that convention be amended so as the impact of the convention and the four protocols which are attached to it apply to situations of non-international armed conflict—that is, internal situations. What we are putting forward is that the amendment, so far as Australia is concerned at this point, only apply to protocol I, which concerns non-detectable fragments, protocol III on incendiary weapons, and protocol IV on blinding laser weapons. The amended protocol II, which concerns mines, booby traps and other devices, already applies to non-international armed conflicts.

CHAIR—As a result of what?

Mr Shannon—As a result of a conference back in 1996 or thereabouts, I believe. Australia has ratified amended protocol II. The particular amendment that was agreed to by the review conference of the CCW in December has seven paragraphs to it. Paragraphs 1 and 2 define what are international and non-international armed conflicts. They do not do that particularly

helpfully; they refer back to the 1949 conventions. There were four of those, agreed upon in 1949, that are the basis of reference to article 2 and article 3 in the first two paragraphs.

The important point to note in the second paragraph of the amendment is that the definition of 'non-international armed conflicts' does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts. So that is the exception part—police civil enforcement type actions such as riots and matters of that kind, but not armed conflicts.

CHAIR—So that is the definition of a non-international armed conflict.

Mr Shannon—Yes. It would be very difficult to define it more precisely, I think, so they simply referred it back to the 1949 conventions, which similarly did not attempt a precise definition of a non-international armed conflict, except in the negative.

CHAIR—So they do not say what it is; they say what it is not?

Mr Shannon—That is right. Paragraph 3 of the amendment is the nub of it. It states that each party to the conflict who are contracting parties to the convention and protocols is bound to apply the prohibitions and restrictions of this convention and its protocols to armed conflicts not of an international character. That is the nub of the change.

Paragraph 4 reserves states' sovereignty rights and the right of a government to maintain law and order, national unity and territorial integrity. Paragraph 5 states that you cannot use the convention to justify external intervention in the armed conflict or in the internal or external affairs of a party. Paragraph 6 applies to parties which accept the convention and the protocols but are not contracting parties and states that, by virtue of their acceptance of these restraints, their legal status is not changed or the nature of the territorial dispute or the dispute in which they are involved is not changed. That really targets sub-state actors who might claim that they are fighting in accordance with the convention and protocols. By their assertion of that, they cannot claim a higher status as a contracting party to the convention. So it is a barrier there to what you would expect in any event.

Paragraph 7 is interesting. It states that additional protocols adopted after 1 January 2002 can apply, exclude or modify this article. In other words, an additional protocol might say it only applies to international armed conflicts. By way of explanation, the proposal for amendment to have the conventions and protocols apply to non-international armed conflicts was proposed by the United States and the ICRC and was accepted without too much difficulty by the conference, by all states who attended. The qualification in paragraph 7, which is that new protocols after January this year do not automatically apply to non-international armed conflicts, was put forward by China, Pakistan and Cuba, and really only refers to a point of principle. They felt that states ought not to bind themselves in advance to a situation which they cannot foresee now. That was adopted by the conference. I should add in that case Australia took the view that we felt we could bind ourselves now to any situation in the future, since we are talking about pretty horrible weapons. In the interests of consensus, paragraph 7 was adopted.

My colleagues from Defence can speak more specifically about ADF policy, but you will see in the note that was put to you that the ADF already implements the provisions both inside and outside Australia and that, because of the exception in paragraph 2—that is, in law and order situations—the provisions do not apply in normal circumstances to police and other bodies undertaking normal law enforcement activities. In any event, our Australian police and other bodies are not armed with such weapons.

CHAIR—Could you explain why 89 countries have ratified the convention but it seems that none has ratified the amendment?

Mr Shannon—Because it has only just come to the fore. It was passed in December last year and countries are only now going through the machinery. I am not sure how recent the statistics that we have are. It could be a month or so.

CHAIR—Is there anything more recent?

Mr Mercer—My understanding is that no state has yet ratified. We have had contact with Canada recently. They have flagged with us an interest in lodging their instrument of ratification this month, and they are actually keen to have other states—Australia, for example—lodge at the same time. We have advised them that the matter is under consideration and, at the very earliest, we would be looking at possibly September-October of this year. But, as far as I am aware, there are no ratifications at this stage.

CHAIR—Are we anticipating then that 20 states will have ratified by September?

Mr Mercer—No, we have no indication of that. There is a CCW related meeting in the next fortnight, and I think it will become much clearer after that process. On the first few days there will be a series of national statements, and I think this is the sort of issue that states would be dealing with.

CHAIR—Will Australia be at that conference?

Mr Mercer—We will be participating. Our mission in Geneva and a number of Defence representatives will be involved, dealing with an unrelated CCW matter that was referred to in the national interest analysis.

CHAIR—The proposal is that the amendment comes into force six months after 20 states have ratified. So we could be one of the first 20 states—or not?

Mr Mercer—I think there is a fair chance that we will be one of the first 20 states, assuming we ratified by September.

Ms Spillane—That said, I think it is fair to add—and Mr Mercer may have something to say about this—that this was something that had very broad acceptance at that conference of states parties. It was the least controversial of anything that was talked about by states parties. It has very wide support, so I do not think the fact that there are no ratifications to date suggests that there are a lot of states that are going to have a big problem with ratifying or are not prepared to ratify.

CHAIR—Just a timing issue?

Ms Spillane—It is just a matter of going through the motions domestically to be ready to ratify.

Mr ADAMS—With regard to the weaponry we are talking about, I think we got rid of the personnel mines. Do we call them personnel mines?

Mr Mercer—Antipersonnel mines.

Mr ADAMS—This committee made a good report on them, I think. With regard to the actual weapons, are we talking about laser guns?

Mr Mercer—Protocol 4 of the convention deals with blinding laser weapons. These are laser weapons, the principal purpose of which is to blind. We are not talking about laser weapons per se. I have one comment on that protocol. It is one of the few instruments that have been agreed to before the weapon has actually been deployed. Those weapons were being developed in the early 1990s, and it was a significant outcome from the first review conference that that protocol was agreed to.

Mr ADAMS—I do not think other committee members were present, so we might enlighten them to the fact that there was a weapon that actually blinded people. So, after another Bosnia, instead of having to put people with blown off legs back together—as in Cambodia—you would probably have had all these lads from 18 to 30 years without any eyes.

CHAIR—This is the blinding laser weapons?

Mr Mercer—That is right.

Mr ADAMS—That would have been the humanitarian need from that sort of weapon afterwards. I am trying to get to the actual weapons we are talking about here.

