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JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 6 December 2006, 7 and 27 February 2007

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**JOINT STANDING COMMITTEE ON
TREATIES**

Monday, 26 March 2007

Members: Dr Southcott (*Chair*), Mr Wilkie (*Deputy Chair*), Senators Bartlett, Carol Brown, Mason, McGauran, Sterle, Trood and Wortley and Mr Adams, Mr Johnson, Mr Keenan, Mrs May, Mrs Mirabella, Mr Ripoll and Mr Bruce Scott

Members in attendance: Senators Bartlett, Ian Macdonald, McGauran, Trood and Wortley and Mr Adams, Dr Southcott and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 6 December 2006, 7 and 27 February 2007

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Committee met at 10.03 am

CHAIR (Dr Southcott)—I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will hear evidence on five treaty actions tabled in parliament on 6 December 2006, 7 February and 27 February 2007. I understand that witnesses from various departments and organisations will be joining us for discussion on treaties. I thank witnesses for being available for this hearing. I should also remind witnesses that these proceedings are being televised and broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses it would be helpful if any issues could be raised at this time.

SKILLEN, Mr Geoffrey, Principal Legal Officer, Attorney-General's Department

HUTCHINSON, Mr Peter, Section Manager, International Agreements Section, International Branch, Department of Families, Community Services and Indigenous Affairs

STAWYSKYJ, Ms Michalina, Branch Manager, International Branch, Department of Families, Community Services and Indigenous Affairs

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

NAM, Ms Juliana, Executive Officer, International Legal Branch, Department of Foreign Affairs and Trade

SULLIVAN, Mr Michael, Acting Director, Western Europe Section, Department of Foreign Affairs and Trade

BAZEN, Mr Derek, Analyst, Superannuation, Retirement and Savings Division, Department of the Treasury

LATIMORE, Mr Leon, Analyst, Superannuation, Retirement and Savings Division, Department of the Treasury

Agreement between Australia and the Swiss Confederation on Social Security

CHAIR—I welcome representatives from the Department of Families, Community Services and Indigenous Affairs, the Department of Foreign Affairs and Trade and the Department of the Treasury. 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 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. Would you like to make some introductory remarks before we proceed to questions?

Ms Stawyskyj—Yes, thank you. The treaty action proposed is that Australia and the Swiss Confederation enter into a new social security agreement. As you will note from the national interest analysis, the proposed agreement was signed on 9 October 2006 and this new agreement is an important addition to Australia's network of 18 social security agreements. Social security agreements generally address gaps in social security coverage for people moving between countries and it helps people to maximise income and allows greater choice in where to live and where to retire. Agreements contribute to the overall bilateral relationship between countries and can also provide foreign currency benefits for a country.

The agreement with Switzerland is another shared responsibility agreement. As mentioned, Australia now has 18 such agreements. Consistent with Australia's other shared responsibility agreements, the new agreement will allow people to lodge claims from the other country, overcome time and other limitations on portability of payments if people live in either country and provide avenues for mutual administrative assistance to facilitate the determination of correct entitlements.

From Australia's perspective the agreement will cover age pension; disability support pension, outside Australia limited to people who are severely disabled; pensions payable to widowed persons; double orphan pension; and carer payment. Switzerland will reciprocate with old age pension, disability pension and survivors insurance. The agreement also includes provisions to avoid double coverage for seconded workers. Similar provisions are also included in our agreements with Belgium, Chile, Croatia, Ireland, the Netherlands, Norway, Portugal and the United States. Around 1,000 people will benefit as soon as the agreement enters into force—750 in Australia and 250 in Switzerland. For Australia these provisions affect the operation of the superannuation guarantee laws and have been negotiated in close cooperation with our colleagues from Treasury.

In November last year in terms of consultation with the community we provided letters and information papers to Swiss community groups and welfare organisations and all state and territory governments advising them of the new agreements. Comments on the new agreement were invited. No formal responses were received.

In conclusion, the government considers that the new agreement with Switzerland will bring benefits to individuals and to Australia. The new agreement follows the same principles as Australia's existing agreements and will strengthen the network of agreements Australia has established. The Swiss authorities have advised that all legal and administrative processes for implementation of the new agreement are expected to be completed before the end of this year. Subject to the views of the committee and the timely completion of necessary action in Australia, the Department of Families, Community Services and Indigenous Affairs, Treasury, the ATO and Centrelink expect to implement the agreement on 1 January 2008.

Mr WILKIE—Obviously, you would be aware that the committee supports these agreements as we have looked at many in the past and we do not really have any problem with them. Does this agreement differ significantly from any of the others?

Mr Hutchinson—No, it is pretty much the same. There are some unique features of each agreement that really depend on the nature of the system and the country we are dealing with. For example, in this case, Australian nationals are equated with Swiss nationals so that they can take a pension abroad, and that application of that provision does not apply to Australian residents who are not Australian nationals. That is a feature of the Swiss system.

CHAIR—It seems that there is a lot more detail in this one than in some of the other social security agreements we have considered.

Mr Hutchinson—I think that is generally a product of the drafting preferences. Each country tends to have its own standard text, so some provisions are certainly much longer than others. Certainly, in-house, we are working at trying to simplify our own text to try to come up with a much more plain English type text that is easier to read.

CHAIR—Is the Swiss pension scheme a contributory scheme? Do they have an income and assets test?

Mr Hutchinson—They do not have an income and assets test. It is a contributory scheme. They have three pillars. The agreement covers the first pillar, which is the old age, survivors and disability insurance. They have an occupational pillar above that, which only applies to people who earn—and I do not know what the current limit is—something like more than SwF20,000 a year, in which case people have to contribute more. Going back to the basic scheme, the employee must contribute, the employer must contribute and, as I understand it, the Swiss federal confederation contributes and each canton contributes as well.

CHAIR—On top of the contributory scheme, do they have a superannuation scheme?

Mr Hutchinson—As I said, they have a sort of an occupational scheme which only kicks in if you earn more than roughly SwF20,000 a year. As I said, I do not know what the current limit is, but is certainly a very generous scheme by European and world standards.

Senator TROOD—We have not previously had an agreement with the Swiss in relation to these matters, so this is a new agreement?

Mr Hutchinson—Correct.

Senator TROOD—I noticed in paragraph 41 of the NIA there is an expectation that there will be a reduction in administrative outlays of around \$1.4 million. Perhaps you can just explain how that comes about.

Mr Hutchinson—That is essentially a product of the way we do our costing methodology. Broadly speaking, we expect to pay about \$1.1 million worth of pensions per annum into Switzerland to people entitled to Australian pensions in Switzerland, so there is a cost up-front for us of approximately \$1 million a year. We expect people living in Australia who have worked and contributed to the Swiss system to be entitled to Swiss pensions. It is very difficult to estimate these things, but we are estimating that something like \$3 million to \$3½ million a year in Swiss pensions will come into Australia. Because we means test our pensions, a proportion of the Swiss pension money that comes in will cause reductions in Australian pension outlays, and

we think that it is slightly more than our initial outlays into Switzerland, which will produce some minor savings over the first few years of the agreement. But it is a very marginal thing.

Senator TROOD—It is not related to this particular agreement, but do you have any other agreements that are near to completion?

Mr Hutchinson—We are working on several agreements at the moment. Greece is one. I think the committee asked about it last time we were before the committee. We are certainly—

Ms Stawyskyj—I am delighted to say that we are close to finalising discussions on the text on that and we are hoping that signing will occur this year.

Mr Hutchinson—We are in negotiations with a number of other countries including Latvia, I think. We have had discussions with Hungary, but they have gone quiet on us. There is also Sweden, and there are a few other countries. I cannot remember them just at the moment but I am happy to give you a list.

CHAIR—Thank you.

Senator IAN MACDONALD—I am new to this committee. How do these agreements come about? What is the catalyst or driver that brings you here today—or that brings us here today perhaps?

Mr Hutchinson—There are a number of different drivers sometimes. Australia first got into the international agreement-making game in the mid-eighties. It was an obvious thing for us to do because we have such a large number of migrants in our population.

Senator IAN MACDONALD—But why particularly the Swiss today? Have Swiss people been petitioning you?

Mr Hutchinson—Putting my hand on my heart, I could not tell you the exact reason because our negotiations started quite a long time ago. But typically we get petitions from people for an agreement. Certainly, I know that I have had phone calls from a number of Australian people getting Swiss pensions who, without an agreement, have to maintain their domicile in Switzerland to continue to receive that pension. So they are very keen for an agreement to come into force so that they can return to live in Australia permanently and still receive their Swiss pension.

Senator IAN MACDONALD—You mentioned that there are 14 of these agreements.

Mr Hutchinson—There are 18.

Senator IAN MACDONALD—Where would Switzerland relate in a scale of how many Australians are affected by it?

Mr Hutchinson—We do not have a major or significant Australian Swiss population, but it is—

Senator IAN MACDONALD—Looking through the list, I would hazard a guess that Switzerland would be right at the bottom.

Mr Hutchinson—Probably not right at the bottom, but at the lower end.

Senator IAN MACDONALD—Are there any other countries where there are a substantial number of Australians who might be impacted upon by this that you are aware of?

Mr Hutchinson—That we do not have agreements with?

Senator IAN MACDONALD—Yes.

Mr Hutchinson—Greece is obviously probably one of the biggest ones. There are a lot of countries in the Asian region—for example, China and Vietnam and countries like that—from where we have certainly had significant inflows of people. But the difficulty there is, of course, that those countries do not have systems in the same way that we have a social security system. So there is an issue of whether we can coordinate our system with countries that do not have similar systems.

Senator IAN MACDONALD—What are your criteria for priority in doing these agreements?

Mr Hutchinson—We typically go to our minister each year—well, not each year, but regularly—because we get approaches from a number of countries. We certainly have a very heavy workload at the moment. Honestly, it is a balancing act. It is obviously a decision that has to be made based on the facts. But it might be to do with the population number; the number of people who are pressing; the political pressure, perhaps; or our broader whole-of-government interest in terms of whether or not we want to secure an agreement with that country and whether that would help the overall bilateral relationship. Japan and Korea are countries that we have recently signed with. They are probably good examples of that. The number of people involved is not significant of itself but there are other pressures.

I guess the other thing I should have mentioned before was our colleagues from Treasury on the business side of our agreements. That often is a main driver for the agreements inasmuch as we have provisions to avoid double coverage which affect business. If businesses are operating in the other country and sending employees between the two countries without an agreement, they are often required to pay contributions into both countries' systems and that ends up in a bit of a multiplier effect with taxation in terms of employee packages. So it becomes a very expensive exercise for business. Therefore, there is often pressure from business through government to negotiate these agreements. I think the USA is probably a good example of that as well. I think that pressure from business in the United States brought the US government to the table when we had been pursuing them for quite a number of years without success.

