COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties referred on 16 November 2010 and tabled on 9 and 10 February 2011

MONDAY, 28 FEBRUARY 2011

CANBERRA

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JOINT STANDING

COMMITTEE ON TREATIES

Monday, 28 February 2011

Members: Mr Kelvin Thomson (Chair), Senator McGauran (Deputy Chair), Senators Birmingham, Cash, Ludlam, O'Brien, Pratt and Wortley and Ms Bird, Mr Briggs, Mr Forrest, Ms Grierson, Ms Livermore, Ms Parke, Ms Rowland and Dr Stone

Members in attendance: Senators Birmingham, Cash, O'Brien and Wortley, Mr Forrest, Ms Livermore, Ms Parke, Dr Stone, Mr K Thomson

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 9 and 10 February 2011 and referred to the committee on 16 November 2010

WITNESSES

Committee met at 10.17 am

CLOGSTOUN, Mr Roy, Executive Officer, New Zealand Section, Department of Foreign Affairs and Trade

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

Exchange of Letters Constituting an Agreement between the Government of Australia and the Government of New Zealand to amend Article 3 of the Australia New Zealand Closer Economic Relations Trade Agreement

Exchange of Letters Constituting an Agreement between the Government of Australia and the Government of New Zealand to amend Annex G of the Australia New Zealand Closer Economic Relations Trade Agreement

CHAIR (Mr Kelvin Thomson)—I declare open this public hearing of the Joint Standing Committee on Treaties ongoing review of Australia's international treaty obligations. Today the committee will take evidence on six treaty actions which were referred to the committee on 16 November 2010 or tabled in the parliament on 9 or 10 February 2011.

I welcome today's witnesses. Although the committee does not require you to give evidence under oath, I should advise you that this is a legal proceeding of the parliament and warrants 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. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make introductory remarks before we proceed to questions.

Mr Clogstoun—I understand from the members of the committee that DFAT has been asked to comment on two submissions that were made to the committee, the first being from Oxfam and the second being from the Council of Textiles and Fashion Industries of Australia Ltd. With regard to the Oxfam submission, all we have to say is that ANZCERTA is a bilateral trade and economic agreement between Australia and New Zealand and anything agreed in ANZCERTA cannot be transferred to any other parties as there are no accession clauses in that agreement. SPARTECA is a non-reciprocal plurilateral between all members of the Pacific Islands Forum. As far as I am aware, there are no plans to renegotiate or revise this agreement. At the Pacific Islands Forum in Cairns in August 2009, forum leaders launched PACER Plus negotiations. In October 2009, trade ministers agreed on priority negotiating issues: rules of origin, trade facilitation, development assistance and regional labour mobility. Trade officials have conducted two negotiating rounds since then: one in April and one in October 2010. The third negotiations meeting is scheduled for 14 and 15 March 2011. DFAT has no comment on the submission provided by Ms Jo Kellock, CEO of the Council of Textiles and Fashion Industries of Australia Ltd, except to reassure the committee that, at the time, ministers at all levels were made fully aware of the positions of Australian industry on this issue.

CHAIR—Can I ask you about the latter submission. As you will be aware, we heard evidence from the Council of Textile and Fashion Industries of Australia and also from the Stafford Group. They opposed the relaxing of the rules of origin for regional content under ANZCERTA and they expressed concern about the impact of those changes in the content rules in relation to men's suits. We had evidence in Melbourne from them concerning this. The Council of Textile and Fashion Industries said:

… it is the combination of duty free entry of finished product ex New Zealand under ANZCERTA and ability to avoid duty on the input materials that creates the significant advantage for New Zealand producers over their Australian counterparts.

They are putting it to us that the playing field is not level, or will not be level should this agreement proceed, so I wonder what your response is to that argument.

Mr Clogstoun—This goes back to what I had spoken initially about in relation to the issue of duty drawback. The New Zealand producers are able to access duty drawback while the five per cent tariff on Australian imports of quality clothes still exists, but this anomaly will rectified, as I understand it, when the tariff is removed sometime in 2012.

CHAIR—As I say, they have a clear view that the playing field is not level, or would not be level if we proceeded down this path. They said:

The amendments proposed by the Exchange of Letters will further water down the ANZCERTA rules of origin provisions, meaning that less and less added value needs to be carried out in New Zealand.

Do you think that is a relevant consideration about the amount of added value that is being carried out in New Zealand as opposed to it simply being a conduit?

Mr Clogstoun—I am not an expert on rules but I believe that a certain proportion of the work will have to be carried out in New Zealand, like the making of the suit. I think where it actually differs is the importation of the input.

CHAIR—The other issue that they raised in a supplementary submission was the question of consultation—that ministers had provided assurances to them and they felt that these assurances had not been honoured. You might like to go to this issue of consultation with the council, through the process of agreeing to these changes to the rules of origin.

Mr Clogstoun—I was not in the job at the time, but I understand consultations did take place between ministers and the industry and between government officials and industry at the time.

CHAIR—Are there further questions? Senator Cash.