CHAIR—In the three categories.

Mr Mercer—Protocol 1 deals with non-detectable fragments: weapons which injure and can leave in the body shards of glass or other material that is not detectable by X-ray, which the ADF does not possess and I understand are not widely used. A number of states have not yet ratified amended protocol 2, so in effect there are five protocols. There is original protocol 2 and amended protocol 2. For those states which have not yet ratified amended protocol 2 and are parties to the original protocol, this extension of scope would bring original protocol 2 in line with amended protocol 2.

CHAIR—In other words, if there is a party to the convention and they sign up to this amendment, it will bring in the protocol 2 that they skipped last time?

Mr Mercer—It will bring in that aspect of it. There are other provisions. It was amended to expand the scope, as we are discussing here. It was also amended to provide strengthened provi-

sions on certain antipersonnel mines to make them detectable and to make them selfdestruct and selfdeactivate. Protocol 3 deals with incendiary weapons, essentially like napalm and flame throwers. Protocol 4, as we have discussed, deals with blinding laser weapons.

Mr ADAMS—And we use none of those weapons in the defence of our country, Captain?

Capt. Dietrich—It is clearly articulated in the national interest statement that none of those weapons are within the ADF inventory, none are anticipated and we do not see a need for them.

Senator MARSHALL—Does the ADF purchase weapons or munitions from companies or states that actually produce the weapons that fall outside this protocol and the proposed amendment?

Capt. Dietrich—I doubt it, but I could not say unequivocally. I do not know which states produce these weapons.

Mr ADAMS—Does anybody in the panel know that?

Mr Mercer—I could not answer that question. To go back one step, of the weapons covered by this convention, the only weapons that the ADF does possess are antivehicle mines, but the expanded scope that we are talking about already applies to that weapon anyway. Working back from protocol 4, my understanding is that there is no market in blinding laser weapons, so I am not sure if there is any active development of those weapons. But perhaps we could take that question on notice and advise the committee.

Mr ADAMS—That would be good.

Mr WILKIE—Do incendiary devices include bombs dropped from aircraft?

Mr Mercer—It would—for example, napalm, which is dropped. One of the technical experts may want to answer that.

Capt. Dietrich—Bombs are considered high explosive, not incendiary, weapons. So the bombs that are in the ADF inventory are explosive weapons, not incendiary. We do not stock napalm.

Mr WILKIE—I was not thinking of napalm; I was thinking more of an incendiary weapon that you would drop from an aircraft which would cause fires.

Capt. Dietrich—There is always a danger of a fire from explosive weapons, but we do not have weapons that are specifically designed to produce that effect.

Ms Spillane—It is worth pointing out too that protocol 3 on incendiary weapons does not ban them outright. These provisions just say that you cannot target civilians with them and you must take certain precautions to try and prevent the possibility of civilians being injured by them. So they are not banned outright by protocol 3; it just means that their use is restricted in these ways

and, by extending the scope, those same limitations on their use would apply to internal conflicts.

CHAIR—Have any of the 89 parties to the convention been shown to have used these types of weapons in internal conflicts?

Mr Mercer—There have been reports that Russia has certainly used mines but, again, mines are not prohibited under amended protocol 2. There are restrictions placed on them. Russia, by the way, has not ratified amended protocol 2. I am not sure insofar as incendiary weapons are concerned. They have certainly used a weapon which has a similar effect: fuel air explosives. There were some reports of a weapon that the US were using in Afghanistan. It was a fuel air explosive called a daisy cutter. The Russians have a smaller shoulder mounted weapon, but that does not fall within the coverage of protocol 3.

At the review conference itself, when this amendment was agreed to, Russia then proceeded to make a clarifying statement, referring to the right of state parties, high contracting parties, to use all legitimate means in relation to internal conflict. That resulted in a series of 30-odd interventions including an intervention by our delegation to clearly state that we understood that to mean all actions would be in accordance with international law. There is a possibility that that comment was made bearing in mind the particular situation that they were faced with in Chechnya.

CHAIR—What was the response of Russia to the interventions?

Mr Mercer—There was no response on the floor. There may well have been exchange afterwards, but there was certainly no formal response.

CHAIR—Can you tell us a little about the meeting of interested NGOs held in mid-2001? Were the views of the non-government sector taken into account?

Mr Mercer—The minister for foreign affairs meets on a regular basis with the National Consultative Committee on Peace and Disarmament—which is a group of approximately 20 community representatives: academics, representatives from interested NGOs, representatives of each of the major parties represented in parliament—to discuss arms control, disarmament and peace issues. The minister gave a commitment at a meeting in March-April of last year to consult with members of the community and interested organisations. The department then proceeded to arrange a meeting in August of last year. At that meeting it was clear that there was strong support across the board from all NGO participants for this proposal. We have had absolutely no indication from any section of the community that there is any opposition to this.

CHAIR—There is also reference to the 2001 review conference agreeing to establish a group of experts to look at a new protocol to do with so-called explosive remnants of war. Could you tell us a little bit about that? Does Australia support that course of action?

Mr Mercer—That is the meeting I referred to earlier. It is the second meeting of that group. It commences on Monday and runs for two weeks. We believe that there is a need for a new protocol to the convention. What is driving this proposal is the concern that is out there with

regard to the impact that unexploded cluster bomblets have had on communities in a number of countries.

CHAIR—Perhaps Captain Dietrich can tell me what an unexploded cluster bomblet is?

Capt. Dietrich—There are a number of area denial weapons where the one bomb sprays a lot of sub-bombs over a wide area. Some of them have a history of unreliability, so the sub-bombs do not explode as they are designed to and then lie on the ground and are prone to detonation when they are touched. They just spread like 200 hand grenades, of which 10 per cent might not explode as they are meant to.

Mr ADAMS—I have visited Laos, and so I will explain to the Chair.

CHAIR—Thank you. I just had not heard of bomblets before.

Mr ADAMS—The Americans had a large bomb which dropped silver bomblets that were round, like a ball, and which span inside. When the cylinders inside come together, they explode. They are scattered all over Laos and Cambodia. They are still there now, and there are still civilians, cows and anything else treading on them, leading to death.

CHAIR—So the bomb itself is dropped from on high.

Mr Mercer—It is a canister full of little bombs.

CHAIR—To what extent would one bomb be able to spread its bomblets?

Mr Mercer—It depends on the actual bomb being deployed, but an area like a football field or several football fields covered with potentially 300 bomblets. If five per cent of those 300 bomblets fail to explode, then you have 15 bomblets lying around over that area. As was mentioned, in Laos they are predominantly round, cricket ball sized objects, and curious children, seeing something like that on the ground, pick them up.