Senator IAN MACDONALD—Switzerland is a lovely place to holiday and they sing very well, but I could not quite fathom the priority, although, when you mention business in the financial capital of the world—or what used to be the financial capital of the world—perhaps that is what it is.

CHAIR—Thank you very much for appearing before the committee today.

[10.20 am]

SKILLEN, Mr Geoffrey, Principal Legal Officer, Attorney-General's Department

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

MILES, Mr Glenn Andrew, Director, Northern Central Eastern Europe Section, Europe Division, Department of Foreign Affairs and Trade

NAM, Ms Juliana, Executive Officer, International Legal Branch, Department of Foreign Affairs and Trade

RAWSTRON, Mr Michael, General Manager, International Tax and Treaties Division, Department of the Treasury

REDMAN, Ms Lynette Fay, Senior Adviser, Tax Treaties Unit, Department of the Treasury

Agreement between Australia and Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol

CHAIR—I welcome representatives from the Treasury and the Department of Foreign Affairs and Trade. 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 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. Would you like to make some introductory remarks before we proceed to questions?

Mr Rawstron—Yes we would like to do that. We welcome the opportunity to present to the committee the benefits to Australia of the proposed agreement with Finland. The proposed treaty is a modern and comprehensive tax treaty intended to update and enhance the existing tax arrangements with Finland. The proposed treaty is generally consistent with Australia's other tax treaties. The renegotiation of the existing treaty was prompted by the triggering of the most favoured nation clauses in the existing treaty in respect of withholding taxes for interest and royalties and the inclusion of non-discrimination rules. The withholding tax clause was triggered by the entry into force by the 2001 protocol to Australia's tax treaty with the United States and the non-discrimination clause was triggered by the entry into force of the 2003 Australia-United Kingdom tax treaty.

In view of the age of the existing treaty with Finland, which was signed in 1984, and with the protocol also signed in 1997, both countries took the opportunity to revise the existing treaty to take account of OECD tax treaty policy, change of business operations and other developments since the treaty was originally signed. The key changes from the existing treaty are reductions in

withholding tax limits for dividends, interest and royalties; the inclusion of an anti-treaty shopping provision; the inclusion of rules to prevent tax discrimination; the extension of the coverage of the treaty to taxes on capital gains; the inclusion of a comprehensive article dealing with the alienation of property; the inclusion of a new article which provides for assistance on a reciprocal basis in the collection of cross-border tax debts; amendments to the information exchange article that reflect OECD standards and extend its operation to all Finnish taxes and all Australian federal taxes; and, importantly, the clarification that bank secrecy does not limit information exchange.

The proposed treaty also updated the number of provisions in the existing treaty including the taxation of business profits in respect of natural resources, building sites and substantial equipment, and new rules dealing with the taxation of income derived through business trusts and rules to prevent double exemption of income derived by temporary residents. The proposed treaty action will reduce tax impediments across border movements for people, capital and technology between Australia and Finland; and facilitate cooperation between tax authorities to reduce fiscal evasion. It will eliminate double taxation and provide a reasonable element of legal and fiscal certainty for commerce between the two countries. Withholding tax reductions in particular will reduce tax impediments to investment and provide long-term benefits to business through lowering the costs to Australian business of using intellectual property, equity and finance for expansion.

The enhancement of information exchange arrangements and assistance in collection will allow for increased cooperation between tax administrations to reduce fiscal evasion. It will also enhance the relationship between Finland and Australia, maintain Australia's position in the international tax community and improve the network of tax treaties, which ultimately supports Australia's geopolitical, strategic, security and regional interests. We therefore recommend that the members of the committee support the proposed treaty action.

Mr WILKIE—Really, what we are looking at here is just an update of an existing treaty that covers the same sorts of provisions that we have had in the past, is it not?

Ms Redman—Yes.

Mr WILKIE—I am just curious—how many other treaties of this nature do we need to update in light of what you have been saying?

Ms Redman—For most favoured nation obligations?

Mr WILKIE—Yes.

Ms Redman—I think originally there were eight for the withholding tax.

Mr Rawstron—I think there might be 13 in total, several of which the committee has already approved.

Mr WILKIE—So there are a few others we are still working on?

Ms Redman—That is correct.

Mr WILKIE—Just for the benefit of some of the new people, can you tell us how these sorts of agreements prevent international tax evasion?

Ms Redman—There are a few articles in the treaty that are particularly aimed at that. There is an article that allows for the exchange of information between the two revenue agencies. There is a new thing in Australia's treaty policy that you have seen in other treaties that came through last year, which is an assistance in collection article. That basically allows the revenue agencies to collect taxes due on behalf of the other revenue agency. They are the key things.

Mr WILKIE—When are we likely to get the other ones before us?

Ms Redman—The ones still to come?

Mr WILKIE—The ones you are working on—yes.

Mr Rawstron—Several are still at the stage of negotiation so it depends on the speed at which the other side is progressing its treaty program.

Mr WILKIE—So it could be months or it could be years?

Mr Rawstron—It could very well be, yes.

Mr WILKIE—Thanks.

CHAIR—Thank you very much for appearing before the committee.

[10.26 am]

SKILLEN, Mr Geoffrey, Principal Legal Officer, Attorney-General's Department

FERRIS, Mr Jason Andrew, Assistant Director, Migratory and Marine Biodiversity, Department of the Environment and Water Resources

LASHKO, Dr Anna, Senior Policy Officer, Department of the Environment and Water Resources

DENGATE, Mr Clinton John, Executive Officer, Sea Law, Environment Law and Antarctic Policy, Department of Foreign Affairs and Trade

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

MORRISON, Mr Adrian Hugh, Director, Korea Section, Department of Foreign Affairs and Trade

Agreement between Australia and the Republic of Korea on the Protection of Migratory Birds and Exchange of Notes

CHAIR—I welcome officers from the Department of the Environment and Water Resources and the Department of Foreign Affairs and Trade. 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 contempt of 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. Would you like to make some introductory remarks before we proceed to questions?

Mr Ferris—Yes, thank you. The agreement between the government of Australia and the government of the Republic of Korea on the protection of migratory birds, which Mr Downer signed with his Korean counterpart in Canberra on 6 December last year, is an important development in Australia's efforts to conserve migratory birds which visit this country. The agreement is similar to Australia's existing migratory bird bilateral agreements with Japan and China. It expands the geographic coverage of our bilateral relationships on the conservation of migratory birds to include the large areas of important habitat within the jurisdiction of the government of the Republic of Korea. The tidal mud flats on the west coast of the Republic of Korea in particular are internationally important for migratory shore birds, which spend their non-breeding season in Australia before flying north to their breeding grounds in China, Mongolia, the Russian far east and Alaska, returning the following spring. Along the way, a substantial number of these birds use the tidal mud flats of the Republic of Korea to stop and replenish their reserves before continuing on their migration.

These same mud flats are under considerable development pressure and this agreement will provide for dialogue between Korean and Australian officials, researchers and conservation groups to promote sustainable development and minimise the impact of development on migratory birds. The agreement will also provide Australia with a mechanism to encourage Korea to participate in multilateral efforts to conserve migratory water birds. Australia has a strong record for promoting such efforts and this culminated recently in a non-binding partnership for the East Asian-Australasian migratory bird flyaway.

It is important to note that the agreement will bring no new obligations for Australia. All of the species included in the annex to the proposed agreement are already protected under the Commonwealth's Environment Protection and Biodiversity Conservation Act and also under state and territory wildlife and environment legislation. The obligations of the new agreement mirror those of the existing agreements with Japan and China. On that basis, we recommend that the committee support this proposed treaty action.

CHAIR—What habitats do these birds have in Australia?

Mr Ferris—In Australia, they vary from coastal wetlands—there are important sites like Roebuck Bay and Eighty Mile Beach in the north-west of Australia, which are sand and mud flat coastal habitats—and inland wetlands that are used by migratory birds to coral quays and more oceanic sites that are used by things like the terns and the migratory seabirds.

CHAIR—What measures are taken to actively protect vulnerable habitats?

Mr Ferris—Because all migratory species are listed as matters of national environmental significance under the Environment Protection and Biodiversity Conservation Act, any action that may have an impact on an important area of an important habitat requires the agreement of the environment minister, and there is a thoroughly scrutinised environment impact assessment process that occurs at the Commonwealth level. There is a similar process that occurs—it varies a little bit across jurisdictions—in each state and territory. Each state and territory has similar wildlife protection legislation. In some states and territories, protected areas are declared that involve these areas of important habitat. Also, a number of them are internationally important wetlands in their own right and are protected under the Ramsar convention and also as a matter of NES under the Environment Protection and Biodiversity Conservation Act.

Mr WILKIE—First of all, congratulations on negotiating this treaty. I have a very significant migratory bird habitat in my electorate of Swan on the Swan River in south Perth, and a lot of those birds come there when they arrive in Australia. I think that any effort you can introduce to help to protect those species is very valuable. I just notice under the treaty that both Australia and the Republic of Korea are required to prohibit the taking, sale, purchase or exchange of migratory birds and their eggs, with exceptions such as scientific research. Given the Japanese, that always scares me. What sort of activity is there in relation to the practices of scientific research or hunting seasons and traditional hunting? What sort of threat is that?

Mr Ferris—It is a very minor threat. It is more of a concern in the context of our agreement with China, where there is some subsistence hunting. It is not considered a major threat in the context of the Korean relationship. There are a very small number of birds taken for research purposes. Most of the research is non-invasive or it involves at worst capture and banding of the

birds and applying colour markings to allow migration studies. There have been a few studies working on the physiology of the birds and trying to understand the migration where birds have been taken and killed, but we are talking about a handful of birds over the last decade. That work was actually undertaken by some Dutch researchers.

Mr WILKIE—Are we aware of any illegal trafficking of the protected species at all?

Mr Ferris—Not in the Korean context, no. The concern is more of a habitat one than direct take of the birds.

Mr WILKIE—Thank you very much.

CHAIR—On avian flu, it is my understanding that the birds that harbour this are geese and poultry—that sort of bird. The birds that we have listed here, given that we have some that come from Korea, and some that come from China and Japan and so on, do not harbour H5N1 avian flu?

Mr Ferris—You are correct in your understanding that it is primarily a disease of water fowl and poultry. There are two duck species included under the agreement, but, while we have reliable evidence of migration, the frequency of migration of those species is very low. I am talking about a handful of recoveries of those two species in Australia.

The bulk of the birds that migrate and are protected under this agreement are migratory shore birds. The work that has been done to date internationally shows that they are able to carry avian influenza viruses at a much lower rate than the ducks and geese and therefore pose a much lower risk. They also have a much lower chance of interacting with domestic poultry, which is a key element of a disease spread model.

Senator TROOD—Have the Koreans implemented this agreement as yet, can you tell us?

