

# Report 79

## **Treaties tabled on 10 May (2), 5 and 6 September 2006**

Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005) and An Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition

Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005) and An Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Mutual Assistance in Criminal Matters

Convention between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol

Convention between the Government of Australia and the Government of the Kingdom of Norway for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion

Amendments, agreed in Shanghai on 26 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment

Amendments, agreed in Shanghai on 25 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment

Agreement between the Government of Australia and the Government of the People's Republic of China relating to Air Services

Agreement between the Government of Australia and the Government of India relating to Air Services

Protocol on Explosive Remnants of War (Protocol V) to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects

Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to amend Annex 2-B (Tariff Schedule of Australia), Annex 4-A and Annex 5-A of the Australia-United States Free Trade Agreement (AUSFTA) to ensure compliance with changes to the Harmonized Commodity Description and Coding System

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## Membership of the Committee

Chair            Dr Andrew Southcott MP

Deputy Chair   Mr Kim Wilkie MP

Members        Hon Dick Adams MP

Senator Andrew Bartlett

Mr Michael Johnson MP

Senator Carol Brown

Mr Michael Keenan MP

Senator Brett Mason

Mrs Margaret May MP

Senator Julian McGauran

Mrs Sophie Mirabella MP

Senator Glenn Sterle

Mr Bernie Ripoll MP

Senator Russell Trood


Hon Bruce Scott MP

Senator Dana Wortley

## Committee Secretariat

Secretary	James Rees
Inquiry Secretary	Stephanie Mikac
Research Officer	Serica Mackay
Administrative Officer	Heidi Luschtinetz





## Resolution of appointment

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

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



## List of abbreviations

ADF	Australian Defence Force
AFP	Australian Federal Police
AUSFTA	Australia-United States Free Trade Agreement
CAMBA	Agreement between Australia and China for the Protection of Migratory Birds and their Environment
CASA	Civil Aviation Safety Authority
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CNIA	CAMBA National Interest Analysis
Cth	Commonwealth
DEH	Department of Environment and Heritage
DFAT	Department of Foreign Affairs and Trade
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999
FCNIA	French Convention National Interest Analysis
FTAs	Free Trade Agreements
HREOC	Human Rights and Equal Opportunity Commission

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HS2007	Harmonized Commodity Description and Coding System that will come into effect on 1 January 2007
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
JAMBA	Agreement between Australia and Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment
JNIA	JAMBA National Interest Analysis
LIV	Law Institute of Victoria
NCNIA	Norwegian Convention National Interest Analysis
NIA	National Interest Analysis
NSW CCL	New South Wales Council for Civil Liberties
OECD	Organisation for Economic Cooperation and Development
Protocol V	Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects
ROKAMBA	Republic of Korea-Australia Migratory Birds Agreement
SAFTA	Singapore-Australia Free Trade Agreement
SCOT	Commonwealth-State/Territory Standing Committee on Treaties
US	United States of America
WCO	World Customs Organization
WSSD	World Summit on Sustainable Development



## List of recommendations

### **2 Treaty between Australia and Malaysia on Extradition and an Exchange of Notes between Australia and Malaysia on the Treaty of Extradition**

#### **Recommendation 1**

The Committee supports the *Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition (Kuala Lumpur, 7 December 2005)* and recommends that binding treaty action be taken.

### **3 Treaty between Australia and Malaysia on Mutual Assistance in Criminal Matters and an Exchange of Notes between Malaysia and Australia on the Treaty on Mutual Assistance in Criminal Matters**

#### **Recommendation 2**

The Committee supports the *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Kuala Lumpur, 7 December 2005)* and recommends that binding treaty action be taken.

### **4 Double Taxation Conventions with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol with France and Norway**

#### **Recommendation 3**

The Committee supports the *Convention between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal*

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*Evasion and Protocol, done at Paris on 20 June 2006 and recommends that binding treaty action be taken.*

#### **Recommendation 4**

The Committee supports the *Convention between the Government of Australia and the Government of the Kingdom of Norway for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, done at Canberra on 8 August 2006 and recommends that binding treaty action be taken.*

### **5 Amendments to the Annex to the Agreement with China for the Protection of Migratory Birds and their Environment**