CHAIR—It is interesting that it did not come under protocol 2 then, as a type of weapon. I realise that protocol 1 is about mines and booby traps that are laid.

Mr Mercer—I suppose that the fundamental difference is the intention. The intention of a mine or a booby trap is to sit there unexploded, waiting to be set off by the victim or the combatant.

CHAIR—This has the same effect.

Mr Mercer—It has the same effect. The term ‘de facto landmine’ is often used by the non-government sector, suggesting that it should be covered. Our minister has certainly received a steady stream of correspondence suggesting that the Ottawa convention be expanded to take in cluster bomblets. But there is very strong resistance to that sort of approach. The consensus that is developing is that the CCW is the appropriate forum in which to negotiate a new protocol.

Capt. Dietrich—One of the differences is that the danger from a cluster bomb arises from a malfunction of the weapon, as opposed to a deliberate creation of that effect.

CHAIR—As a deliberate planting.

Capt. Dietrich—It is just that there is nearly always that failure of a number of them, which then remain for an undetermined period, representing a hazard to innocent people.

CHAIR—Are there any other weapons that one would expect to come under the convention and be included in the extension to internal conflicts?

Mr Mercer—I suppose I have brought the argument to focus on cluster bomblets, but the explosive remnants proposal that the ICRC initially put forward was to cover all explosive remnants, including 500-pound bombs that fail to explode, to grenades or mortar rounds that do not explode. There are those weapons as well. What is being wrestled with at the moment is how you come up with a protocol which deals with weapons which are fundamentally different. The effect may be similar, but the sorts of technical improvements that may be possible on one weapon may not suit something else. They are the sorts of technical things that are being looked at at the moment. For example, with the fuel-air explosive weapons that I referred to earlier, at the review conference, Mexico ran through a list of weapons that they thought should be prohibited and should be dealt with under the CCW, including cluster bombs, fuel-air explosives and concussion bombs—which I think are used mainly for riot control; they are non-lethal weapons. I suppose there is scope for considering a whole range of other weapons which may fall under this.

CHAIR—But is there not a dividing line between what is essentially a military type of weapon and something that you use in civil disturbances?

Mr Mercer—I think there is—as, for example, with the concussion bomb. My understanding of a concussion bomb is that it could not be defined as an inhumane weapon, unless the purpose is to maim the individual. But my understanding is that it is to knock somebody off balance, rather than to cause any long-term injury or to be lethal.

CHAIR—You wouldn't use it in a military engagement, as such?

Mr Mercer—I am not sure.

CHAIR—You might?

Capt. Dietrich—It might be used by the military in a counter-terrorist hostage recovery operation.

Ms Spillane—The question of what other weapons future protocols might cover or might need to cover comes back to the concept implicit in the title of the convention, which is weapons which are excessively injurious or have indiscriminate effects. I know the ICRC has certainly done a lot of work on trying to identify what sorts of weapons fall into that category. It is a matter, I think, that is going to be of ongoing international discussion in terms of deciding

whether the international community can come to a consensus on weapons that have that effect and, therefore, should fall under this convention.

CHAIR—Is there an expectation that, after this conference that is being held in two weeks, there will be something that you could report back to the committee on?

Mr Mercer—A group of governmental experts met in May, meets over the next fortnight, meets again in December for one week and then reports to an ad hoc meeting of states parties this coming December. Basically its mandate is very broad, it does not assume that there is a need for a new instrument to deal with these weapons. Some states have said, 'We think existing international law is adequate and there is no need for a new instrument.' We are hoping that the group of experts will recommend to states parties that negotiations should commence in the coming year on a new protocol to deal with the explosive remnants of war.

CHAIR—So we should keep an eye out for the ratification of this?

Mr Mercer—Yes.

Senator KIRK—If there is a new protocol developed in relation to these sorts of weapons that you are talking about, will it automatically be the case that the protocol will apply to internal conflicts or will it only be to international conflicts? How would that work?

Mr Mercer—That was, in fact, the purpose of paragraph 7 in the proposed amended article 1, which is to not prejudge that. In the debate that has occurred to date, we have not heard any state suggest that such a protocol should not apply to non-international armed conflicts. It would certainly be our preference to see a new protocol apply to both non-international and international. But clearly, until the extent of the protocol is clearer, it is hard to say. We would be hopeful that it would apply.

CHAIR—Thank you, ladies and gentlemen. We have appreciated you giving your time this afternoon.

[2.40 p.m.]

ROHAN, Mr Geoff, General Manager, Operations, Australian Fisheries Management Authority

ROSS, Mr Paul, Manager, International Fisheries, Agriculture, Fisheries and Forestry—Australia

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

CHAIR—Welcome. We are now considering the agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas. I am obliged to remind you that, although the committee does not require you to give evidence under oath, the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make some introductory remarks before we go to questions?

Mr Ross—Thank you for the opportunity to present to the committee this agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas. It is more commonly referred to as the FAA compliance agreement, and I think that is a bit less of a mouthful. The agreement was negotiated during 1993 and was approved by the 27th conference of the Food and Agriculture Organisation of the UN in November of that year. While Australia have always strongly supported this agreement, we are yet to submit our instrument of acceptance. We had initially given priority to ratifying the UN Fish Stocks Agreement, which we achieved at the end of 1999. Since then, we have given the compliance agreement priority and we would like very much to become an original member. To date, 22 states have accepted the agreement, and it will enter into force after the lodgment of 25 acceptances.

CHAIR—Do you have a list of the 22 states?

Mr Ross—Yes, I do.

CHAIR—Could we have a copy of that?

Mr Ross—Yes. The compliance agreement was developed as part of the international response to concerns over the rapid increase in irresponsible fishing on the high seas and the damaging effect that that overfishing is having on fish stocks off coastal states such as Australia. Illegal, unreported and unregulated fishing continues to be a growing problem for Australia. It is conservatively estimated that the value of illegal take of patagonian toothfish from our southern waters over the past five years is around $200 million. There is evidence of increasing illegal activity and these illegal fishers are becoming very sophisticated and very well organised. We apprehended two vessels fishing illegally in February this year, and you may

have seen that only last week the French authorities apprehended a vessel fishing in their zone with some assistance from an Australian vessel.