Senator CASH—I appreciate your evidence is that you were not actually there at the time. We did, however, hear evidence from TFIA in relation to the negotiations that they said they had at a ministerial level and the assurances that were provided to them and then the ultimate decision, which they now say is in direct contradiction to the assurances. Chair, is it possible to ask the witness, on notice, to provide us with a summary of the consultation that actually was

undertaken and the negotiation, just so that we can do a comparison with the evidence that we received in Melbourne?

CHAIR—Is that request possible?

Mr Clogstoun—Sure, that is not a problem.

Dr STONE—You are quite personally comfortable and satisfied that this new arrangement will not discriminate against Australian manufacturers—of course inadvertently and as an unexpected consequence?

Mr Clougstoun—Yes, sure. I understand that, at the time of the consultations, some advance time was given where the changes from the regional valuation content approach to the CTC approach was agreed that it all take place on 1 January 2012 to give industry adequate time to adjust. The problem is that New Zealand products come in duty free; whereas in the other FTAs we have negotiated the lead time is a lot longer. But because we have had this free trade agreement with New Zealand spanning the past 30 to 40 years, the duty free impact of that kicks in almost immediately.

Dr STONE—So we cannot make a special arrangement for this particular change to be brought in much longer than just in one year's time? Is there any condition that stops that being given a longer time frame?

Mr Clougstoun—I will have to check that with the department concerned, the Department of Innovation, Industry, Science and Research.

Dr STONE—The problem with this is that, once the damage is done with the unfair competition, it is virtually impossible with a review to reinstate the industry connections and the viability if an industry has already been damaged. That is the great consequence of a problem with this sort of change in agreement, isn't it?

Mr Clougstoun—Yes.

Ms LIVERMORE—I note what you said about the Oxfam submission and that we are here to talk about ANZCERTA. But one of the things that that submission throws up is the contrast between ANZCERTA and the Pacific economic cooperation agreement and the fact that the Pacific rules of origin have not changed for 30 years; whereas there has been quite a lot happening under ANZCERTA. Are you able to fill the committee in on your views as to why that contrast is there, why there has been so much activity on the rules of origin terms under ANZCERTA in contrast to this other agreement?

Mr Clougstoun—With the rules of origin in ANZCERTA, there were about 700 items that were left over and that applied under the old system, the regional valuation content. The decision was taken to bring it in line with all our other FTAs and convert those 700-odd items to the CTC approach—it is called the substantial transformation approach. SPARTECA is a totally different agreement. There are separate rules of origin conditions applying for SPARTECA. I think it is a 50 per cent rules of origin.

Ms LIVERMORE—Right.

CHAIR—If there are no further questions, thank you for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

[10.28 am]

COLMER, Mr Patrick, General Manager, International Finance and Development Division, Treasury

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

THOMPSON, Ms Lynne, Senior Adviser, Development Banks Unit, International Finance and Development Division, Treasury

Amendments to the Convention Establishing the Multilateral Investment Guarantee Agency to Modernise the Mandate of the Multilateral Investment Guarantee Agency

Amendment to the International Finance Corporation Articles of Agreement

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants 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. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make any introductory remarks you wish to make before we proceed to questions.

Mr Colmer—I have only recently moved into this position so please bear with me. I think I will make an opening statement and see if we can deal with it that way.

CHAIR—Certainly.

Mr Colmer—The World Bank is undergoing a series of reforms to respond to the needs of members and to improve the long-term effectiveness and legitimacy of the bank. The World Bank was established initially in 1944 and provides financial and technical assistance to developing countries around the world. We are dealing today with two arms of the World Bank: the International Finance Corporation or IFC; and the Multilateral Investment Guarantee Agency or MIGA. They are two of five arms of the World Bank group.

The International Finance Corporation contributes to the bank's overall poverty reduction mandate through its operation with the private sector in middle- and low-income countries. The IFC is the largest provider of multilateral financing for the private sector in the developing world. The Multilateral Investment Guarantee Agency promotes foreign investment into emerging economies by offering political risk insurance or guarantees to investors and lenders. MIGA ensures that new cross-border investments originating in any MIGA member country destined for a developing member country can be insured. Types of foreign investment that can be covered include equity shareholder loans and shareholder loan guarantees. MIGA also

provides technical assistance and advice to help developing countries to attract and retain foreign investment.

The amendment to the IFC articles of agreement is part of the delivery of Australia's G20 commitment to reform the multilateral development banks so that they are more flexible and responsive. Increasing the number of basic votes allocated to each member of the IFC in parallel with a selective capital increase open for subscription to those members interested in increasing their shareholding is intended to strengthen the relative voting power of small and low income members, most of which are developing or transition countries. Australia, along with most developing countries, will not take part in the selective capital increase in order to facilitate an overall increase in the representation of developing and transition economies. The amendments increase the effectiveness and legitimacy of the World Bank as the leading global development institution and enhance the influence that developing and transition countries have over governance, policies and decision making in the World Bank.

The amendments to the MIGA convention are intended to modernise MIGA's mandate and expand its scope. It is expected they will significantly enhance MIGA's development impact and ability to deliver on its mission: to promote foreign investment into developing countries, to help support economic growth, to reduce poverty and to improve people's lives. The four amendments allow MIGA to provide additional coverage in the area of stand-alone debt; broaden the process whereby investors may register for MIGA's consideration; increase the scope for coverage of existing assets; and eliminate a requirement for joint application by an investor and a host country to authorise coverage for non-commercial risks.