Mr Ferris—We have had some informal discussions. We had an informal meeting in the margins of the last round of Japan and China discussions. There has been a longstanding relationship on the research side with Korea, and that continues. There is certainly a range of activities already occurring that will come under the umbrella of this agreement. How much influence that has on the development that is occurring in the coastal mud flats of Korea is yet to be seen, but we hope that will be something that will follow the agreement entering into force.

Senator TROOD—They have formally gone through the procedures they need to go through for the government to accede to the arrangement?

Mr Ferris—I am sorry; I misunderstood the question.

Senator TROOD—I am grateful for the earlier information, but I wanted this information.

Mr Ferris—That is my understanding. I believe that they are ready to exchange notes.

Mr Morrison—I believe they are, Senator.

Senator TROOD—Are there any threatened species in this list of 59?

Mr Ferris—No, not at the moment.

Senator TROOD—So they are basically healthy populations.

Mr Ferris—There is some concern about declines of a couple of species—the curlew sandpiper is one—but they are not at the thresholds that would have them being considered threatened at this stage.

Senator TROOD—Thank you.

Senator IAN MACDONALD—As I mentioned in my speech in the Senate, I thought there was a concern about the longevity of Latham's snipe, which is one of the birds listed. Going back to the chairman's questions on the avian flu, I understand that birds that have avian flu are so weak that it is unlikely they would make the distance from Korea to Australia. Is that correct?

Mr Ferris—That is our understanding, yes.

Senator IAN MACDONALD—In answer to the chairman's question about actively protecting vulnerable habitats, you answered in relation to Australia. But in relation to Korea, what does this agreement do to encourage or enforce the Koreans to look after their habitats? Is there anything in the agreements that provides for that?

Mr Ferris—It is quite specifically addressed in the agreement, but unfortunately it is at the level of endeavour. Article 4 says:

Each Party shall endeavour to manage and conserve the habitat of migratory birds through activities such as the designation of conservation areas in its territory.

Senator IAN MACDONALD—So if they are going to drain the swamps in Korea, there is nothing this agreement can do to stop that?

Mr Ferris—It will provide us with an opportunity to stress our concerns, which we have not had in the past. Certainly we are aware of plans by the Korean government to undertake further reclamation of coastal mud flats. The agreement will certainly give us an opportunity to try to encourage them to do that in a way that manages habitat for migratory species.

Senator IAN MACDONALD—You have had other agreements on migratory species. Have they generally added to the protection? Have they been successful?

Mr Ferris—I think that the two agreements we have with China and Japan have been successful in that they have provided for a dialogue. That dialogue has ranged from specific issues at individual places through to providing the foundation for our whole-of-flyway collaboration under more informal arrangements.

For example, Japan and Australia have worked very closely together under the auspices of the Japan-Australia migratory bird agreement to recognise that we need to get all of the countries in

the migration of these species involved in their conservation. Through that, we have developed a partnership for the flyway. I believe that, without the bilateral agreements, that task would have been much more difficult. So I think they have achieved positive conservation outcomes.

Senator IAN MACDONALD—Chair, this might be a question for you rather than for the committee. I have already spoken on this long before I had any inclination of joining this committee. They seem to be tabled in the houses of parliament, people speak on them and then they come to this committee. Is that the way it works?

CHAIR—I do not think you would have spoken on this one. There was an earlier one with China and Japan. That may be what you spoke on.

Senator IAN MACDONALD—No, quite clearly I spoke in the Senate on this. As I said, I mentioned my joke about the Latham's snipe and the grey-tailed tattler, which I related to another Labor leader. I am sure that the officers would have read and reread my every word in the speech. It would have been on this. This is testing you out.

Mr Ferris—I am sorry, I do not recall your speech. But we did quite recently make some amendments to our agreements with Japan and China only in the last few months. There has been some conversation relating to Korea in respect of one of the large-scale developments that occurred there over the last few years. That attracted some parliamentary attention. I am sorry; I am not familiar with that particular speech.

Senator IAN MACDONALD—I will take Mr Adams's assurance that I was talking about Japan and China and not Korea.

Mr Ferris—They are the same birds, essentially.

Mr WILKIE—Just to help the senator out—and I am sure that everybody would be hanging every word of the speech—

Senator IAN MACDONALD—That is why I am surprised that the department is not familiar with it.

Mr WILKIE—the process is normally that the treaties would normally be tabled in the parliament and the Senate and then there would be 15 sitting days for the committee to report. Then members of the committee and others can comment on that process.

CHAIR—Thank you very much for appearing before the committee today.

[10.43 am]

BARRINGTON, Mr Jonathon Harold Sutherland, Senior Policy Adviser, Antarctic Territories, Environment and Policy Section, Policy Coordination Branch, Australian Antarctic Division, Department of Environment and Water Resources

KIMPTON, Mr Philip, Executive Officer, Sea Law, Environment Law and Antarctic Policy Division, International Legal Branch, Department of Foreign Affairs and Trade

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

SKILLEN, Mr Geoffrey, Principal Legal Officer, Attorney-General's Department

Measure 4 (2006) Specially Protected Species: Fur Seals

CHAIR—We will now take evidence on Measure 4 (2006) Specially Protected Species: Fur Seals. I call representatives of the Department of the Environment and Water Resources and the Department of Foreign Affairs and Trade. 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 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. Would you like to make some introductory remarks before we proceed to questions?

Mr Barrington—Yes, thank you. This treaty action in the form of Measure 4 (2006) Specially Protected Species: Fur Seals amends appendix A to annex 2 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty. The measure changes the wording of the appendix by deleting the words 'All species of the genus *Arctocephalus*, Fur Seals.' The measure is legally binding. It was adopted by consensus at the 29th session of the Antarctic Treaty Consultative Meeting in Edinburgh in Scotland in 2006. We expect it will enter into force on 23 June this year, which is one year following the cessation of the meeting at which it was adopted. At this time we have no indication that any consultative party will seek a time extension or resile from the approval of this measure.

What this measure does is remove fur seals of the genus *Arctocephalus* from the list of specially protected species under the annex. There are only two species of this genus found in Antarctic waters, those waters south of 60 degrees south latitude: the first is the Antarctic fur seal and the second is the sub-Antarctic fur seal. The international scientific consensus is that the conservation status of fur seal populations in the Antarctic region is sound and that these species no longer require specially protected species status to ensure their conservation.

The removal of fur seals from the list of specially protected species is consistent with the objectives of Australia's delegation to the Antarctic Treaty Consultative Meeting and the result

of several years of formal and informal negotiations. In our view, removing fur seals from the list reinforces the operation of the specially protected species arrangements under the protocol and their designation as a mechanism for protecting Antarctic species of significant risk of extinction.

CHAIR—Thank you. This is a great success in terms of moving fur seals off the protected list. Could you elaborate—because the current status is it will not be specially protected but it still will require a permit; it has to be for a specific purpose for scientific study; where possible, non-lethal techniques should be used for scientific research—on how that differs from being on the specially protected list and what actions were taken while the fur seals were on that list?

Mr Barrington—Originally fur seals were put on the specially protected list back in the 1960s and very little action has been taken in respect of them over the period since then. They were protected from commercial harvest right the way through to this time. Over the years various Antarctic Treaty members have undertaken scientific research on these species, such as tagging programs. The status under the specially protected species has meant there needs to be a compelling scientific purpose for such research and that those scientific activities ought to be done non-lethally. The consequence of that is that they have been left untouched over the ensuing decades and the populations have rebounded strongly.

CHAIR—That is great. So now it is possible that people will take some fur seals but it has to be for a legitimate scientific purpose—is that right?

Mr Barrington—Yes.

CHAIR—There has been no scientific research into fur seals since the 1960s.

Mr Barrington—There has been ongoing scientific research into these species since the 1960s. The species will remain, despite the removal from the specially protected species listing under the full protection of the protocol and under the full protection of the Convention for the Conservation of Antarctic Seals. Both of those have strong measures to ensure that the activities involving these seals are for scientific purposes, as you indicated.

Mr WILKIE—Following on from what the chairman said, how does removing the seals from the list—I am quoting from a statement I have got here:

The removal of fur seals from the specially protected species list is in Australia's national interest as it will improve the efficiency and effectiveness of the Antarctic treaty and associated agreements. The removal reinforces the operation of the specially protected species designation as a mechanism for protecting Antarctic species at significant risk of extinction—

achieve that aim?

Mr Barrington—The specially protected species designation has been developed internationally over the decades as a means by which species threatened with extinction come under a special category. When a species such as fur seals rebounds to a strong conservation status, it is in the interests of the categories and the criteria you use to establish species under endangerment that, once the species has recovered, you remove it from that category. The Antarctic Treaty has moved on to looking at other species and their categorisation under the

specially protected species status: one group of species for addition and the review of another group of species already on this list. This reinforces the global consensus about how species should be moved into special protection categories. The Antarctic Treaty consultative parties have taken on board the work that has taken place in other international forums in order to have a collective view about how to identify species for inclusion in these specially protected categories.

Mr WILKIE—I suppose what you are saying is that it gives credibility to the list and the process.

Mr Barrington—Yes, and it reinforces the operation of the list in relation to those species that need to be on it.

Mr WILKIE—Does Australia currently take fur seals?

Mr Barrington—No, we do not.

Mr ADAMS—The fur seal numbers and population are back to what it was, say, pre-1770—back to pre-white settlement of Australia?

Mr Barrington—I cannot answer that because there were no available data as to what the native population of these species was; what I can say is that the populations have substantially increased in the Antarctic region to a point at which their conservation status is sound and their population as a species is very stable.

Mr ADAMS—I understand that. I guess the reason the numbers went down was the sealing around Tasmania and the Bass Strait islands was pretty intense.

Mr Barrington—It was very intense indeed. It took about a decade to wipe out the commercial operations at Macquarie Island.

Mr ADAMS—Have they come back to Macquarie Island?

Mr Barrington—They have returned to Macquarie Island in small numbers, and those numbers are slowly increasing.

Mr ADAMS—An issue that got quite a bit of coverage was the branding of seals. It is usually done by scientists out of the Antarctic Division in Tasmania. To fill you in, the only way to brand a seal was to do some sort of process onto the skin of the seal and it was seen to be a rather fierce way of doing it. I think it is very difficult to tag a seal. Has that matter been resolved, do you know?

Mr Barrington—To my understanding, there are very stringent ethical requirements placed on any tagging of seals in the Antarctic area. I am not certain but I am pretty confident that the branding system that used to be in operation has now ceased.

Mr ADAMS—Is there a new one?

Mr Barrington—As I understand it, yes.

Mr ADAMS—Have we stopped that one without developing another one? I just get worried about that sort of attitude.

Mr Barrington—I do not have details about that; I would have to take that on notice.

Mr ADAMS—Thank you.

Senator TROOD—This is part of a process of review; it is not a review that has taken place at the instigation of a particular country that is party to the treaty—is that correct?