The compliance agreement forms part of a framework of internationally agreed measures for fisheries conservation and management, and it is a legally binding element of the FAO Code of Conduct for Responsible Fishing. We consider that implementation of the agreement would be a useful additional element in combating illegal fishing on the high seas. Australia has played a leading role internationally in addressing problems of illegal fishing, and we see that accepting this agreement would enhance that leadership role. The key objective of the agreement is to deter the practice of reflagging, which is where owners of vessels seek to evade complying with international conservation and management measures by registering their vessels with states that do not cooperate or are unable to comply with such measures. These states are sometimes called 'flag of convenience' states. Underpinning the obligations in the agreement is the concept of flag state responsibility. The agreement sets out clearly the responsibilities of flag states and makes the flag state responsible for taking enforcement measures against their vessels that contravene this agreement.

There are two primary obligations in the agreement. The first is that parties must ensure that the fishing vessels entitled to fly their flag only fish on the high seas if authorised to do so and that they can take action against that vessel if it does not comply with international management and conservation measures. Importantly, if a party to the agreement is not in a position to exercise its responsibilities then it should not authorise its vessels to operate on the high seas. The second primary obligation is that parties are required to maintain a record and to supply to the FAO specific information on vessels they have authorised to fish on the high seas. This information is to be shared with other members in the hope of deterring or preventing further unauthorised or unsustainable fishing practices. Significantly, the agreement also provides for the first time for the creation of an international database of information concerning high seas fishing vessels.

As part of the process towards Australia's acceptance of the agreement, we have consulted widely with interested parties. A discussion paper was produced and circulated and posted on AFFA's web site. An article was placed in the AFMA news and information packages were distributed to participants at the national fisheries conference. The views of the Australian fisheries industry, particularly those with an interest in high seas fishing, were canvassed, and industry expressed broad support for the agreement and for increased international cooperation in dealing with illegal fishing. We also consulted with the main NGOs with an interest in fisheries management and conservation, as well as relevant state and Commonwealth government agencies.

Industry raised a few concerns. We were able to respond to them that none of those concerns were going to be affected by acceptance of the agreement. We do not envisage that entry into force of the agreement will impose a significant burden or cost on the government or industry. We anticipate that the impact on business will be minimal and there will be no new fishing permit system required and that existing administrative procedures will be used to collect any additional information. There will be some minor legislative amendments required to implement the agreement. We feel there are strong benefits from Australia accepting this agreement. We are ready to answer your questions.

CHAIR—Thank you for that. Obviously the majority of the problems with illegal fishing arise from the activities of flag of convenience registered fishing vessels. Would that be right?

Mr Ross—Yes.

CHAIR—How does this agreement overcome that? I also assume that flag of convenience registrations are likely to take place in nations that will not be a party to this agreement. So how does this agreement overcome the problems of flag of convenience registrations?

Mr Ross—The parties that sign onto this agreement have those obligations to ensure that the vessels that operate under their flag are complying with the agreement. There is also the requirement to take into account the history of vessels in determining that authorisation. So the previous activities of these vessels, to the extent that it is known, needs to be taken into account in that authorisation process.

CHAIR—That is only with nations that are parties to the agreement. I am wondering how successful we will be in preventing the illegal fishing activities from nations that are not parties to the agreement or vessels registered in those nations that are not parties to the agreement—registered from the outset.

Mr Rohan—An obligation exists under the agreement that countries which are being approached to register a vessel consider the status and history effectively of those vessels. If the boat has been previously flagged under a flag of convenience type state, that may be a basis for not accepting it on the new register. That may provide a commercial disincentive for those vessels to go onto such registers and to participate in illegal activity if it may prejudice their ability to get onto a substantial register at a later date.

It is an indirect measure, but it is better to have that there than not to. In general, it is difficult to prevent companies from registering their vessels under flags of convenience, if it is their wish to do so. Here we are establishing a sort of world order of good behaviour and practice, under which diplomatic pressure and persuasion may be brought to bear to encourage more countries to join and, hence, then limit the opportunities for this activity to occur.

Mr ADAMS—Do they register so that they can get insurance on the boat?

Mr Rohan—That could be a factor as well, indeed.

Mr ADAMS—It is a major factor. The same applies to the ships of shame, doesn't it? Ships of shame in the business of freight or oil do the same thing. We have fought hard, and there are not too many of them on the Australian coast because they know that, if they come here, they will not get away. But pressure can be put on the countries that register these vessels or hold the capital that puts them to sea. This treaty will help us find or identify such pressure points, won't it?

Mr Rohan—I would suggest that. We need to look at this treaty as being one amongst a number to which countries are party, such as UNCLOS, United Nations Convention on the Law of the Sea, and subsidiary agreements that have been ratified by Australia, such as the UN fish stocks agreement that came into effect in December last year. All these treaties and agreements

build a fabric or framework under which pressure can be brought to bear. I would suggest that this is one more tool in the toolbox that can assist in exerting some pressure. But the reality is that there are loopholes if countries or companies wish to exercise the opportunities and get around them. So it is a long-term program with an effort to build in diplomatic and commercial incentives.

Mr ADAMS—There is Australia's experience in the last five years. I think I will be in Western Australia looking at those boats in a week or so, and also the toothfish. Can you give the committee a run-down on what has occurred around Macquarie Island in the last five years?

Mr Rohan—I will give a brief summary. A total of six foreign fishing vessels have been apprehended in relation to illegal fishing in Australian waters around Heard and McDonald Islands. That is Australian territory some 6,000 kilometres, 4,000 nautical miles, south and west of Fremantle. It is a very remote area but, if adequately conserved, it will remain quite a lucrative long-term fishery. The Australian territory around Heard and McDonald Islands is based on the Kerguelen Plateau and adjoins a French territory where there is similar such fishing. The remoteness of that area and, I guess, the high international price achievable for these fish makes them quite attractive to illegal operators.

We are finding that there is a concerted effort by—I think we could only really call it—'coordinated criminal activity' to flag boats in various ports, set up dummy companies to operate these vessels and fish in the Australian zone, in the French zone and in other waters where they believe they can make a harvest. They do this in flagrant disregard of international cooperative arrangements, such as exist to protect subAntarctic waters, and also in disregard of coastal state laws. This is an ongoing problem for Australia. It is not just a fisheries resource abuse issue; it is a disregard of Australian sovereign fishing rights for those parties who are licensed to fish in those areas. Also, it potentially impacts on conservation values in those areas. This is an ongoing issue for Australia. To return to these treaties, the measures embodied in the current treaty that we are looking at today can assist in helping to build or put more bricks in the wall to enable responsible countries to take a stand on these matters. But there is no doubt that this is not a simple process.