The amendments as such introduce no substantive changes to Australia's obligation to either the IFC or MIGA. Australia's actual IFC shareholding remains unchanged as a result of the increase in basic votes, while its voting share will decline marginally. Australia has an interest in seeing these amendments accepted, as they will help to improve the effectiveness of the IFC and MIGA in promoting economic and financial stability, international development and poverty reduction.

CHAIR—Can I ask you a process question. The committee understands that the legislation implementing the MIGA amendments, the International Financial Institutions Legislation Amendment Act 2010, was given Royal Assent on 24 November last year, the day the legislation was tabled in parliament. Is that right?

Mr Colmer—That is correct.

CHAIR—What factors are involved in bringing a treaty for automatic entry into force as occurred in this case?

Ms Thompson—I am not sure I understand the question, but the amendments that were made to the act do not involve automatic update of the articles of IFC or of MIGA. So it is different from the amendments that have previously been made in relation to the IMF and the IBID or the World Bank, which did allow for automatic update of the articles when changes were agreed at headquarters. Does that answer the question?

CHAIR—I might come at it slightly differently. Why was legislation introduced and passed before the treaty was tabled in the parliament?

Mr Colmer—The issue around there was a matter of timing—particularly, there was a separate issue around the International Bank for Reconstruction and Development, and it was thought to be more efficient to progress all three changes together rather than have two separate ones. The other consideration was the need to demonstrate our commitment to the G20 agenda, and the view was taken that ensuring prompt implementation of the reforms was important in that context.

CHAIR—Obviously, the role of this committee is to scrutinise treaties in the window between signature and ratification, so if the government moves to introduce legislation relating to the treaty before it is tabled in the parliament, and therefore considered by the committee, that clearly has the potential to usurp our role. So I am interested in understanding the basis of the decision to introduce legislation.

Mr Colmer—Yes, we do understand that it was not in line with the standard process, but because of the way that the World Bank process ran, and the way the G20 process ran, the decision was taken that it was important to progress them expeditiously. I think that was the reason it went this way. It is not intended that this is the standard process.

CHAIR—In terms of making contact with the committee to discuss these situations with us, what is your plan of attack?

Ms Thompson—I might just say that the MIGA changes have been voted on at the bank and have been accepted. So, with the legislation getting royal assent, they were adopted in Australia. The voting on the IFC changes is not yet complete, so they have not yet been adopted by the bank.

Mr Colmer—Mr Chairman, on your question about the process, I am not sure what actually happened back in October-November, but we can certainly make sure that, if this happens again, we consult with the committee. There may have been some consultation—I am not sure—but we certainly do not have a problem with finding ways of working with the committee to smooth these things through, if we need to do that again in the future.

CHAIR—All right. I might ask you a couple of questions going to the substance. How do you rate the significance of the amendments overall, in terms of building a better investment environment in the developing world? What is your view of that?

Mr Colmer—I think we would have to class these investments as relatively small in the overall scheme of things. They are not going to make major changes, but they are part of an ongoing process of modernising and streamlining the organisations. The particular one, really, is the MIGA amendments, which expand MIGA's range of activities. I do not think they are fundamental changes that are going to make major differences to the operations of MIGA. They are more in the realm of streamlining.

CHAIR—In terms of the developing countries in which you are trying to do risk profiles and charge fees for insurance that is structured for investment risk, how is that tackled?

Mr Colmer—That is a detailed administrative question for MIGA. We do not get involved at that level. It is the role of MIGA to do that. I am sure we could find some more information, if that would be helpful for the committee.

CHAIR—I would be happy to have a little bit back on that front, if that is all right. I might ask a little bit about the IGA amendments and this question of the voting power of developing nations at present. The committee understands that the share allocation in the World Bank does not adequately represent developing nations at present, and the national interest analysis notes that the relative voting power of developing and transition countries has in fact eroded over time. What is the history of the share allocation process and the voting method?

Ms Thompson—For the IFC, which is the arm that we are talking about, the original voting structures and share allocation were based on those at the IBRD, which is the first arm of the bank that was set up. I am not on top of all the details about how that evolved over time, but we can provide more information on that.

Mr Colmer—The way that it works is that there is a combination of a basic vote and a vote that relates to shares. Over the years, the World Bank and its arms have recapitalised and sought further additional funding. The basic vote versus the share relationship has favoured the voting power of developed countries—

CHAIR—Yes.

Mr Colmer—which are more likely to take up those increased share allocations than some of the developing countries. So it has got a little bit out of whack over the years.

CHAIR—Do you think that that has had an effect on the decision-making processes of the World Bank group or the way in which the development agenda has functioned?

Mr Colmer—That is a difficult question to answer. What we are trying to do as much as anything is to ensure that the World Bank and the other organisations retain legitimacy and the support of the developing countries, and I do not think there is any suggestion—although I admit that it would be a very difficult question to answer—that it has made changes to the actual decision making. But it is a question about maintaining support for those international institutions.

CHAIR—And is that the driver of the proposed changes: seeking to maintain support for the institution?