Mr Barrington—Yes, it is. There was a process of review established by the treaty parties and instigated by the Standing Committee on Antarctic Research, and it has been taking place since the late 1990s. It sought to first establish what criteria should be adopted in terms of these reviews and, secondly—taking fur seals in the first instance—to look at the application of those new criteria to the species currently on the specially protected species list. As a consequence of that, we have come forward with this measure to remove fur seals from that list.

Senator TROOD—So there is a systematic working through of the various protected species—is that right?

Mr Barrington—Yes. The Standing Committee on Antarctic Research has adopted the IUCN criteria for that process and it follows the same four-step approach they take in assessing the status of the species.

Senator TROOD—Are there other seals under other genera that are still protected?

Mr Barrington—The Ross seal is the other species that is on the specially protected species list. There is a paper going to this year's Antarctic Treaty Consultative Meeting that indicates that the scientific consensus is that the species should remain on the specially protected species list on the basis that the data are not yet comprehensive enough to establish a basis by which its status should change.

Senator TROOD—But is there data that is encouraging that the stock is recovering as well?

Mr Barrington—It is encouraging but it is not satisfactory, and you would not want to change the status at this time.

Senator TROOD—Thank you.

Mr ADAMS—How many species do we have down in Antarctica?

Mr Barrington—There are a small number of seal species in the Antarctic region. There are about eight species—I can actually drag up my special list I prepared—seven species.

Mr ADAMS—How many are on the endangered list?

Mr Barrington—On the specially protected species list there is the Ross seal and the Antarctic fur seals—that is, the Antarctic and sub-Antarctic fur seal.

Mr ADAMS—So we are taking two off and only having one on the list, are we?

Mr Barrington—Yes. Other species, not fur seals, have been considered for addition to that list such as the southern giant petrel.

Mr ADAMS—Could you list the data next time you come before this committee when we have another treaty? Can we have the figures on what we are coming back to and that sort of things so that we have got some baseline data to look at?

Mr Barrington—Yes, we will provide that when we come back to you next time.

Mr ADAMS—There are no countries in the world that are commercially sealing in Antarctic waters?

Mr Barrington—No countries are commercially sealing in the Antarctic region.

CHAIR—There is a complete moratorium on—

Mr Barrington—Yes, the protocol establishes the Antarctic region as an area for conservation and the Convention for the Conservation of Antarctic Seals establishes that proposals for commercial catches need to be brought forward by a nation, and no nation has done so.

Mr ADAMS—Thank you.

CHAIR—On notice, could we have some detail on the population of fur seals and how those numbers have rebounded since the 1960s?

Mr Barrington—I can give you some details now if you like on how the population has rebounded since the 1880s: we understand that they were basically commercially extinct and down as low as about 3,000 animals in some locations.

CHAIR—In the 1880s?

Mr Barrington—Yes. Since then the population has recovered to roughly 1.6 million—just a second and I will give you the exact figures: I believe the Antarctic fur seals are currently at 1.6 million in the Antarctic region out of a global population of about 6 million and the sub-Antarctic fur seals are a population of about 300,000 in the Antarctic region.

Mr ADAMS—Is the Antarctic fur seal related to the Arctic one?

Mr Barrington—I do not believe so, but I would have to take that on notice.

Mr ADAMS—Different species?

Mr Barrington—I believe so, but I would have to take that on notice.

Senator IAN MACDONALD—Just to clarify for me—what is the status of the fur seal in Australia?

Mr Barrington—In Australia we have one breeding colony of the sub-Antarctic fur seal at Macquarie Island. It is a very small colony. It started as a breeding colony, again, in the 1950s and currently there are probably around 300 individuals that come to that island to breed.

Senator IAN MACDONALD—But they are protected under Australia?

Mr Barrington—They are listed under the Environment Protection and Biodiversity Conservation Act as a vulnerable species at Macquarie Island, and we have a recovery plan in place for these species.

Senator IAN MACDONALD—Do these species come to Tasmania?

Mr Barrington—Occasionally, I think you will find that they haul up in Tasmania.

Senator IAN MACDONALD—What are the ones that hang around the salmon farms?

Mr Barrington—Those would normally be Australian fur seals or New Zealand fur seals.

Senator IAN MACDONALD—They are a different species.

Mr Barrington—Yes.

Senator IAN MACDONALD—How are they categorised under Australian law?

Mr Barrington—I understand Australian fur seals are also listed as vulnerable but—

Senator IAN MACDONALD—Vulnerable or a menace?

Mr ADAMS—They have good taste in fish.

Senator IAN MACDONALD—They have indeed. I suppose this is not about them—and this is a discussion for another time and place—but they are increasing hugely in numbers at the moment around Australia, aren't they?

Mr Barrington—Yes, the numbers are rebounding back to what would be more normally the numbers in the native population.

Senator IAN MACDONALD—That is because they follow the trawlers, slip into the nets, have their feed and then get out through the seal excluder devices and they do not even have to work for their feed these days.

CHAIR—Thank you, former minister for fisheries, and thank you very much for appearing before the committee today.

[11.07 am]

O'CALLAGHAN, Mr Paul, Executive Director, Australian Council for International Development

SHEEHAN, Ms Carly, Coordinator, Humanitarian and Emergencies, Australian Council for International Development

Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation

CHAIR—Welcome. We will now take evidence on the agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation. 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 parliament. At the conclusion of your evidence, would you please ensure that Hansard has had the opportunity to clarify any matters with you.

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. Would you like to make some introductory remarks before we proceed to questions?

Mr O'Callaghan—Yes, please. Thank you for the opportunity to participate in these important deliberations today. Your deliberations on this treaty are of great importance. The treaty itself is far less complex than many matters brought before you for consideration. It presents no special technical concerns in certain respects, but it is of fundamental importance because of the nature of the bilateral relationship between Australia and Indonesia and perhaps, as importantly, because of the potential implications within the Australian political space over time.

ACFID has welcomed the very impressive steps made by Indonesia's political and civil society leadership towards democracy over the last nine years. President Yudhoyono's leadership in achieving a peace settlement in Aceh after 30 years is especially commendable. We hope that he will apply similar political capital in the coming years to promote the autonomy process in Papua and curtail human rights abuses in that province. We believe that an umbrella treaty of this kind has the potential to enhance the bilateral relationship and support the Australian government's efforts to deepen and strengthen that critical relationship.

By way of background, many ACFID member agencies—and there are 36 of them operating in Indonesia—have been operating there for some decades, some going back over 50 years. So we have quite a long-term interest in this as we look forward to the decades ahead and the role that this treaty might play. I regret to say that we anticipate that, without greater clarity over some key words in the text, we believe that the treaty is not likely to survive the vicissitudes of bilateral politics beyond the short term. In particular, principle 3 of article 2 is a concern.

In a quite benign domestic and bilateral political environment—take Australia-Uruguay relations for example—this would not be a major concern in terms of language such as ‘support activities’ or ‘threat’. But of course the Australian political context, and that of our neighbour Indonesia, is not benign at all. In that regard, when we read the assertions by senior DFAT and Defence officials, for whom we have great respect, about the strength of the bilateral political relationship as effectively the building block for a long-term application of this treaty, we would urge you to look closely at those claims. A great deal hinges on the accuracy of those assertions.

We certainly welcome the commitment by the current heads of government and their ministers to strengthen and defend the relationship, but of course we can be confident that successive Australian and Indonesian governments will find themselves in periodic bilateral crises which are connected to strong constituency views. Our perception is that the executive arms on both sides—in Jakarta and in Canberra—are a long way ahead of public attitudes in their respective countries.

While the treaty has been drafted with the best of intentions on both sides, it was, in our view, an error to decide to avoid the use of clear textual language on matters that are at the heart of this relationship and which the treaty tries to deal with. Some of Australia’s leading commentators have already indicated to you in their submissions that that decision to avoid the use of clear textual language is likely to unintentionally make the official relationship more vulnerable to turbulence from constituency pressure over the medium term. ACFID’s concern is that, among other things, this is likely to damage the excellent five-decade-long pattern of cooperation at civic society level that our agencies have been engaged in.

What I am referring to here in terms of, if you like, domestic concerns is the steady strengthening of anti-Australian sentiment in some parts of the Indonesian elite circles, particularly since 1999. There is evidence of widespread, if ill-founded, suspicion about Australian intentions with regard to Papua. The political pressure which led Indonesia to terminate the last bilateral security agreement is a salutary reminder of this, and the withdrawal of Indonesia’s ambassador last year from Australia and Indonesia’s understandable irritation at being pressured to assist with processing of recent Sri Lankan arrivals are symptomatic of the same issue.

Within Australia the Lowy Institute poll of 2005, the particularly shrill reaction publicly to the Schapelle Corby case and the Bali nine case simply reinforce a picture of the underlying suspicion and hostility that many Australians have towards Indonesia. The Prime Minister’s withdrawal of the refugee bill before the Senate last year was also in some ways a reflection that the executive arm of government cannot presume legislative approval on a matter of such importance which relates to Papua.

Australians know very little about Papua but the signs are that in the future they would not tolerate perceived acquiescence by an Australian government to Indonesian government pressure, particularly about human rights issues in that province, particularly when—as you found in the presentation by the Indonesian civic society voices here recently—there is opposition within Indonesia to such acquiescence. The practical effect of this, in relation to the treaty’s provisions, is that we believe that neither side of politics nationally in Australia would be likely to act decisively to stop future anti-Indonesian campaigns within Australia.

In light of the domestic, political dynamics on both sides, the assertions that I referred to before by our colleagues from DFAT and Defence would appear to warrant much closer scrutiny by the committee. We are not even confident about the medium-term dynamics within Australia and as a former high school student of Bahasa Indonesian, it strikes me as not good omen that we have a much smaller proportion of young Australians studying that language now than 35 years ago when I was doing it. In short, there is considerable potential for adverse public reaction within Australia in a foreseeable bilateral crisis, and we would urge the committee therefore to recommend at least a clarification of certain terms, particularly 'support', 'participate' and 'threat' that are used.

We would also recommend that there be a preambular recognition of the international covenants and UN conventions that both parties are already obligated under and that the treaty include a statement that promotes universal respect for and observance of human rights and freedoms. I will leave my comments at that for the moment.

CHAIR—In the submission you mentioned that ACFID represents 72 non-profit agencies. Could you give the committee a list of the 72 and, of the 72, how many are currently working in West Papua.

Mr O'Callaghan—There are currently five members working in West Papua, and they are covering areas including vocational training, leadership training, law and justice, HIV-AIDS, school education, water sanitation, hygiene and community radio.

CHAIR—One of the principal recommendations is for a definitional clarification of 'support', 'participate' and 'threat'—what is your understanding of how that clause will be interpreted without definition or clarification?