Senator MARSHALL—That is the point, though, isn't it? What flags were the six ships you have talked about sailing under?

Mr Rohan—Various flags: Panama, Sotome, Togo. We have had others from Vanuatu. It varies.

Senator MARSHALL—Are any of those countries likely to sign up to this?

Mr Rohan—Most unlikely.

Mr WILKIE—When they get caught and the vessels are confiscated, you obviously sell the catch and the vessel itself. What return would you get from the sale and the fines, if you can find them?

Mr Rohan—The Fisheries Management Act provides, effectively, for mandatory forfeiture of vessels that are foreign fishing vessels apprehended in the Australian fishing zone, but the

owners of those vessels may lodge an appeal against that forfeiture. In fact, of the three boats we currently have in port at the moment, two have been forfeited to the Commonwealth and one is under appeal. Where the Commonwealth has forfeiture or has seized the vessels, it can sell the catch. Once forfeiture is confirmed, that catch becomes the property of the Commonwealth. In the case of where there is action pending, the funds are held in trust. The value of the fish varies, of course. For the two most recently apprehended vessels, the *Lena* and *Volga*, which were brought in by the Royal Australian Navy in February this year, the value of the catch in round figures was $2 million.

CHAIR—Was the catch the patagonian toothfish?

Mr Rohan—Yes, it was. There is also some small amount for bait fish that is held on board, but it is negligible. The vessels themselves have not been sold. Australia is required to bond under UNCLOS, the United Nations law of the sea. With the *Volga*, the last of those three vessels, where forfeiture has not been confirmed at this point, its owners have initiated an action to have that vessel bonded.

Mr ADAMS—I just want to get on the record the nationality of the captains of those three vessels.

Mr Rohan—All Spanish.

Mr ADAMS—Radio officers and other officers?

Mr Rohan—The technical crew, the engineers, generally in the last two apprehensions have been Russian. The master, the fishing master and I guess the first officers have tended to be Spanish; the engineers Russian; and the bulk of the crew who do the hard, routine work in the most recent cases were Indonesian and Chinese.

Mr ADAMS—Somebody would be acting as an agent, putting these crews together, as happens with other ships and shipping in the world. Where would those crews be put together? Where would the agent be operating from?

Mr Rohan—It varies, depending on who is running the operation. We have had some intelligence to suggest where that may be happening in the case of the current operation. But I would be reluctant to go into details at this point, if that is all right.

Mr WILKIE—What penalties would be incurred by the captains and the crew; or do they just get extradited?

Mr Rohan—In the most recent instances, three persons from each of the vessels have been prosecuted. The prosecution could only be led against those operators where there can be established a clear link of knowingly having participated in illegal fishing. In the case of the *Lena*—all three were prosecuted successfully; they pleaded guilty—the master was fined a total of $50,000 and the two subsidiary sort of officers were fined $25,000 each.

Mr WILKIE—Would they lose their licence?

Mr Rohan—They do not hold a licence under Australian arrangements. So, through direct or multilateral linkages such as CCAMLR—the international body for conserving sub-Antarctic waters, of which the European Union, Spain and Russia are members; we will provide a report to that body when it meets in October or November this year—we seek to exert some pressure on those countries to take a responsible approach to the activities of their nationals.

Mr ADAMS—We will submit a major written report to CCAMLR?

Mr Rohan—Yes; I expect so. We contribute to that report, and I expect that there will be a formal request to explain and take action.

Mr ADAMS—Did Australia make a diplomatic representation to Spain after those boats were seized?

Mr Rohan—Australia has advised those countries through the Department of Foreign Affairs and Trade. We have made varying degrees of representation.

Mr ADAMS—I am interested in the database that Mr Ross talked about. Are most Australian ocean-going fishing boats connected to AFMA through the satellites?

Mr Rohan—Yes, they are.

Mr ADAMS—They are all basically connected and their catches are recorded through that?

Mr Rohan—Yes.

Mr ADAMS—I was trying to link that to the international database that Mr Ross talked about. Can you give me some detail on that?

Mr Rohan—All vessels authorised to fish in CCAMLR waters, as they are called—a conservation area encompassing sub-Antarctic waters—are required to carry an observer and have an operational vessel monitoring system, called a VMS for short. Observers have a dual function. They report on the activities of the vessel and establish a separate statement as to the vessel's fishing practices, backed up by the electronic monitoring system put in place. The system accepted by CCAMLR and operated by Australia gives us multiple reports each day on where vessels are. The observers use the same system or the vessel's communications system to report back on the actual catches. These are fed into databases, which provide the basis for stock assessment of the fisheries. This forms part of the database for CCAMLR itself, which then undertakes a wider assessment.

Mr Ross—I would like to add a bit in terms of the compliance agreement. One of the requirements is for parties to supply information to the FAO. The FAO is to set up this database; in fact, it has already developed the database and countries are voluntarily providing information to it. I understand that they currently have about 6,400 vessel records in the database from a number of countries that are already parties to the agreement: Canada, Japan, Norway, the US and the EU. The information in that database will be made available to other parties to the agreement and, on request, to various fisheries management organisations around the world.

Mr ADAMS—That is terrific.

Mr WILKIE—We have been discussing the possibility of illegal fishing with regard to Tasmanian salmon. Has that been a problem?

Mr Rohan—Not on the high seas, I suspect.

CHAIR—In relation to types of offences or contraventions, what else could illegal fishermen be charged with, other than fishing illegally? Are there other contraventions with regard to environmental and conservation concerns? Can you give any examples?

Mr Rohan—Generally, in my experience, charges where we have been involved have been laid only under the Fisheries Management Act. Our approach has been to apply the Fisheries Management Act as the primary legislation.

CHAIR—The primary offence is fishing illegally.

Mr Rohan—Yes, that is right. I am not aware of environmental legislation being applied here. There is another set of legislation which is administered by the Australian Antarctic Division—the Antarctic Marine Living Resources Conservation Act. But the Fisheries Management Act penalties are higher, so we utilise that avenue. That is the main nature of infringement. Broader areas of offences are covered under the Fisheries Management Act.

CHAIR—But there is not, say, a separate offence such as depleting fish reserves or something like that, as opposed to the actual offence of fishing where you should not?

Mr Rohan—Reserves are being established in certain areas, such as in the 12-mile zone around Heard Island, but most of the fishing activity by illegal boats is detected outside that reserve area. That would be an additional offence if they were detected inside the reserve, if we could prove that. Another would be an offence under the Crimes Act, if that were to apply. Those areas are certainly looked at by AFMA and the Director of Public Prosecutions when it comes to laying charges.