Mr Colmer—That is certainly one of the principle areas of concern, and certainly there has been a process over the last year or two of reassessing the voting structures of all the international financial institutions. There is an awareness that it is important for their legitimacy for them to be responsive to the concerns of smaller countries. At the same time, the basic principle is that the institutions try to operate their voting on the basis of relative economic weight within the world, so quite clearly there are some very large countries that have relatively large voting power in these institutions and there are a lot of small countries that have relatively lower voting power. The sorts of agreements here are making some changes but I do not think that they are going to change the fundamental position of the very big countries in the world.

CHAIR—There being no further questions, I thank you for attending to give evidence today. If the committee has any further questions, the secretariat may seek further comment from you at a later date.

Proceedings suspended from 10.45 am to 11.00 am

JOHN, Mr Thomas, Acting Principal Legal Officer, Private International Law Section, Justice Policy Branch, Access to Justice Division, Attorney-General's Department

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

MOORE, Mrs Karen, Assistant Secretary, Justice Policy Branch, Access to Justice Division, Attorney-General's Department

Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal hearing of the parliament and warrants 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. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make any introductory remarks you wish to make before we proceed to questions.

Mrs Moore—Thank you, Mr Chair. I will just make a brief introductory statement. The purpose of the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement is to streamline procedures for litigation with cross-Tasman elements. It is one part of the arrangements for Closer Economic Relations between Australia and New Zealand which commenced with the 1983 Australia New Zealand Closer Economic Relations Trade Agreement. In 2009, two-way bilateral investment between the two countries totalled $110 billion and it continues to increase annually. The greater movement of people, assets and services across the Tasman also increases the prospects for litigation with a trans-Tasman element. The implementation of the agreement should reduce the time and costs involved in such litigation. The agreement had its genesis in 2003, culminating in its signature in 2008. Since 2003, extensive discussions and consultations between the Australian and New Zealand governments, the states and territories, the courts, the legal profession and other interested stakeholders have taken place. This agreement is supported by all stakeholders.

The key elements of the agreement are that it will allow most initiating processes of any court in either country to be served without the need to obtain the leave of the court to do so. It provides for the registration and enforcement of most judgments of any courts in either country. It allows for the service and enforcement of certain specified tribunal decisions in either country. It permits certain courts to grant interim relief in support of court proceedings in the other country, such as, for example, a Mareva injunction for freezing assets. It applies a common test when deciding whether a court in Australia or New Zealand is the most appropriate forum to resolve disputes so that you do not end up with parallel proceedings happening in two different courts, and it allows certain specified civil penalties and criminal fines to be enforced by the courts of the other country. Legislation to implement the agreement has almost been finalised in both countries, and regulations and amendments to court rules are currently being prepared in

consultation with stakeholders. The agreement will not commence until it receives final approval through the parliamentary processes and all implementation measures are in place. Once operational, the new trans-Tasman scheme should ensure that cross-Tasman litigation is simpler, cheaper and more efficient. This will increase certainty for those engaged in cross-Tasman trade and will be another important step towards closer economic integration between Australia and New Zealand. Thank you, Mr Chair.

CHAIR—Thank you. The national interest analysis says that the resolution of trans-Tasman legal disputes can be time consuming, expensive and complicated. What is the volume of the cross-jurisdiction cases that come up between New Zealand and Australian courts annually or—

Mrs Moore—We do not have accurate statistics on that, because unfortunately the courts do not keep the statistics to enable us to extract them.

CHAIR—Do you have any examples of these things being time consuming or complicated? Where is the origin of that statement?

Mr John—The complexities arise because Australia and New Zealand treat each other mainly as two foreign countries and litigation conducted between parties in Australia and New Zealand is conducted in accordance with the same rules that apply between foreign nations. The complexities arise because there are quite complex private international rules that would apply to these transnational litigation proceedings and tests, for example, that would apply in Australia would apply differently in New Zealand to some of the questions that arise in transnational litigation between the two countries. Service, for example, is one of the issues that we obviously address in this agreement and proceedings on that are much more complicated at the moment because there are no formal arrangements between New Zealand and Australia on foot in regard to service. If you look at, for example, issues such as tests—which I alluded to just before—and we have two different tests dealing with the jurisdiction of the court or whether a court should exercise the jurisdiction over a matter that can lead to problems between the two jurisdictions, making it more complicated for parties to estimate as to which way the courts would find. There are a couple of other examples—quite a few areas.

Mrs Moore—So the complexity arises from the procedural aspects rather than the underlying course of action.

CHAIR—There are certain matters excluded from the agreement, such as those under the Family Court or relating to child welfare. Can you explain to us the reason for those areas being carved out and the way in which Australia and New Zealand currently cooperate on these matters?

Mr John—First of all that was a recommendation made by the working group that was looking at these issues. Those recommendations were adopted. The reason why these recommendations were made was essentially because either there are already international agreements to which Australia and New Zealand are already party to which are operational in that sense between the two countries or alternatively there are some statutory regimes already in place that have made these kinds of proceedings already easier for that particular subject matter between the two countries.