#### **Amendments to the Annex to the Agreement with Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment**

#### **Recommendation 5**

The Committee supports the *Amendments, agreed at Shanghai on 26 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, done at Canberra on 20 October 1986 and recommends that binding treaty action be taken.*

#### **Recommendation 6**

The Committee supports the *Amendments, agreed at Shanghai on 25 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, done at Tokyo on 6 February 1974 and recommends that binding treaty action be taken.*

### **6 Air Services Agreement with China**

#### **Recommendation 7**

The Committee supports the *Agreement between the Government of Australia and the Government of the People's Republic of China relating to Air Services, done at Canberra on 23 March 2004 and recommends that binding treaty action be taken.*

### **7 Air Services Agreement with India**

#### **Recommendation 8**

The Committee supports the *Agreement between the Government of Australia and the Government of India relating to Air Services, done at New Delhi on 6 March 2006* and recommends that binding treaty action be taken.

## **8 Protocol V on Explosive Remnants of War**

### **Recommendation 9**

The Committee supports the *Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects* and recommends that binding treaty action be taken.

## **9 Amendments to the Australia-United States Free Trade Agreement to ensure compliance with changes to the Harmonized Commodity Description and Coding System**

### **Recommendation 10**

The Committee supports the Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to amend Annex 2-B (Tariff Schedule of Australia), Annex 4-A and Annex 5-A of the Australia-United States Free Trade Agreement (AUSFTA) to ensure compliance with changes to the Harmonized Commodity Description and Coding System and recommends that binding treaty action be taken.



## Introduction

### Purpose of the report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of ten treaty actions tabled in Parliament on 10 May<sup>1</sup>, 5<sup>2</sup> and 6 September 2006.<sup>3</sup> These treaty actions are:

#### 10 May 2006

- *Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition (Kuala Lumpur, 7 December 2005)*
- *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Mutual Assistance in Criminal Matters (Kuala Lumpur, 7 December 2005)*

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1 Australia, House of Representatives 2004-05-06, *Votes and Proceedings*, No. 95, p. 1080; Senate 2004-06, *Journal*, No. 81, p. 2139.

2 Australia, House of Representatives 2004-05-06, *Votes and Proceedings*, No. 120, p. 1359; Senate 2004-06, *Journal*, No. 99, p. 2574.

3 Australia, House of Representatives 2004-05-06, *Votes and Proceedings*, No. 121, p. 1376; Senate 2004-06, *Journal*, No. 100, p. 2591.



### 5 September 2006

- *Convention between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol (Paris, 20 June 2006)*
- *Convention between the Government of Australia and the Government of the Kingdom of Norway for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion (Canberra, 8 August 2006)*
- *Amendments, agreed in Shanghai on 26 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, done at Canberra on 20 October 1986*
- *Amendments, agreed in Shanghai on 25 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, done at Tokyo on 6 February 1974*
- *Agreement between the Government of Australia and the Government of the People's Republic of China relating to Air Services (Canberra, 23 March 2004)*
- *Agreement between the Government of Australia and the Government of India relating to Air Services (New Delhi, 6 March 2006)*
- *Protocol on Explosive Remnants of War (Protocol V) to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects (Geneva, 28 November 2003)*

### 6 September 2006

- *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to amend Annex 2-B (Tariff Schedule of Australia), Annex 4-A and Annex 5-A of the Australia-United States Free Trade Agreement (AUSFTA) to ensure compliance with changes to the Harmonized Commodity Description and Coding System*

## Briefing documents

- 1.2 The advice in this Report refers to the National Interest Analyses (NIAs) prepared for the proposed treaty actions. These documents are prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty. Copies of the NIAs may be obtained from the Committee Secretariat or accessed through the Committee's website at:

[www.aph.gov.au/house/committee/jsct/10may2006/tor.htm](http://www.aph.gov.au/house/committee/jsct/10may2006/tor.htm)

[www.aph.gov.au/house/committee/jsct/5\\_6\\_september2006/tor.htm](http://www.aph.gov.au/house/committee/jsct/5_6_september2006/tor.htm)

- 1.3 Copies of treaty actions and NIAs may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:

[www.austlii.edu.au/au/other/dfat/](http://www.austlii.edu.au/au/other/dfat/)

## Conduct of the Committee's review

- 1.4 The review contained in this report was advertised in the national press and on the Committee's website.<sup>4</sup> Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Members of Parliament, stakeholder organisations and to individuals who have expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A. Exhibits received are listed at Appendix B.