Mr O'Callaghan—I think for anyone who has been a close observer of Australia-Indonesia relations over the last 40 years, the vagueness about these terms leaves very much open the scope for substantially different interpretations of the meaning of the terms in the two capitals. Events in the last two years would confirm that and, therefore, in essence, we believe that there needs to be more consideration given in negotiating a more detailed text to capture the essence of what is potentially quite a fraught future in the bilateral relationship. If the treaty were to go ahead like this, we would feel confident that it could be used as a basis for stronger claims in both capitals in a way which is likely to generate perhaps even stronger friction between the two countries.

CHAIR—Thank you.

Mr WILKIE—To follow on from that question that was asked previously, does your organisation have any suggested definition to be used for those three terms?

Mr O'Callaghan—We do not have any specific suggestions to make about the terms, but we would be happy to come back to you with some ideas.

Mr WILKIE—If you could take that on notice, that would be good. It is fine for people to say there is a problem here, but, if there is a problem, we also need to find a solution, so if you have got some anticipated definitions that would be good. I am just curious, why are the existing

guidelines on aid activities in Indonesia, such as the AusAID approval process, insufficient to prevent aid activities from being regarded as threats to stability in RI?

Mr O'Callaghan—Why are they insufficient?

Mr WILKIE—Yes.

Mr O'Callaghan—I think to date the experience of our member agencies is that they have not been used actively to exclude certain activities. But I have to say also that in light of the particular operating environment, the role of the armed forces and the police in the province, that there would be many more agencies on our side—because there are 36 operating in Indonesia—operating in Papua if the conditions were more conducive.

Mr WILKIE—The treaty also states that the principles will operate consistent with the UN Charter obligations, given this condition, why do you see the principles as a threat to aid activities in Indonesia?

Mr O'Callaghan—The current text appears to us—and we have been advised of this by international lawyers—to be in breach of the freedoms of expression and association enshrined in the International Covenant on Civil and Political Rights and possibly with domestic Australian legislation. But we are not expert lawyers on this.

Mr WILKIE—Even though they are saying the principles will operate consistent with the UN charter, your advice is that the text does not comply with that?

Mr O'Callaghan—The charter and the international convention are not the same thing.

Mr WILKIE—Thank you. I may have some more later.

Senator TROOD—Are your remarks about the lack of clarity in some of the language specific to the words 'support', 'participate' and 'threat', or are there other phrases or words in the proposed treaty that concern you?

Mr O'Callaghan—Those are just the ones we have focused on; there are other aspects of interest, I suppose. Those are the ones which we feel are right at the heart of the probability of misunderstanding and of different interpretation. If these particular aspects of the treaty were clarified, we think it would go some way to ensuring at least the possibility of a smoother of handling forthcoming issues and periodic crises.

Senator TROOD—Like Mr Wilkie, I would like to see your suggestions as to how we might get around these problems, but I have another question. How do you assess, at the moment, the access that non-government agencies have to West Papua?

Mr O'Callaghan—There is a formal process, as I mentioned in the submission. For our agencies which are being supported by the Australian government's AusAID, there is a thorough process for, if you like, selection, scrutiny and approval by local authorities in Papua. That process works. As I said, it is not quite like any other part of the country where other agencies

are operating because of the different circumstances. The access overall is not as good, but I cannot report that there are major problems.

Senator TROOD—You cannot report that there are no major problems. So, for the most part, access is possible without too much difficulty. Is that putting it too strongly?

Mr O'Callaghan—The five agencies that I am talking about are able to operate their program activities with access and through meeting with relevant communities without major problems.

Senator TROOD—Then perhaps you can explain to me your remarks on the way in which the treaty, in your view, is likely to have the unintended effect of facilitating the gradual expulsion of respected Australian non-profit agencies from West Papua. Your argument appears to be that there are clauses in this treaty which are likely to give a foundation to the Indonesian government to limit access from non-government agencies. Is that your proposition?

Mr O'Callaghan—I think it is fair to say that—and reports by Human Rights Watch and others have made this clear in the last year—many forms of criticism of Indonesian government activity by citizens in Papua are treated as though they are separatist activities. For most international observers it is clear that there is a part of the activity which is related to a separatist cause but that much of the activity which is being claimed to be separatist at that local level is, in fact, very much like what occurs elsewhere in Indonesia but is not called that.

Our concern is that—going right down to local official level—there will be, if you like, an ability for an interpretation to be placed on a range of activities or any criticism in particular of existing policy locally, whether it might relate to water and sanitation arrangements, or whatever, which could be cast in that way. I accept that this is an assertion on our part, but I think the pattern of behaviour, if you like, particularly if you look at the interaction between police and TNI forces and civil society groups in Papua over recent years, would suggest that it is not a conducive environment.

Senator TROOD—I share your concerns with any instances of breaches of human rights of that kind that might occur in West Papua, but I just wanted to understand how the treaty might, in fact, provide a condition, a pretext, an opportunity, or any other means by which the Indonesian government might seek to crack down on some of this activity. I must say that that seems to be your proposition to us, and I cannot say that I see it. I am not sure that you have persuaded me.

Mr O'Callaghan—This is part I suppose of the advice we receive from agencies operating there. It is, as I said, not a conducive environment. It is one in which their presence hinges almost solely on, if you like, a positive report card at local level, which is true everywhere, in one sense, but in an environment where there is considerable local level dissatisfaction with aspects of Indonesian government activity. Particularly the process that is required bilaterally with AusAID and the Indonesian government, going to down to provincial and sub-provincial level, is one where we believe that this treaty will unintentionally provide a greater cover for local officials to be able to say that the role of foreign NGOs is inimical to the interests of good administration in the province in the interests of Indonesia.

I agree it is an assertion, but it is one based on advice that we received from agencies operating there. It is a concern that they have that the particular, if you like, ambiguity allowed in the text is likely to lead, in their view, to that outcome. Unlike every other province in Indonesia where they operate, there is a perception that it is more likely that access will be either terminated or visas not provided in Papua than anywhere else.

Senator TROOD—I must say my experience is that the Indonesian government is not diffident about taking steps it regards as necessary for its internal security and the existence of treaties or other means of this kind is really not going to change the way they behave in these circumstances. I think you have referred to the pattern of behaviour, I would have thought that we should perhaps take some encouragement from the pattern of behaviour that exists at the moment in relation to access. What your evidence seems to be is that for the most part non-government agencies are getting access and being able to do things that we want them to do in West Papua.

Mr O'Callaghan—I would only add the caveat that I think there would be many more that would be quite keen to be involved there in normal developmental activities if the circumstances were different with the government relationship.

Mr ADAMS—In your submission you mention that the possibility of the introduction of basic human rights might be seen as political in Indonesian terms, can you just elaborate a bit on that?

Mr O'Callaghan—This has not been a problem up until now. It is generally not a problem in most countries, but the concern there is that whenever you, for example, work with a local community to help them recognise that the local school that they had which was promised three teachers and has not received any teachers for the last two years, that they actually have the right to—

Mr ADAMS—Argue about that.

Mr O'Callaghan—push for that and so on. This is I guess elementary human rights education, but it does naturally grate at a local political level and further up the line, so that is the basic idea.

Mr ADAMS—Would that generally be coming out of the local funds that would have been allocated at the local level?

Mr O'Callaghan—It is not generally a major part of any program activity. It is folded in whichever area. I mentioned water before—it could be in maternal health or in other program activities. It is intended generally, by the Australian and other foreign NGO's, to enable local citizens to obtain better accountability from officials and politicians in the area.

Mr ADAMS—My last question is: do you think, with the clarification of some of those key words that you put in your submission, that this treaty would help NGO's in West Papua?

Mr O'Callaghan—I will put it this way: we think it would be very desirable to avoid unnecessary friction with Indonesia overall through this treaty. We would like to pre-empt possible use of the treaty as a vehicle to minimise NGO involvement in that province and I think

it is fair to say that both the police and the TNI would prefer to have no foreign NGO involvement in that province overall which is not the view necessarily of the central government.

Senator McGAURAN—Who are the five aid agencies active in West Papua?

Mr O’Callaghan—I can provide a list of those to you. I would rather not name them because that in itself could be a difficulty for them.

Senator McGAURAN—But you know them?

Mr O’Callaghan—Yes, I have a list here.

Senator McGAURAN—Then what is the difficulty, given that you would forward them to me? They would still be included would they not, Mr Chairman? Is there a confidential matter about this?

CHAIR—It can be received confidentially.

Senator McGAURAN—But why?

Mr O’Callaghan—Because that reflects the nature of the relationship that we are talking about in that difficult operating place. I am happy to provide it to the parliament.

Mr WILKIE—Just on that—if you were to provide the information, even if it is confidential, the committee would then determine later on whether or not the submission would be received confidentially. That is my understanding. You just need to be aware of that.

Mr O’Callaghan—Good, thank you.

Senator McGAURAN—So I take it that there is already a very strained relationship between the Indonesian government and the five agencies you will not name.

Mr O’Callaghan—No that is not correct. I did not say that.

Senator McGAURAN—Then for my own clarification, could you tell me why you will not name them?

Mr O’Callaghan—I will provide the committee with the names of the organisations.

Senator McGAURAN—But why won’t you?

Mr O’Callaghan—It could cause difficulty for those organisations as a direct result—it is quite possible in the political context on the ground in Papua. I am sure as a committee you would prefer not to see that happen as a result of this discussion.

Senator McGAURAN—But this is an open public hearing. You come forward with understandable points, but to withhold information, I think is petty.

Mr O’Callaghan—Senator, I am not withholding—I am providing it to the committee and you can make a judgement as to whether you want to make it public. Obviously it is your right to do that. But it is a reflection of the issue that we are talking about for not only the five organisations but this relationship of foreign NGO’s operating in Indonesia. It would be more prudent that you consider that matter in a formal communication after this.

Mr WILKIE—Can I help here—would it be fair to say that what your organisation is concerned about is that the ratification of this treaty without certain changes may develop a situation where it might be harder for these people to operate in Indonesia?

Mr O’Callaghan—That is part of it but they would also not like to see any retribution on the communities that they work with as a result of their names being used here.

CHAIR—Yes, sure.

Mr O’Callaghan—I will provide you with that.

CHAIR—That is where we will leave it. You will write to the committee and we will deal with it when we receive it.

Senator McGAURAN—I will just acknowledge my dissatisfaction with that approach and that answer. Nevertheless, I think Senator Trood made the good point that this is more a question of your human rights concerns that I do not think can necessarily be assigned specifically to this treaty. One of the words you did object to was the word ‘support’. In article 2 principles, page 213—at least in our documents—I read where that was used. I would have thought in this sense it was actually well defined. Let me read it to you:

The Parties, consistent with their respective domestic laws and international obligations, shall not in any manner support or participate in activities by any person or entity which constitutes a threat to the stability, sovereignty or territorial integrity of the other Party, including by those who seek to use its territory for encouraging or committing such activities, including separatism, in the territory ...