CHAIR—Okay. I want to ask you about the impact on business. It is suggested in the national interest analysis that the proposals will support trade and commerce. Can you tell us something about the benefits to business under the changes?

Mrs Moore—We anticipate that the implementation of this agreement should increase certainty for business, because litigation will become simpler, so that if there is a dispute with a trans-Tasman element that arises between, say, a business in Australia and a business in New Zealand it will be simpler to resolve that dispute through the courts than is currently the case. So it will increase certainty in the business community for people engaged in trans-Tasman trade.

Mr FORREST—I want to pursue the Chair's question about the exemptions. The Family Court and child custodial matters, to me, would be super-sensitive issues, given the number of Kiwis and Australians that move between the two countries. If it is excluded from these arrangements, I want to know—further to the Chair's question—how arrangements in those areas currently work to justify why they are not included in this agreement.

Mrs Moore—There is an organisation called the Hague Conference which deals with private international law issues, and quite a few of their agreements deal with family law related issues. So, for example, there is a Hague agreement on child abduction and there is a Hague agreement on child maintenance to which Australia and New Zealand are already party. Those agreements work very well and very efficiently. People are already familiar with them, so we did not want to interfere with those arrangements in creating this new scheme. They will continue to operate as they already do.

Dr STONE—To what extent are our legal practitioners—Australian lawyers and New Zealand lawyers—able to work in each others jurisdictions without changes or special registrations? Is this also movement in that area of being able to work without impediment in either New Zealand or Australia?

Mrs Moore—Not specifically. Generally, if one lawyer wants to appear, for example, via video conference in a court in the other country, they still have to be admitted to practice in that country. There is a small exception to that in relation to applying to have the proceedings stayed on the grounds that the other country's court is the more appropriate venue for that dispute to be heard in, but otherwise it does not interfere with the regulation of the legal profession in either country.

Dr STONE—So won't that leave a major impediment still in place? If you are being represented by a law firm in Australia, clearly registered to function in whatever state, and then they cannot give this video conference evidence or do the work they need to do in the other jurisdiction, is not that a major impediment to in fact a free-flowing, less bureaucratic legal interchange between the two countries?

Mr John—I have to say that it was not addressed in this particular context in the sense that there were specific regulations. My understanding is there is work being done around mutual recognition across the Tasman, but I would have to take that question on notice in order to provide detailed information on that, because that is not my area.

Dr STONE—So that is unfinished business?

Mr John—We are not dealing with that particular aspect of it, no.

CHAIR—If you could take that on notice, we would appreciate it.

Senator O'BRIEN—I am prompted to ask this question because there are certain notable proceedings taking place in the United Kingdom about an extradition. I see in this agreement there is provision for the enforcement of subpoenas. If someone were subpoenaed under this agreement, rather than extradited, would they have the same protections against being returned to New Zealand as they would under an extradition arrangement?

Mr John—There are safeguards with respect to subpoena proceedings that have been incorporated into the legislation. In as far as they protect in the same way as some would be protected under an extradition request, a different area within the department deals with that kind of question and I must admit that I am not be able to comment here but I will be very happy to provide further information.

Senator O'BRIEN—If you could take that on notice, that would be good. It is probably less contentious with New Zealand, but I can imagine that inventive prosecutors might look at this option. For example, with a country that had a death penalty it would be a way of circumventing our refusal to cooperate in proceedings where a death penalty was involved.

Dr STONE—New Zealand does not have the death penalty.

Senator O'BRIEN—They do not now.

Ms LIVERMORE—In the attachment on consultation I note that point forty just says that regular consultation on implementation continues to occur between the relevant departments. Can you talk about what that consultation is covering and what the next steps following the ratification of this agreement are?

Mrs Moore—There has already been legislation passed by the parliaments of both countries. We need to make some minor amendments to our legislation. At the moment the main discussions with the states and territories are about the regulations and the amendment of court rules to make sure that all the implementation measures are in place before the agreement can actually commence.

CHAIR—Thank you for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

[11.20 am]

JACKSON, Ms Maggie, First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department

JOSEPH, Ms Muriel, Senior Legal Officer, Treaties, International Arrangements and Corruption Section, International Crime, Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department

LANGTRY, Mr John, Assistant Secretary, East Asia Branch, North Asia Division, Department of Foreign Affairs and Trade

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

SADLEIR, Mr Michael, Director, Consular Operations (Asia and the Pacific), Department of Foreign Affairs and Trade

TAYLOR, Ms Alexandra, Assistant Secretary, International Crime, Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department

Treaty between Australia and the People's Republic of China concerning Transfer of Sentenced Persons

CHAIR—We will now take evidence on the treaty between Australia and the People's Republic of China concerning transfer of sentenced persons. I call representatives from the Attorney-General's Department and the Department of Foreign Affairs and Trade. If you nominate to take any questions on notice, could you please ensure that your written responses to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make any introductory remarks that you wish to make before we proceed to questions.