Mr ADAMS—With respect to the New Zealander who helped to bring the boat from South Africa to the Tasman Rise, were you able to get anything on him, in order to charge him?

Mr Rohan—No. I think it is a matter of what we may suspect to be the case, but we really do not have anything which would be—

Mr ADAMS—It is pretty common knowledge around Tasmania.

Mr Rohan—The trouble is that we cannot take things to court on that basis alone, unfortunately.

CHAIR—Has there been any indication that some of our near neighbours are going to be interested in acceding to this treaty—Indonesia, Korea, China?

Mr Ross—I tried to find out a bit more about which other countries are actively in the process of acceptance, but I was not able to get anything specific—only an indication that there are at least two or three other countries close to this point.

CHAIR—You do not know who they are?

Mr Ross—No.

Senator MARSHALL—I want to understand the size of the problem. Are you able to tell me the actual size of this industry in terms of dollars and employment, and what impact illegal fishing is having on that?

Mr Rohan—In regard to the fishery around Heard and McDonald Islands?

Senator MARSHALL—Australia wide.

Mr Rohan—Australian interest in high seas fisheries extends beyond the Heard and McDonald Islands fishery. Australia is an emerging participant in high seas fisheries. Our fisheries are largely coastal and near water, and based on high-value species. The HIMI fishery is an important one, and I use that as an example because, apart from the value of that fishery to the operators, it provides a base of operations for them to extend into demersal trawling activity further west in the western Indian Ocean. I do not have figures for the value of their catches from that area. There is probably a commercial-in-confidence element to some aspects of that. Some Australian vessels fish in the Tasman Sea between Australia and New Zealand, mainly by trawl or by line methods. Interestingly, Australia's participation in tuna fisheries has expanded substantially. Australian vessels now have essentially replaced the Japanese licensed fishing access that had been granted and that was wound up by the mid-1990s. These vessels are showing their capacity to fish not only in the Australian fishing zone but also moving into high seas areas adjacent to those fisheries, on both the eastern and western coasts. I think we are seeing the emergence of a fishery, certainly beyond that which we have had in the past.

Mr ADAMS—This must be a costly exercise. Has there been any extra government allocation of funds to the enforcement of these treaties or to the work we are doing from a fisheries point of view, from the environmental side or from the law enforcement side of it?

Mr Rohan—AFMA has a budget for dealing with illegal fishing incursions into the Australian fishing zone. We work in close cooperation with Coastwatch as a coordinating agency and with the Department of Defence and Customs as primary providers of surface patrol vessels. Those budgets are quite substantial—the AFMA component is probably the smaller element of this. Defence, of course, has borne the cost of providing their frigates and oilers for attending to call-outs or requests to go down to the Heard and McDonald Islands area. I guess expenditure in these areas has increased to that extent, along with increased expenditure by Coastwatch in increased surveillance in northern regions.

CHAIR—Have there been any examples of Australian ships reflagging and then being caught up in any illegal activities?

Mr Rohan—Not that I am aware of. The short answer is that I do not know of any. I would not want to say that there are not some out there but, because Australian activities on the high seas have been so small in a relative sense, it is not the sort of issue that we have had a problem with.

CHAIR—Thank you very much for your time this afternoon. We appreciate your appearing before the committee.

[3.19 p.m.]

ALDER, Mr Michael, Manager, Wine Policy Section, Department of Agriculture, Fisheries and Forestry

WILD, Mr Russell, Executive Officer, International Economic Law, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—Last, but not least, I welcome witnesses from the Department of Agriculture, Fisheries and Forestry and the Department of Foreign Affairs and Trade to give evidence relating to the agreement establishing the Office of International Vine and Wine. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as do proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would either of you wish to make some introductory remarks before we turn to questions?

Mr Alder—Yes. Most of the information in relation to this treaty is contained, obviously, in the national interest analysis document that has been provided to you. But perhaps I will just highlight a few of the pertinent points and a little bit of background on the Office of International Vine and Wine. The OIV is an intergovernmental body that has been around since the 1920s. It originally comprised eight European countries and over time it has spread to include about 46 countries, obviously including Australia, which joined by treaty in 1978. The document that is before you today is not a new treaty. It is a revision of the 1924 treaty, but the revisions are so extensive that we are seeking to actually terminate the old treaty and replace it with the new one. What we will be seeking today is ratification of the new treaty that was approved by diplomatic conference in April last year, as well as approval to withdraw from and terminate the 1924 treaty and to transfer all of the assets and liabilities of the old OIV to the new OIV that will be created by this treaty.

The new treaty is basically the result of a fairly extensive review Australia initiated in 1996. The major purpose of this review was essentially to update the organisation, which had not been reviewed for 75 years. The treaty language and some of the provisions of the treaty were somewhat dated. The review is essentially aimed at improving the financial organisation, or operating structure, of that body and creating a more modern international organisation. From our own point of view, Australia is also looking at particularly ensuring that the resolutions that emanate from this body reflect the range and variety of views brought by the member countries to the organisation; that is, new world wine producing countries as well as those from Europe.

The outcomes of the four-year review that are essentially embodied in the new treaty include some important improvements as far as we are concerned. I will just note a few of them. In particular, there is the inclusion of consensus decision making in this organisation. You will note under article 5 that all scientific and technical type resolutions will be approved by consensus. Where consensus cannot be agreed, there are provisions to move to a vote. However, countries that believe that their national interests may be threatened by such a decision can actually impose a veto through their minister for foreign affairs. This is a vast improvement on

any arrangement that might allow for, for example, European wine producing countries and their allies to force a vote, win that vote and have the resolution passed, much against our interests. It also updates the charter under article 2 of the treaty itself. It specifically includes provisions for harmonising wine regulations and looking at arrangements for mutual recognition of different arrangements, which is something the Australian wine industry is particularly keen on, given that our practices vary from those in Europe in many areas. We now have English as an official language, which is a great help, given that French has been the only official language. In fact, until 1992 our representatives had to attend and try to take it in French, so it made it rather difficult for us.

CHAIR—Did the French easily concede that?

Mr Alder—I think eventually they realised that there were at least 16 states that preferred it in English in some way, so they have been informally conducting general assemblies and other meetings in simultaneous translation—in English and Spanish, in fact. So we now have English, Spanish and French, and it is likely that Italian and German will also be added in due course. We also have modern concepts like strategic planning that have been introduced to this organisation, which is a fairly advanced thought, I have to add, to the OIV.