So by using the words ‘support’ to the threat of sovereignty, territorial integrity including separatism, I think that in fact well defines what the word ‘support’ means, which an aid agency of course should not and never would get involved in. I make that point that support is well defined.

Senator WORTLEY—In regard to your organisation’s representation of the 72 non-profit agencies, could you just expand further the funding that goes into those non-profit agencies? What percentage of the funding would be raised by those agencies themselves and where is that funding is raised?

Mr O’Callaghan—Last year the funding raised was around about \$800 million directly from Australian donors, both individuals and corporates. The Australian government contributed a further \$50 million or so in support for activities, including those of the five agencies here. In addition to that there is the humanitarian and emergency funding the government provides. It works very closely with our member agencies. We still have 30 member agencies in Indonesia, which are doing post-Tsunami reconstruction work, some of which is connected to Australian

government funding. By and large the answer to your question is that the vast majority of Australian NGO activity overseas is funded directly by ordinary Australians.

Senator WORTLEY—One of the submissions has actually raised a concern about fundraisers and rallies for West Papuan refugees held in Australia, possibly being construed under the agreement as supporting a separatist movement. Do you share those concerns with regard to fundraising activities on Australian soil?

Mr O'Callaghan—I would be happy to provide the committee with a copy of the ACFID code of conduct, which is a national industry code that has been operating for 10 years. It has an annual audit process on every signatory and it requires each signatory to ensure that they do not get involved in any direct political support for causes overseas. So, if you like, a requirement in remaining a signatory under this code is that they are not involved in that kind of political activity.

CHAIR—It would be great if you could provide that, thank you.

Senator WORTLEY—Thank you.

CHAIR—Thank you very much for appearing before the committee today.

[11.39 am]

TINKLER, Mr Mathew, Seconded Solicitor, Human Rights Law Resource Centre Ltd

CHAIR—Welcome. We will continue our discussion of the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation. 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 parliament. At the conclusion of your evidence would you please ensure that Hansard has had the opportunity to clarify any matters with you.

If you nominate to take any questions on notice, 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. Would you like to make some introductory remarks before we proceed to questions?

Mr Tinkler—Yes. Thank you for the opportunity to appear today. The Human Rights Law Resource Centre has made four key recommendations in relation to the treaty. I would like to deal briefly with each of those in turn. First, the centre recommends that the treaty should include preambular recognition that Australia and Indonesia are each signatories to key international human rights covenants and that, consistent with the obligations under those covenants and the UN charter, the treaty will be interpreted so as to promote universal respect for and observance of human rights and freedoms.

Like the last witness, I have read with interest the transcript of the previous public hearing in respect of the treaty. In particular, I note the comments made by the Department of Foreign Affairs and Trade in support of the treaty. Here the transcript is replete with references to human rights. The department has placed great emphasis on Australia's commitment to human rights and encouragement of human rights awareness and accountability in Indonesia, yet the treaty itself is devoid entirely of any mention of human rights. A fundamental principle of the UN charter is faith in human rights and the dignity and worth of the human person. It is simply not sufficient that the treaty includes a vague reference to the UN charter and claims this discharges Australia's international human rights obligations.

The second recommendation follows from the first. In addition to preambular recognition, the centre recommends that the treaty should include the promotion and encouragement of and respect for human rights as a fundamental principle. Along with many other organisations that have made submissions, the centre is deeply concerned with the apparent emphasis on principles of sovereignty and territorial integrity, seemingly at the expense of human rights protections.

Indonesia and Australia are each parties to key international human rights instruments, including the ICCPR, ICESCR and the convention against torture. In February 2006, Indonesia was elected a member of the UN Human Rights Council. In recognition of these commitments to human rights, the treaty must include respect for and recognition of human rights as a fundamental principle. Without a balance of the overemphasis on sovereignty and territorial

integrity with human rights protections, the treaty fails to comply with Australia's and Indonesia's international human rights obligations.

Third, the centre recommends that the treaty should be amended to include an article that specifically provides for circumstances in which security cooperation may be refused where the human rights of an individual are threatened. The Bali nine case is unambiguous proof, in the view of the centre, that without human rights protections in relation to informal intelligence sharing between Australia and Indonesia, the fundamental human rights of Australian citizens are at risk.

The centre recognises that Indonesia has made great and real progress in relation to human rights, yet there is still much work to be done. Australia and Indonesia are culturally diverse and hold different values in relation to key areas of cooperation, including defence, justice and crime and punishment. In light of the Bali nine and the granting of protection visas to West Papuan refugees last year, it is clear that the risk of human rights breaches in Indonesia is not fanciful and, moreover, the human rights concerned, such as the right to life, are absolute.

As the committee is aware, the treaty is also inconsistent with other Australia-Indonesia treaties such as the mutual assistance and extradition treaties, which each include protections for human rights. What is clear from Australian case law involving the Bali nine is that these protections do not extend to informal intelligence sharing contemplated by the treaty. Given that this agreement has been touted as a benchmark, the treaty must set the bar high for negotiations with other countries and include human rights safeguards, including an absolute prohibition of intelligence sharing when it is foreseeable that the death penalty may result.

Finally, the centre recommends that clause 3 of article 2 of the treaty should be deleted. It is clear from the many submissions received by the committee that the majority of interested groups overwhelmingly oppose this clause. It is also clear that, whatever the intention, it is being viewed as an attempt to stymie legitimate public debate regarding the fate of particularly vulnerable groups in Indonesia. In the view of the centre, the clause is vague and ambiguous and arguably in violation of international law and creates obligations upon Australia which, if called upon, could create a situation of inconsistency with domestic legislation, international human rights commitments and fundamental democratic principles. The national interest analysis is clearly deficient in its analysis on this point.

The centre considers that the clause is redundant, apart from the specific emphasis which is placed on separatism. The treaty is otherwise abundantly clear that the principles of sovereignty and territorial integrity are paramount. Moreover, these are fundamental and accepted principles of international law. In summary, it is the view of the centre that, as it stands, the treaty fails to discharge Australia's international human rights obligations, and it should be amended.

Mr WILKIE—You have already touched on the fact that Australia has in place many treaties with Indonesia which cover human rights obligations, so I just want clarification on your argument as to why then it was necessary to include human rights provisions in a security treaty, given that both parties already had those obligations under existing human rights treaties.

Mr Tinkler—As I mentioned in the introduction, in the Federal Court of Australia involving the Bali nine case, an application was brought for preliminary discovery against the Australian

Federal Police. The application failed, but the court ruled that the safeguards in place in the extradition and mutual assistance treaties do not apply to the informal intelligence sharing that occurred in that case, so the provision data from the AFP to the INP is not protected by those safeguards. In fact, six of the Bali nine have found themselves now on death row as a result of that information.

Mr WILKIE—That is currently the case with a whole range of countries that we deal with, so that that informal sharing of information can occur. Is it your argument that we should review that process generally, not just in the case of this treaty?

Mr Tinkler—I certainly think we should. The AFP guidelines were reviewed in light of that Federal Court case but, as it stands, the guidelines still allow intelligence data to be provided to Indonesia or any country when a death penalty may result, provided the person has not been charged. In the view of the centre, that is simply not satisfactory—particularly given that this agreement has touted as a benchmark and it is really setting the precedent for these sort of agreements in future. Formalising that practice should certainly include a human rights framework.

Senator WORTLEY—Could you expand on your comment that article 2, clause 3 should be deleted, and the impact or the possible impact that you believe that could have here in Australia?

Mr Tinkler—Arguably, if Indonesia calls upon Australia to adhere to that clause, it could require the Australian police, for example, to refuse to issue a permit for a group that wants to protest about conditions in West Papua and West Papuan refugees. If that is construed by Indonesia as being a separatist movement, or encouragement or support of a separatist movement, then arguably that is what the clause requires.

Senator WORTLEY—So that is not just a protest; it could be anything? It could include fund raising activities or rallies?

Mr Tinkler—Certainly, or perhaps even making people in West Papua aware of their human rights. The committee may be aware that there is a media ban in place at the moment in West Papua, as I understand it. I can quote from the Indonesian Minister of Defence who said the media ban is required for fear that media presence in West Papua ‘would encourage the Papuans to campaign on issues of human rights’. So if an Australian organisation encourages West Papuans to become aware of their human rights and their right to self-determination or freedom of expression, then arguably that is encouraging a separatist movement.

Senator WORTLEY—You are saying that if, on Australian soil, Australians wanted to participate in a rally, protest or fundraising event in support of a particular group, the Indonesian government could say that if that went ahead we would be in breach of the treaty? Is that correct?

Mr Tinkler—As the treaty stands, yes.

Senator BARTLETT—I just want to understand what you are saying about human rights obligations under international law and the like. I am fully sympathetic with that but, purely from an international treaty point of view, article 2 also has item 6 that says nothing in the

agreement shall affect in any way existing rights and obligations under international law. I appreciate it is always nicer to have things explicitly stated, but doesn't that item, at least in legal theory, mean that those human rights obligations still apply?

Mr Tinkler—In theory, it might, but the same could be said for the issues of sovereignty and territorial integrity. We have seen the need to specifically and expressly include those provisions in the agreement, so to balance those provisions, why wouldn't we include human rights safeguards? The other criticism I have of article 2, clause 3, is that the phrase 'consistent with their respective domestic laws and international obligations', is open to interpretation and subject to change, particularly 'domestic laws'. Does this apply to domestic laws in Australia and Indonesia now? What if the laws are amended in Indonesia and what if that includes a definition of a separatist activity that is contrary to Australian principles of justice and fairness?

Senator BARTLETT—With regard to this type of treaty, which is the framework for security cooperation—I think security is a word that can mean lots of things to lots of people—are you aware of any other types of security treaties or agreements in the international arena, not necessarily just between Australia and another country, that do include human rights types of requirements?

Mr Tinkler—No, I am not aware specifically of other agreements that do. As far as I am aware, there are very few other agreements that are similar to this agreement.

Senator BARTLETT—That deal with security stuff in general?

Mr Tinkler—As I understand it, this is particularly in response to the ongoing terrorist threats and things like that and it is a fairly new concept in bilateral treaties. We were not able to source any other treaties to reference some of these issues that we are discussing.

Senator TROOD—You are obviously right when you say that treaties are open to interpretation and subject to change, but that is a proposition that applies to all treaties and all agreements and things of that kind. I must say I am a bit perplexed by your proposition that you want to delete article 2, clause 3 when it specifically preserves domestic laws and international obligations.

Mr Tinkler—Yes, but what it creates a situation which is, on its face, inconsistent with our existing domestic laws and legislation.

Senator TROOD—But it specifically preserves the application of domestic laws and international obligations and that is what you are asking us to take seriously, aren't you? You are asking us to take seriously the international obligations we have signed, such as the universal declaration, the covenant and such laws as exist to protect freedom of speech. Your answer to Senator Wortley's proposition seems extraordinary to me.