Ms Jackson—Thank you, Chair, for the opportunity to appear before you this morning. Australia's International Transfer of Prisoners, or ITP scheme, has been in place since 2002. The purpose of the ITP scheme is to reintegrate prisoners into society by allowing them to apply to serve their sentences in their home country, without language and cultural barriers which can reduce their prospects of rehabilitation. Once transferred, the prisoner's sentence will be enforced as far as possible as originally imposed in the sentencing country. The legislative framework for the ITP scheme is contained in the International Transfer of Prisoners Act 1997. The act operates in conjunction with Australia's multilateral and bilateral ITP treaties, which are brought into effect through regulations made under the act. The Australian government is committed to expanding the scope of its ITP scheme, especially with Australia's regional partners in law enforcement cooperation. To date, Australia has developed ITP agreements with Thailand, Cambodia, Hong Kong and Vietnam. Australia is also a party to the Council of Europe

Convention on Transfer of Sentenced Persons, which enables us to transfer prisoners to and from 64 states' parties.

The negotiation of a bilateral treaty with China has been a priority for the Australian government for some years. As of 25 February 2011 there are 24 Australians known to be imprisoned in China. A further seven Australians have been charged with offences. According to the Australian Bureau of Statistics prisoner census as at 30 June 2010, 174 prisoners in Australia indicated China as their country of birth. At present China is not a party to any other bilateral or multilateral arrangements which would enable prisoner transfers between Australia and China. The proposed agreement with China would strengthen Australia's bilateral relationship with China; it would also be a tangible demonstration of Australia's commitment to law enforcement cooperation in the region.

This treaty is broadly similar to the Council of Europe Convention on Transfer of Sentenced Persons. The agreement is consistent with the requirements of the ITP act. Most importantly, every transfer would require the consent of the prisoner and of both the Chinese and Australian governments before it could take effect. The consent of the Australian state or territory where an incoming prisoner would be detained is also required, as well as the consent of the state in which an outgoing prisoner is housed if the prisoner is a state, rather than a federal, offender. Prisoners would only be eligible for transfer to Australia if they are Australian nationals. Only prisoners who are Chinese nationals may be transferred to China. However, in exceptional circumstances both countries can agree to waive this condition.

The agreement specifies that sentences will be enforced by the continued sentence enforcement method. This means that the receiving country continues to enforce the sentence, as far as possible, as originally imposed by the sentencing country. However, if necessary the sentence may be adapted prior to transfer to make it compatible with the law of the receiving country, providing the adapted sentence is no harsher than the original sentence. The judgement against the prisoner must be final, with no further legal proceedings pending or appeals, before the conditions of transfer can be met. The agreement imposes a dual criminality requirement, meaning that the conduct for which the person was convicted and sentenced must also be criminal in the receiving country. Further, the prisoner must have at least one year left to serve on their sentence at the time they apply for transfer. This is in recognition of the length of time it can take to process an application for transfer. This requirement can be waived by agreement between Australia and China in exceptional cases.

Under the agreement, the receiving party pays the cost of transfer. In the Australian context, under administrative arrangements with the states and territories, the state or territory that the prisoner is transferring to may seek some or all of these costs from the prisoner, providing the prisoner consents to the transfer on that basis. Once the prisoner is transferred, the ongoing costs of imprisonment become the responsibility of the receiving country. The agreement specifies that the sentencing country retains jurisdiction to modify or cancel the prisoner's conviction or sentence after the prisoner has been transferred. Arrangements for the international transfer of prisoners have been supported by successive Australian governments for humanitarian and rehabilitative reasons. The agreement is expected to reduce the financial and emotional burden on Australians who have family members imprisoned outside of Australia. The agreement is likely to enhance community protection through the effective management and monitoring of prisoners transferred back to Australia, and enables prisoners' convictions to be recorded by the

relevant authorities of their home country. The agreement is also expected to relieve demands on the Australian consular officials in China who are required to provide assistance to Australian prisoners and their families in China.

The transfer of prisoners to their home countries may also remove language and cultural barriers, and enable prisoners to undertake vocational and educational programs in prison that might not otherwise be available to foreign prisoners. One substantial benefit flowing from the ITP scheme is that it provides the Australian and Chinese governments with the opportunity to grant conditional release to transferred prisoners at the end of their non-parole periods. Examples of conditional release schemes are release on parole or licence, and weekend and home detention schemes. These schemes give prisoners the benefit of gradual reintegration back into society.

In conclusion, the arrangements to enable the international transfer of prisoners are becoming increasingly important in the administration of justice. The number of countries participating in such arrangements continues to grow. The proposed agreement will reduce the burden on the friends and family of prisoners, and assist in enabling Australians to serve their sentences within the Australian prison system where their access to better support networks can increase the prospects of successful rehabilitation. The agreement will also further cement Australia's bilateral relationship with China.

CHAIR—You pointed out that this arrangement is growing in significance and there are over 60 of these agreements at present. How many prisoners would there be in Australia who are serving sentences that have been imposed in other countries?

Ms Jackson—My understanding is that to date there have been 78 prisoner transfers since the introduction of the scheme in 2002, but that includes both incoming and outgoing transfers. I do not have a number for the—

CHAIR—I think the committee might find it interesting to have the breakdown. I do not imagine there would be a whole lot of outgoing, but we might want to get that confirmed.

Ms Jackson—In fact I think the numbers are the reverse of one's natural instinct: there are more leaving Australia than coming to Australia.