One thing that needs to be stressed is that the new treaty provides the OIV with no additional powers. Its powers are only recommendatory in nature, so there is no domestic legislation involved—there has not been and there will not be—in terms of implementing this treaty. We believe that it will increase the organisational efficiency of the OIV and move it in the right direction in terms of, as I mentioned earlier, reflecting the various interests of the much larger wine world that we now operate in rather than one that is just European focused.

The treaty will come into force on the first day of the year after the 31st instrument of ratification is deposited with the French government. We expect this is likely to occur some time next year, so the treaty would come into force at the beginning of 2004. To date, about 10 to 11 countries, I believe, have ratified the treaty. During the review process and the conference we consulted very closely with the Australian wine industry. The industry and, indeed, the Australian government have had concerns about the organisation, but we both believe that the new treaty, while a compromise, represents a fairly major step forward from the current 1924 treaty.

CHAIR—In particular, what has been the advantage in Australia being a member of this august body?

Mr Alder—We believe the major advantage is that the OIV has been a traditional body for the European wine producing countries and has a history of influence in the way that European wine law is written subsequently. As I said earlier, it is not mandatory to adopt the OIV's resolutions, but the Europeans who operate in the European Union operate within the OIV and you find that the style of wine law that is developed and implemented in Europe is very similar to the style of recommendations that are passed by the OIV. So we believe there is some role for influencing the process early on—that is, being in the tent rather than outside.

You also get early warnings as to the direction in which the Europeans are going. That is important because more than 50 per cent of our wine trade is with Europe, and it is envisaged

that this will grow to about 60 per cent. So in terms of protecting our own wine interests, we believe this is one body that we should be actively involved in, along with others. So we operate here, as well as in what was the New World Wine Group, and we operate through bilateral wine agreements with the European Commission.

Mr ADAMS—Seventy per cent of the world's wine is still grown in Europe. Is that the right figure?

Mr Alder—You are certainly in the right ballpark. The vast majority of world production and consumption is in Europe. So, yes, it is the world's biggest market.

Mr ADAMS—Where is the secretariat of this body?

Mr Alder—It is based in Paris and it is French.

CHAIR—That is where it has its annual meeting.

Mr Alder—Its headquarters are in France. Its General Assembly meetings are held in a variety of places. Usually, every three years they are held in Paris, but countries usually host a congress and general assembly. For example, I have just come from the last general assembly meeting, which was held in Slovakia. Last year, it was held in Australia, in Adelaide in October, so we were the host country.

Mr ADAMS—Do they deal with things like the cork crisis? Do they get to that level?

Mr Alder—They deal with a whole range of scientific and technical resolutions and they could cover the usage of cork. At congresses which involve the presentation of a whole variety of papers by various members, cork is certainly one of the subjects that gets a fair coverage, I would have to say—particularly when it was held in Portugal.

CHAIR—The regulations are not mandatory. How many of them has Australia adopted?

Mr Alder—I could not answer that.

CHAIR—Many, some, none?

Mr Alder—It is not so much a matter of how many we have adopted; many of them are about technologies that are already operating in Australia. They look at new technologies: for example, spinning cone technology—do not ask me to explain, because I am not a winemaker. This technology is already used in Australia and other New World countries, to some degree. There is currently a resolution going through the system about that. If they approve this in due course and agree that this a reasonable practice to adopt in winemaking, then we are not adopting the resolution; we are already doing it. So on many of the sorts of things that they pass, we are ahead of the game already.

CHAIR—Does it deal with any of the trademark issues, passing off or intellectual property issues?

Mr Alder—Yes, they have in the past, before my time in this organisation. They have dealt with issues like appellations of origin, geographical indications and so on. In fact, there was quite a famous resolution passed in Madrid in 1992 concerning appellations of origin—which Australia voted against, I have to say.

CHAIR—About champagne and things like that?

Mr Alder—Champagne is a geographical indication which we have agreed, in principle, to give up under our bilateral wine agreement. But they do cover those sorts of things. While it is generally a scientific and technical organisation, they have something called Commission III, which is an economics commission that looks at law and regulation, marketing and a whole range of other things. For example, at the moment we are looking at a harmonised labelling resolution that might facilitate trade in wine.

Mr ADAMS—Does it consider health issues of wine?

Mr Alder—Yes. The OIV has a nutrition and health subcommission which actually looks at wine and health issues, and Australia has a delegate to that. In fact, Australia holds the vice-presidency of one of the expert groups under that commission at the moment.

Mr ADAMS—They would be a very healthy person, I reckon.

Mr Alder—I think the jury is still out on that. It is certainly something the Europeans favour, that drinking red wine is good for your health.

CHAIR—Does this organisation come up with that sort of scientific research on how good red wine is for your health and things like that?

Mr Alder—They certainly publish the results of health related research, there is no doubt about that. There have been questions raised as to how you should present that information and Australia has been very clearly of the view that it must be balanced when it is presented. So, as much as you might wish to promote the benefits of drinking red wine, you need to look at the risks as well.

CHAIR—On some of the issues that they cover you have indicated that the agreement introduces decision making by consensus with a veto. What dispute resolution arrangement is currently in place under the 1924 agreement and how are they proposing to settle disputes under the new agreement?

Mr Alder—Under the current agreement they can just call a vote and that is it. Whichever resolution wins the majority of the votes that are counted is passed. However, this has not been the practice for at least the last two or three meetings. Given that this treaty has been in draft form, the OIV has tended to move towards consensus, so where there has been strong opposition to a particular resolution they have not proceeded with it but have taken it back. For example, in Bratislava a couple of weeks ago there was a dispute about one of the resolutions. They have returned that to the relevant commission of the OIV to try to resolve and then bring back to the General Assembly. So, under the current arrangements, yes, technically, you could force a vote but they have not been enforcing that.

Under the new one, the arrangement is set out in article 5. Essentially, if there is not agreement or consensus—and consensus means in this case the absence of sustained opposition rather than everyone fully agreeing to everything—then it is up to the president to bring the parties together. At the last OIV general assembly in Adelaide, Australia did not agree with some of the resolutions, but we simply abstained with a note. We were not going to oppose it. It was not contrary to our interests but we did not fully support it. So if there is sustained opposition then it is up to the president to bring the parties together to talk about it and, if there still cannot be agreement and the party who has the problem objects, the issue is delayed by one year. It can be brought back to the general assembly and voted upon if necessary at the following general assembly. However, that country still holds the right to say, 'No, we do not wish a vote to proceed,' and it can be blocked by a formal letter from the government involved.