Mr Tinkler—I agree that it is an extreme example.

Senator TROOD—Why would you want to get rid of the clause that specifically preserves those rights?

Mr Tinkler—It is one thing to say that the clause specifically preserves those rights, because it then goes on to arguably create an obligation that is inconsistent with those existing laws. On its face, I would say that the clause is bad law and should be deleted. It adds nothing to the previous clause on sovereignty and territorial integrity, apart from the specific emphasis on separatism. To my mind, separatism is not a crime in Australia and encouraging a separatist activity is not a crime. There is a fundamental human right of self-determination under the ICCPR and ICESR. Indonesia is a signatory to that and so is Australia.

Senator TROOD—It is possible I might not change your mind on this proposition, so I will not press it other than to say that it seems to me rather perverse when you have a clause in the treaty that actually protects the very things that you are concerned about. To argue for its removal does not seem to me to advance your cause.

Mr Tinkler—I take your point on that. I think the clause is quite circular and that is one of the reasons I think it should be deleted. There are other clauses in the agreement which require the parties to act in accordance with international law and I do not think removing that clause would remove that obligation.

CHAIR—Thank you very much for appearing before the committee.

[11.53 am]

KING, Professor Geoffrey Peter, Private capacity

MAKABORY, Ms Paula, Coordinator, International Human Rights Campaign

CHAIR—Welcome. We will continue our discussion of the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation.

Prof. King—I am from the West Papua project at the University of Sydney. We have circulated a document to the committee that was produced in cooperation with ELSHAM Papua, and Paula specifically. We would like to table it, if we could.

CHAIR—Senator Bartlett has moved that exhibit 21 for the treaty tabled 6 December 2006 be included in the committee's records and that has been seconded Mr Wilkie. That motion is carried and the document has been tabled. 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 a contempt of 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. Would you like to make some introductory remarks before we proceed to questions?

Ms Makabory—On behalf of ELSHAM and the West Papuan people in Papua: I am a native born Papuan and have witnessed ongoing conflict in West Papua. My point, the point dealt with in the submission by ELSHAM, is that signing up to this treaty between the Australian government and Indonesia will contribute to human rights abuses in West Papua. Today, there is no difference between the situation and conditions in West Papua and the situation and conditions in East Timor before they got their independence, so we can say that West Papua today is becoming the second East Timor.

The conflict in Papua, which has claimed an estimated 100,000 lives, stems from the now discredited process by which the UN drove the transfer of sovereignty of Papua from Dutch colonial administration to Indonesian control. The denial of the Papuan people's right to self-determination and the policies and practices of Indonesian authorities have spawned the conflict which is now entering its fifth decade as we speak. Papuan people want a peace dialogue, not bullets, not guns. Papuan people do not want any bullets or guns; they want a peaceful, democratic dialogue with full respect for human rights and human dignity, to solve the conflict in West Papua.

Article 2.3 of the agreement contains Papuan provisions. It says:

The Parties—

Australia and Indonesia—

shall not in any manner support or participate in activities by any person or entity which constitutes a threat to the stability, sovereignty or territorial integrity of the other Party, including by those who seek to use its territory for encouraging or committing such activities, including separatism, in the territory of the other Party ...

When I look at this, I can see that there is no guarantee of human rights in this democratic era. What happened in Papua? West Papuan people tried to express their own demands through different things, and they ended up in jail or even killed by Indonesian security forces. Look at what happened in the Abepura case in 2000, the Wasior case in 2004, the Puncak Jaya case in 2004, the Timika case in the year 1999 and the Biak case in the year 1998. These were all demonstrations, peaceful demonstrations, by West Papuans to express that they wanted to resolve the conflict there. But then the Indonesian military and Indonesian security forces responded with brutality. So they have taken lives and there are human rights abuses in the area.

With this treaty, I understand Australia would like to build a good relationship with the Indonesian government, but do not forget that the Indonesian government, from my point of view, is now confused. They tried to put development policies in Papua; it was trial and error. They gave us a special autonomy law to solve the conflict, but then the Megawati government brought on conflict by establishing the West Irian Jaya province, which was totally against law No. 21 in the year 2001.

CHAIR—I am going to pull you up there because we have another witness to consider in the next half hour. We are considering the treaty and I see that your organisation has some recommendations here on page 25 of the document that you have tabled. Our job is to consider the treaty. I might see if there are any questions. Mr Wilkie.

Mr WILKIE—Thank you, Mr Chairman. I have two questions which I would like you to take on notice so you could respond afterwards. Firstly, regarding the discussion we have already had, I would be very interested in your opinion whether the human rights situation in West Papua is improving or becoming worse and has the transition to a democratic federal government improved that situation? Secondly, President Yudhoyono, as you were saying, is committed to the implementation of the special autonomy law for West Papua. Can you tell us what affect this will have on the human rights situation and the military's activities in West Papua? I would appreciate your views on that. Specifically in relation to this treaty, I have read one of the submissions from Dr Benny Giay which says:

Based on these concerns, I ask Australians not to support this treaty because the treaty will only cause more death and tragedy on the part of West Papuan civilians in the future.

Why will this treaty cause that to occur in West Papua?

Ms Makabory—Because it is clearly so in article 2.3. Let me discuss freedom of speech. Since Indonesia ratified the International Covenant on Civil and Political Rights in September last year, it means that the right to self-determination is upheld under the covenant. The Papuans, since the democratisation and reform era, have tried to stand up and speak about their rights as Papuans. This treaty does not describe the roots of conflict but instead is just about the symptoms of the Papuan conflicts. I do not think that this treaty will guarantee the human security of West Papuans themselves when they try peacefully talking about the causes or the

roots of conflict in Papua. This treaty will give Indonesia more legitimation to kill my people than to handle them in a peaceful way to solve the roots of the problem in West Papua.

West Papuan people have been getting to know their political history since the annexation, as they call it, in the year 1969 through the Act of Free Choice. They would like to be respected, with human dignity and human rights but then what has happened in Moulrier district in Puncak Jaya which has caused thousands of people to be displaced from their places and caused eight people to die in the refuge camps including women and children because of yellow jaundice, starvation, malaria and things like that .

Mr WILKIE—I can appreciate. I understand there are examples of abuses that have occurred in past, but what I am looking for is why you believe this treaty specifically—and it must be specifically related to this treaty—would cause problems for West Papuans?

Ms Makabory—Just like I say, in Indonesia there is a culture of impunity in judicial systems and once Papuans stand up to speak about their rights, then Indonesia will take them away because this treaty has already guaranteed that. This is not the problem; this is just the symptom. Indonesia will never ever open dialogue with West Papua and they have been trying to close West Papua for long decades for international media and international NGO's to visit and see what is actually the conflict in West Papua, what are the roots of the problem.

Mr WILKIE—I can understand what you are saying, but I have to relate specifically to what we are looking at which is this treaty.

CHAIR—I have one question from Senator Wortley and then we will have to move on.

Senator WORTLEY—In the document you have tabled today you say, 'The treaty needs to be amended to affirm the upholding of human rights.' You then go on to say, 'The right of movement of media and human rights monitors to areas of conflict is vital.' Could you just expand on the 'movement of media' in relation to that?

Ms Makabory—As you know, for years in West Papua, any foreign media who have come to try to talk to West Papuan people, once their intentions are known by the police or security forces, will be kicked out or will even be put into jail. In other cases, they were not allowed to move anywhere in Papua unless they had a surat jalan—a clearance letter.

Senator WORTLEY—Are you saying that you want this issue of movement of the media addressed in the treaty—you believe that that should be the case?

Ms Makabory—I want that too. I want this treaty to place more emphasis and guarantee on human security in West Papua and also for other Indonesians and Australians.

Senator McGAURAN—I would like to correct something that Ms Makabory said, and it ought to be put on the *Hansard*. I believe she said that, by Australia signing this agreement, it would trigger the death of her people. I would object to that—that we would be waving through human rights abuses. Australia has always acted properly and proudly, particularly in the region, with regard to human rights. You are unable to connect your cause, as good as it may be—and

we all know that there are human rights abuses in West Papua—with what we are discussing today, which is this particular treaty. You have somewhat used today as a soapbox.

CHAIR—That is a statement. You do not have to respond to that. Thank you very much for appearing before the committee today.

Mr ADAMS—You have had a privileged life, mate.

CHAIR—Come on, Dick.

Mr ADAMS—You have had a privileged life, to have your statements always made.

CHAIR—Order!

Mr ADAMS—Other people in the world have not.

Senator McGAURAN—Make a statement, then.

[12.08 pm]

WHITE, Professor Hugh John, Private capacity

CHAIR—Thank you. We will continue our discussion of the Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation. 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 parliament. At the conclusion of your evidence would you please ensure that *Hansard* has had the opportunity to clarify any matters with you.

If you nominate to take any questions on notice, 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. Do you wish to make some introductory remarks before we proceed to questions?

Prof White—Yes, if I may. Thank you very much for this opportunity to appear before the committee. My approach to this issue will be a little bit different from those of some of your earlier witnesses today, although in some ways my conclusions end up being somewhat similar. Most of the text of the proposed treaty enumerates and encourages practical cooperation between Australia and Indonesia across a whole range of security related areas. That cooperation seems to me to be very beneficial. The way in which that cooperation has grown over recent years is something of which the government can be rightly proud. On the other hand, I do not see any particular purpose served by capturing that within a treaty. But one clause of the treaty; the one that has already received a lot of attention this morning, clearly has treaty intentions—that is the intentions to create specific new obligations on the parties. That is, of course, clause 2.3.

There has been some discussion of the wording of that clause already, so I will not go into detail on it. I wish simply to make the observation that it seems to me that—taken as a whole and particularly with the latter part of the clause taken into account—the most natural interpretation of that language is that the Australian government, in ratifying this treaty, would commit itself to prohibit persons in Australia from acting in a way that would encourage a range of things including obviously separatism. 'Encourage' is a complex word but I think in its natural meaning it would include simple statements in support of that cause. If that is correct, then it seems to me that the scope of this clause is very broad indeed in the case of Australia taking on commitments to regulate the expression of views by Australian citizens and others in Australia. This would seem to me to go well beyond Australian law and Australia's political culture.

My concern is not that any Australian government would actually fulfil that clause. My concern is that they would not. In particular, that clause is likely to have raised expectations in Indonesia, about what Australia is prepared to do in the management of these sensitive issues between our two countries, which are likely to be disappointed. I should make the point that although, as has already been pointed out in the discussion, there is a phrase 'consistent with domestic laws and international obligations' and I am no lawyer but it is worth pointing out that it seems to me to be that that phrase—if it does indeed overturn what seems to be the most

natural interpretation of the language itself—does render the clause self-defeating. That, in itself, would cause a lot of disappointment in Jakarta. Because of course this is not a hypothetical issue.