CHAIR—All the more reason why we would appreciate a breakdown of that, if you can provide it.

Ms PARKE—Ms Jackson, you said that the receiving party could adapt the sentence? I am thinking about a prisoner coming from China to Australia. So Australia could adapt the sentence, you said, prior to the transfer. I just cannot see anything in article 12 that says it is prior to transfer.

Ms Jackson—The normal arrangement would be that the precise sentence is negotiated between the two governments so that the prisoner can give an informed consent and the other country can give an informed consent to the transfer. So any adaptation that might occur—for example, the imposition of a non-parole period, particularly if the sentence is much longer than a similar offence would attract in Australia—would be part of the agreement.

Ms PARKE—Right, so there is no provision to adapt a sentence once they are in Australia?

Ms Jackson—No.

Ms PARKE—But there is a provision for either party to grant a pardon to the transferred person?

Ms Jackson—Yes.

Ms PARKE—So in what circumstances could a pardon be granted?

Ms Jackson—Well, that would be very rare in the Australian situation, because the Governor-General can only grant a pardon where it is clear that the conviction was wrongly imposed. So if there is substantial new evidence that would exonerate the convicted person and there is no longer any avenue of appeal open to the person, in that rare circumstance there might be a pardon granted in Australia. I am not in a position to say whether pardons are granted frequently in China, but certainly we have had three prisoners transferred from Thailand who were pardoned by the King of Thailand after their transfer and were immediately released from prison in Australia.

Ms PARKE—Has Australia ever pardoned a transferred person?

Ms Jackson—No.

Ms PARKE—I notice that the treaty only applies to prisoners who are sentenced in China where the person's conduct that led to the conviction is also a crime in Australia. Has there ever been a case in any of our arrangements with other countries where someone has been convicted in another country for crime that is not a crime in Australia and they have wanted to transfer but they have not been able to be transferred? Because I would think that somebody in that situation would have a pretty strong claim to want to be transferred.

Ms Jackson—Our notes of negotiations as agreed between ourselves and China indicate that in such a case the transfer would occur outside of the strict terms of the treaty, but one would imagine that the terms and conditions of transfer would be quite similar. Some of Australia's treaties do enable countries to agree to waive the dual criminality requirement and then to conduct the transfer under the terms of the treaty, but it has been specifically agreed with China that in those circumstances the transfer would be outside the terms of the treaty.

Ms PARKE—Have we ever had a situation where an Australian prisoner has been on death row and has been transferred to Australia and we have adapted the sentence accordingly?

Ms Jackson—No, it is not possible for a prisoner subject to the death penalty to be transferred. Before that can occur, the sentencing country would have to commute the sentence to a sentence of imprisonment; and then the transfer can follow the normal course.

Ms PARKE—Is Australia currently in negotiation with Indonesia over a similar treaty?

Ms Jackson—We have been in dialogue on that subject with Indonesia for quite a number of years.

Ms PARKE—And how is it progressing?

Ms Jackson—The President has indicated that he would be open to such an agreement, but Indonesia is not a party to any bilateral or multilateral treaty for the transfer of sentenced persons and does not have domestic legislation.

Senator WORTLEY—You said that at least one year of a sentence must be remaining when an application for transfer is made, the reason being, you went on to say, the time frame that a transfer would take. What is the expectation of the time frame for transfer in these situations?

Ms Jackson—I do not know that it is possible to put a time frame on individual transfers. They would vary considerably depending on the circumstances of the particular individual applying for transfer. I would imagine that in a case where there is serious illness that is the basis for the transfer things could be progressed much more quickly than in the normal course, but certainly our experience has been that it is not unusual for cases to take 12 months for consents to be arrived at.

Senator WORTLEY—What sort of reason would be given for a transfer application to take 12 months?

Ms Jackson—It is quite a complicated exchange of information about the prisoner's conviction, about the sentence, about behaviour in prison, about the medical condition of the prisoner and so on. So there is quite a deal of information that has to pass between the parties. Often more information will be required than was originally provided. There will need to be negotiation on the actual sentence to be served in the receiving country. These things just take time.

Senator WORTLEY—Is there an agreement on a standard form of information from both parties that would be required for a transfer or can that change as the case progresses?

Ms Jackson—The standard requirements are set out in article 8 of the treaty, but they are expressed in general terms. Depending on the circumstances of a particular individual, more information—for example, more detailed medical information, including the prisoner's condition and the medication or other treatment the prisoner receives—may need to be provided.

Senator WORTLEY—Could there be a situation where additional information is required and that could draw out the time frame taken for the transfer to occur?

Ms Jackson—That is correct.

Senator WORTLEY—Thank you.

Dr STONE—You say that, following transfer, the sentence must be enforced as far as possible. You have had some 72 of these incoming-outgoing cases with our currently existing bilateral agreements. How often have these sentences been changed in either Australia or the

other country? What are the circumstances in which they have been changed? Is it due to ill health or is there some other reason that we cannot match the sentence in the other country as originally given?

Ms Jackson—One particular case of which I am aware was where several women applied to transfer from Thailand, where they were the subject of sentences of 35 or so years—from recollection. That is much longer than our law permits, where the maximum sentence is 25 years. In that case we negotiated with Thailand for a non-parole period to be set, which was broadly similar to the term that they would have served for a similar offence within Australia. It certainly happens, and it is not infrequent.