CHAIR—And are there any sanctions against a country that dissents or vetos?

Mr Alder—Not as far as I am aware. As I say, it is not mandatory for member countries to take up the recommendations.

Mr WILKIE—Is there anything that might come up by way of dispute that would be covered by the WTO?

Mr Alder—Yes, there are issues that come up. Earlier you mentioned geographical indications. Clearly this is an area that is covered by the TRIPS council of the WTO. All of these areas overlap with areas like the Codex Alimentarius Commission, which I know is not WTO; it is the FAO. The TBT Committee could cover a number of these areas as well. You may have noticed that in article 2 of the treaty on intellectual property issues we have said that the OIV, for example, could make recommendations or resolutions on such matters, provided they are not contrary to existing international agreements on those matters. So we would say: if it is contrary to the TRIPS agreement, for example, then we would oppose it.

Mr WILKIE—I see the United States are not part of the body; why would that be?

Mr Alder—The United States formally indicated their withdrawal in December 2000. They have had longstanding problems with the OIV in terms of what they saw as its Eurocentric approach. As I recall, in their letter to the OIV formally withdrawing from the organisation they indicated they were unhappy with the consensus-making rule and they were unhappy that they had not achieved one vote per country. There was another reason which escapes me. But essentially I think they have decided that, strategically, it would be better for them to withdraw from a European organisation and pursue their interests through other bodies such as the new world wine producing organisations and, most particularly, bilaterally with the European Commission.

CHAIR—Has it affected the US wine industry adversely?

Mr Alder—Not as far as I am aware.

CHAIR—Would it affect the Australian wine industry adversely if we were to opt out?

Mr Alder—There are a few things there. Firstly, the United States, as we all appreciate, is a slightly larger economic and political force in international trade negotiations than Australia. Secondly, the European Union is a net exporter to North America and the US whereas Australia is a huge net exporter the other way, so our leverage and our interests are far different. Thirdly, Australia is the country that actually initiated this review and we did achieve most of the types of things that we wanted so we felt somewhat honour bound to pursue right through the process rather than withdraw from an organisation that we believe through the review had essentially come up with the right results.

Mr WILKIE—I was looking at the budget. Our contribution is probably the smallest contribution I have ever seen for any treaty that we have ever had come before us. Is their budget large enough to operate the organisation?

CHAIR—Wasn't it $70,000?

Mr WILKIE—Yes. They are going from $38,000 to $70,000. It seems a very small amount.

Mr Alder—Yes, it is. It is quite a small organisation. They employ only 14 or 15 staff in Paris, so it is not a huge organisation by any means. If you ask the Director-General of the OIV his view, I can tell you exactly what he would say on whether he has enough money.

CHAIR—Double the staff.

Mr Alder—The answer is fairly clear: triple it, or whatever you like. We think that their budget is fairly reasonable for an organisation of that size. The review made a number of recommendations to add a few staff here and there in certain areas. The budget will increase for countries, as mentioned in the NIA statement, because of the translation costs. When we add English and Spanish full time and Italian and German, the costs will be reasonably substantial for a small organisation.

CHAIR—Does the budget have to cover the supply of samples for the conferences?

Mr Alder—No, the host country usually provides all of those or they are covered by the conference fees.

CHAIR—I am pleased to hear it.

Mr Alder—We did exactly the same.

Mr WILKIE—You were just spying the size of Mr Wild's brief case.

CHAIR—Indeed.

Mr Wild—That is for later.

CHAIR—How is the president chosen? Is the president elected from the signatory states?

Mr Alder—Yes, the president must be a member of one of the signatory parties to the agreement.

CHAIR—Who is the current president?

Mr Alder—He is from Argentina: Felix Aguinaga. His term is due to expire next year. The procedure generally is that countries are asked whether they have any nominations. That process will start next month.

CHAIR—Have we had a president from Australia before?

Mr Alder—No.

CHAIR—Are we aiming to?

Mr Alder—I don't believe we are at the moment. We have nominated various people for heads of the OIV commissions and we have an Australian as president of one of the expert groups of the OIV at the current time. We have not held the role as president. Most of the presidents have been of European origin with the exception of a Chilean, I think, and the current Argentine president.

Mr ADAMS—Have there been any new breakthroughs in the production of wine?

Mr Alder—They are always developing new technologies. The big focus in wine making at the moment is to establish the relationship between colour and quality and so on, and to have an easy method for doing that with wine grapes. There is a lot of work going on in Australia through the Grape and Wine Research and Development Corporation, the CRC for Viticulture based in Adelaide and the Australian Wine Research Institute. Colour and quality is the big area for focus at the moment.

Mr ADAMS—Distribution is being squeezed at the moment. If they end up getting it all the same as they did with tomatoes we will stop drinking wine.

Mr Alder—I think there is enough diversity of wine in Australia. We have 1,400 wineries to keep us all fairly interested.

Mr ADAMS—But we are going to end up with a couple of distributors.

Mr Alder—You are quite right.

Mr ADAMS—This is the danger in that caper.

Mr Alder—This is the trend overseas, as well. For most food products worldwide there are shrinking distribution chains.

Mr WILKIE—Yes, we noticed that the quantity comes from the east but the quality comes from the west.

CHAIR—You just had to get that on record.

Mr Alder—I could not possibly comment on that.

Senator KIRK—I noticed that there was consultation with state and territory governments. I wondered whether they expressed any reservations or dissent about the terms of the treaty.

Mr Alder—No, they all supported the aims as far as I am aware.

CHAIR—Is there anything else you think the committee needs to know about this treaty?

Mr Alder—No, I think you have it all there.

CHAIR—I think we get the picture. Thank you very much for your attendance here today. We appreciate the evidence that you have given.

Resolved (on motion by **Mr Wilkie**):

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this committee authorises publication of the evidence given before it at public hearing this day.

CHAIR—Before we finish, I would like to place on the public record that this is Bob Morris's very last Joint Standing Committee on Treaties public hearing. On behalf of the committee, I would like to pay tribute to Bob for his years of service to this committee. In fact, he has been here from the outset, since the commencement of this committee six years ago, and I know he has had a far longer parliamentary career prior to that. As senior research officer for JSCOT his contribution has been invaluable. I speak on behalf of previous committee members as well as the current committee when I thank you, Bob, very much for all the work you have done. We could not have operated so effectively without you. We wish you all the very best.

Committee members—Hear, hear!

Committee adjourned at 3.45 p.m.