Indonesian concern about not just the Australian government's but the Australian public's support for separatism, I believe is likely to be at the heart of Indonesian interest in this entire document. This clause I would guess is likely to be the most important one from an Indonesian point of view. It is also worth bearing in mind that the boot is on the other foot to a certain extent. There are issues that relate to Australia's security in which we are concerned about expressions of support or encouragement from Indonesia. One need only look at the approach that we have taken to the question about how support for violent extremism in Indonesia might play out in the Australian security context.

So it seems to me that on both sides the clause appears to create obligations on the other which neither of them can meet within their present political cultures and legal frameworks. My concern about that situation is that it would be bad for bilateral relations with Indonesia. The history of bilateral relations with Indonesia has been that it has been punctuated by periodic crises in which one side or the other has been disappointed at the other's inability to manage our domestic affairs in ways that suit the expectations of the other. A clause in a treaty like this which raises expectations of the way in which either side can manage these issues which cannot be met, which go beyond the kinds of approaches that either government can take, are in a crisis likely to amplify bitterness rather than reduce it. We have of course seen in the fate of the previous security agreement with Indonesia, the Agreement to Maintain Security, just this kind of cycle where the Indonesian decision to rip up the AMS in the height of the East Timor crisis amplified the sense of crisis and in some ways made it harder to manage what was, anyway, a very difficult moment in the bilateral relationship.

My position before the committee is to suggest that if my interpretation of that language is right and, in particular, if that is the way the Indonesians are interpreting that, then signing a treaty which includes that clause would be an error. I recommend that the committee should clarify exactly what the scope of the language in 2.3 really is, clarify to what extent it is consistent with Australian law at the moment. It should clarify what Indonesia's interpretation of that language is and propose that the Australian government convey its interpretation in detail to Indonesia to ensure that the two sides as they ratify this language, if that is what they do, really do understand the obligations the language appears to impose on them. Thank you.

CHAIR—Thank you.

Mr WILKIE—Firstly, congratulations on that presentation. It sums up exactly the points and definitions. I am not sure if you are aware that we have your *FEER* article that was written on 6 November.

Prof. White—The article in the *Far Eastern Economic Review*.

Mr WILKIE—I thought it was excellent, and I agree with the thoughts there where you suggested that the treaty becomes, like its predecessor, a symbol not of the strength of the relationship but of the fragility. I have a number of other questions relating to the treaty itself. Given the poor human rights record of the Indonesian military, what do you believe the risks to Australia are from a closer defence cooperation with the Indonesian military?

Prof. White—There are two parts to the answer to that. The first is that I think that, however one judges the past and however one judges TNI today, Indonesia as a country has changed enormously in the last decade and particularly in the years since 1998, and TNI, more slowly, has also changed. It is still, I think, a very troubled organisation. It is an organisation whose role in Indonesian society is still quite inconsistent with our strategic and political culture, and very bad things are still done in Indonesia by TNI. But I do not believe now—and it is worth saying that I have not believed for a long time, including during the Suharto regime—that the right Australian response to that is to refuse to undertake close relations with TNI.

There are two reasons. The first is that I think Australia's own interests in managing a good relationship with Indonesia, including a good strategic relationship with Indonesia, do require us to maintain good contacts with TNI. And, although I think we must be very careful not to exaggerate this, and it often is exaggerated, the second reason is that, if our engagement with TNI can help in even a very modest way to bring TNI to playing a role in Indonesian society—and conducting itself in relation to Indonesian society—which is more consistent with Indonesia's own aspirations for the way in which it evolves as a political society, then I think that is not a bad thing to be doing. On the other hand, it is a process that needs to be undertaken very cautiously because you want to do things which encourage progress in good directions rather than progress in bad directions.

It is worth bearing in mind that the present president, President Susilo Bambang Yudhoyono, as deputy head of TNI, in the months immediately after the fall of Suharto, came to Australia as a guest of the defence department—I was then serving in the defence department—and spent a week or perhaps 10 days with us talking about the roles of militaries in democracies. We ran a series of seminars and workshops and things for him and a number of his colleagues. I saw a lot of him at that time. It was part of a broader program that we had within Defence, between Defence and TNI at that stage. Notwithstanding the terrible things that happened a couple of years later in East Timor and so on, I still came away from that process persuaded that people like SBY are committed to trying to improve the way in which TNI does its work. I think it would be foolish of Australia to turn our back and not try and help on that.

Mr WILKIE—I have two questions. One relates to that interaction between TNI and the military. We have had the suggestion that, if Australians are there teaching TNI and helping them, it would develop better processes with the military so that when they apply those processes it will be with more regard to human rights issues. But others have suggested that giving that assistance adds legitimacy to the fact that they are still going to go out there and commit human rights atrocities. What you are saying is that we are better off being in the tent trying to help them, rather than being on the outside as an observer.

Prof. White—Yes. It is a balance to be struck. I think there is legitimacy in both positions. I think the way to manage the relationship is to do it in such a way that you have more of the positive effect and less of the negative effect, but I think it is fair to say that the management of the relationship is a delicate business, precisely because that balance does have to be struck.

Mr WILKIE—Given the continuing sensitivities of the relationship to separatism issues, and its inclusion in the treaty, in your opinion will the treaty enable the security relationship to move beyond earlier disagreements such as that over East Timor?

Prof White—I do not believe the language in the treaty, other than 2.3, will make much difference one way or another to the management of the bilateral security relationship, either in the defence area or in the broader areas in which it has spread, in particular in the last few years. That relationship has grown strongly. As I say, I think it is a credit to both governments that on really critical issues like people-smuggling and counterterrorism and responses to various crises or natural disasters, that relationship has grown in a very impressive fashion. But I do not believe the treaty actually makes much difference to the way in which those elements of the relationship develop or not. I do not actually think the treaty creates new obligations on either side; it simply provides a kind of political framework. That could be done with subtreaty-level documents or, for that matter, could proceed without them.

Senator IAN MACDONALD—Professor, as I read article 2, point 3, it says—to personalise it—that Australia:

... shall not in any manner support or participate in activities by any person or entity which constitutes a threat to the stability, sovereignty—

of Indonesia. Is that how you read it?

Prof. White—That is how I read the bit that you have read out, yes.

Senator IAN MACDONALD—What is wrong with that?

Prof. White—It depends entirely, as one of my predecessors in this chair said, on how you define ‘support’, ‘participate’ and ‘threat’. The interpretation of that, I would suggest, is likely to occur within the context of the meaning of the latter clause, the bit that you did not read out:

... including by those who seek to use its territory for encouraging ...

Now, that first language that you read out appears to place obligations on the parties in relation to their own conduct. What is significant about that second clause, the second part that begins with ‘including’, is that it appears to place obligations on the states parties to regulate the activity of those on their territory—that is, ‘individuals’.

Senator IAN MACDONALD—That is not an interpretation. Let me go further.

Prof. White—My point is only that I think that is a natural interpretation of the words and we would want to be careful it was not Indonesia’s interpretation.

Senator IAN MACDONALD—It is a wrong interpretation. It says Australia:

... shall not in any manner support or participate in activities by any person ... who seek to use—

Australian—

territory for encouraging or committing ... activities ... separatism, instability—

et cetera.

Prof. White—Precisely. The question thereby hangs whether a statement made on Australian territory in support of, in encouragement of, would constitute a use of the territory for encouragement.

Senator IAN MACDONALD—But it is not an active thing; it says ‘shall not in any manner support or participate in’. It does not say they will arrest those who do. It just says Australia will not do it.

Prof. White—Here we come straight to the question of interpretation, which I think is at the core of this question. I believe you could read the language in the way that you have. I equally believe that you can read the language in the way that I have. The critical question for the way in which this language affects the future of Australia-Indonesia relations is whether that is the reading Indonesia has. Because if Indonesia is misinterpreting—

CHAIR—Senator Macdonald, I am sorry but I have more questions coming, so if you would just wrap it up.

Senator IAN MACDONALD—On your interpretation of this, would you consider Australia’s sending troops to Timor—its intervention—a breach of your interpretation of this paragraph?

Prof. White—I believe that the Indonesians would interpret it that way. That is what is important.

Senator BARTLETT—Could I go to the very start of it, article 1, item 1, which I guess says the main objectives of the agreement and gives a bit of an overview, an umbrella of interpretation. Just passing through part of it, it talks about an objective of the agreement being ‘to intensify cooperation ... on matters affecting’ the nations’ respective national security. On this notion of national security, it seems to me there is a very, very strong view amongst some in Indonesia that it is absolutely integral to their national security that there be not even the slightest sign of any push for self-determination or separatism or whatever in West Papua.

This links not just to the article you were talking about but also to the previous point you made about defence cooperation. If this treaty is there to intensify cooperation on matters affecting Indonesia’s national security, we are training their defence force for that purpose and they see it as central to their national security—a pretty hard line on whatever is happening in West Papua. I think it is a reasonable, logical thread. People are saying the concern is that this treaty could be used to legitimise hardline activities, to put it politely, by at least some within Indonesian defence.

Prof. White—I personally do not draw that interpretation from the treaty. I think it is possible for Australia to engage in quite close security cooperation with Indonesia, and indeed to sign the kind of language that this document has in sort of putting a chapeau over that kind of cooperation, without finding ourselves in a position of endorsing everything that the Indonesian military might do or everything that the Indonesian police might do. To go back to the point I made in response to the deputy chairman, it does require us to be very careful about the way in which we manage our detailed cooperation with Indonesia. But it seems to me that the language in the treaty, other than the language I have talked about, does not itself carry that problem. If it

was not for the language at 2.3, I would regard this treaty as an acceptable, if somewhat anodyne, piece of routine diplomacy.

Senator BARTLETT—Given your background in defence and past history with training, defence et cetera, it seems that one of the problems is that it is actually quite hard to find out what is going on in places like West Papua. Is there any legitimacy in seeking to incorporate—either in this or as part of this—greater openness access, not necessarily by Australians but by independent observers?

Prof. White—There are two separate points here. I think that would be a very good thing to do. What I am saying here is not intended in any way to defend Indonesia's approach to managing the problem of Papua. Personally, I am not an advocate of independence for Papua and I do not think the Australian government should be. I do think more openness about West Papua would be a good idea, but I personally would not say that that needs to be in this agreement.

I do not think, at any rate, that not having it in this agreement would significantly weaken Australia's position to make statements on this because, as others have said during this hearing, our rights and responsibilities to do so are well covered in other documents. My concern is much more specifically to do with the way in which the wording of 2.3 raises, I think, false expectations in Jakarta about what we are prepared to do to them—expectations that I think we are bound to disappoint them on.

CHAIR—Thank you very much for appearing before the committee today. I am sorry that we have run out of time.

Resolved (on motion by **Mr Wilkie**, seconded by **Senator McGauran**):

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 and submissions presented at public hearing this day.

Committee adjourned at 12.28 pm