Dr STONE—So you would expect the same sort of negotiation to occur with China?

Ms Jackson—Yes.

Dr STONE—And with similar sorts of good outcomes? We have not had any evidence that there would be a problem.

Ms Jackson—One hopes so.

Dr STONE—Are most of these exchanges initiated by the prisoner?

Ms Jackson—Either the prisoner or the prisoner's family—they may sometimes apply.

Dr STONE—So prisoners are well aware of the other treaties—with Cambodia, Vietnam, Thailand and so on—and they will obviously be made aware of this treaty if it comes to pass? Their lawyers would be very familiar with it, I presume.

Ms Jackson—I might pass to my DFAT colleagues.

Mr Sadleir—That is true.

Dr STONE—If there is an exchange, can the prisoner's legal representation have the same sort of access via telecommunication or branches of their legal office in that other country? Is there any restriction on them having ongoing legal interaction once they are transferred either way?

Ms Jackson—Not that I am aware of, but that would be a matter for the relevant prison authorities to permit access of the kind that the prisoner seeks.

Dr STONE—What are the prisoner's appeal mechanisms if, once they get transferred, they experience a different sort of outcome to the one they anticipated or was negotiated? Is there any appeal mechanism or process like prisons in Australia have?

Ms Jackson—Our ITP Act specifically precludes any kind of appeal, so it is very important that, before the prisoner consents to the transfer, they fully understand the terms of the transfer. It would be a matter for consular authorities to confirm the full understanding of the prisoner before agreement is reached.

Dr STONE—But if that agreed situation was not what was experienced by the prisoner, if they agreed to a certain sentence, commutation or certain set of circumstances and understood it thoroughly but it did not seem to be occurring in the other country—in this case we are talking about China—is there any mechanism of appeal? I suppose you are suggesting that, if they are a Chinese national, there would be no appeal back to our embassy, so they would have to appeal to their own country in some way.

Ms Jackson—It sounds like the situation you are postulating is in fact a breach of the treaty.

Dr STONE—A breach of the agreement, yes.

Ms Jackson—That would be a matter for diplomatic channels to take up.

Dr STONE—Thank you.

Ms LIVERMORE—The prisoner, in most instances, would need to make a request for a transfer and it all has to occur with the prisoner's consent, but are there any risks to prisoners in that situation that you have become aware of—where the prisoner has asked to be transferred back to their home country and that has led to any kinds of repercussions within the prison system overseas?

Ms Jackson—None of which I am aware. I do not know whether our DFAT colleagues are.

Mr Sadleir—None of which I am aware of either.

Ms LIVERMORE—So are there any particular safeguards in place or does it really fall back to the normal interaction with our consular officials in the other country?

Ms Jackson—This is not a situation that we have encountered in practice, but clearly any issues that arise in the course of the transfer and subsequently would be matters that we would engage our DFAT colleagues in.

Ms LIVERMORE—Okay.

ACTING CHAIR (Mr Forrest)—Are there any further questions? I would like to ask one of my own. It is to do with assessing the willingness of the Chinese to be cooperative in this. In your opening statement, Ms Jackson, you said that China is not a signatory to any of these agreements with anybody, not even the Council of Europe. If we are successful in getting this arrangement up with China, will the Australia-China agreement be the only one that exists for China?

Ms Jackson—That is my understanding, yes.

ACTING CHAIR—Thank you for clarifying that. Are there any further questions?

Dr STONE—Ms Jackson, I think that is a very interesting point—that, for China, this is the first time they have entered into such an agreement, although there are many, many around the world and have been for many years. Did China initiate this bilateral agreement or did Australia?

Is there an expectation, do you believe, that China will now enter into many other such agreements with other countries, or is it that we have many more Chinese nationals imprisoned in Australia than other developed countries do?

Ms Jackson—I am really not in a position to answer for China in this regard, but I can confirm that Australia initiated the negotiation of this treaty and in fact pre-empted it coming into force by making regulations under the act to enable a specific individual to transfer from China who was gravely ill at the time.

Dr STONE—So how were we able to do that if this treaty is not as yet in place?

Ms Jackson—Australia only needs to declare a country to be a transfer country before it has an ITP relationship with that country, and it does so by passing regulations. The advantage of having the regulations underpinned by a treaty is that then there is a reciprocal arrangement agreed between the parties.

Dr STONE—I see. So we found China quite amenable to this treaty; it is just that perhaps other countries have not made the same initiating steps?

Ms Jackson—That may well be; I am not in a position to comment.

ACTING CHAIR—Senator Birmingham, we are about to wind up but I will give you an opportunity to ask a question before I wrap things up.

Senator BIRMINGHAM—Thank you, Acting Chair. I will review the *Hansard* and pass anything through to the Secretariat, having not heard the other questions asked—my apologies.

ACTING CHAIR—I thank the witnesses for returning today and giving evidence. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

Resolved (on motion by **Senator O'Brien**):

That this committee authorises publication of the transcript of the evidence given before it at the public hearing this day.

Committee adjourned at 11.51 am