- 1.5 The Committee received evidence at public hearings held on 19 June, 4 and 11 September 2006. A list of witnesses who appeared before the Committee at public hearings is at Appendix B. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:

[www.aph.gov.au/house/committee/jsct/10may2006/hearings.htm](http://www.aph.gov.au/house/committee/jsct/10may2006/hearings.htm)

[www.aph.gov.au/house/committee/jsct/5\\_6\\_september2006/hearings.htm](http://www.aph.gov.au/house/committee/jsct/5_6_september2006/hearings.htm)

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4 The Committee's review of the proposed treaty actions was advertised in *The Australian* on 17 May and 20 September 2006. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee, both in the advertisement and via the Committee's website.



## Treaty between Australia and Malaysia on Extradition and an Exchange of Notes between Australia and Malaysia on the Treaty of Extradition

- 2.1 The *Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition (Kuala Lumpur, 7 December 2005)* (the Extradition Treaty with Malaysia) provides for the surrender of an accused or convicted person to the other Party to face criminal charges or serve a sentence.<sup>1</sup>

### Background

- 2.2 Australia has concluded 34 bilateral treaties<sup>2</sup> on extradition.<sup>3</sup> The Extradition Treaty with Malaysia is based on Australia's model extradition treaty.<sup>4</sup>

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1 National Interest Analysis (NIA), para. 6.

2 Attorney-General's Department, *Submission 13*, Treaties Tabled 10 May 2006. Australia has extradition treaties with Argentina, Austria, Belgium, Brazil, Chile, Ecuador, Finland, France, Germany, Greece, Hong Kong, Hungary, Indonesia, Ireland, Israel, Italy, Republic of Korea, Latvia, Luxembourg, Mexico, Monaco, Netherlands, Norway, Paraguay, Philippines, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Turkey, United States of America and Venezuela.

3 NIA, para. 5; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24; Attorney-General's Department, *Submission 13*.

- 2.3 The extradition relationship between Australia and Malaysia is currently governed by the *London Scheme for Extradition within the Commonwealth 1966* (the London Scheme).<sup>5</sup> The London Scheme is an arrangement of less than treaty status which applies between most Commonwealth countries.<sup>6</sup> The current requirements for extradition to and from Malaysia require the Requesting Party to provide a brief of evidence sufficient to establish a *prima facie* case.<sup>7</sup>
- 2.4 The current arrangements are no longer consistent with the Australian Government's adoption of the 'no evidence' policy for extradition which Australia has now incorporated into most of its bilateral extradition treaties.<sup>8</sup>
- 2.5 Under the no evidence approach, the Requesting Party must provide certain documents to support an extradition request.<sup>9</sup> The Committee was informed that:
- [A no evidence approach] still requires, as do all bilateral no evidence treaties, the provision of sufficient information to determine that the person is sought in the legitimate pursuit of the enforcement of the criminal law of the country making the request.<sup>10</sup>
- 2.6 The move away from the *prima facie* approach towards the no evidence approach is seen as a trend towards greater simplification of extradition matters and a no evidence standard for extradition requests.<sup>11</sup>

## Obligations

- 2.7 The key obligation of the Extradition Treaty with Malaysia is for both Parties to extradite to each other, pursuant to the terms of the Treaty, any persons who are wanted for prosecution, or the imposition or

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4 NIA, para. 5.

5 NIA, para. 4; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24.

6 NIA, para. 4; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24.

7 NIA, para. 4.

8 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24.

9 NIA, para. 10.

10 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 25.

11 NIA, para. 10; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, pp 24- 25.

enforcement of a sentence, in the Requesting Party for an extraditable offence.<sup>12</sup>

- 2.8 An 'extraditable offence' is detailed in Article 2 of the Extradition Treaty with Malaysia. Among other things, it provides that an extraditable offence must be punishable under the laws of both Australia and Malaysia for a period of not less than one year.<sup>13</sup> Where a request for extradition is made relating to a person convicted of an offence, at least six months of the sentence of imprisonment must remain to be served.<sup>14</sup>
- 2.9 In the case of an offence relating to taxation, customs duties, foreign exchange control or other revenue matters, extradition may not be refused on the ground that the laws of the Requested Party do not impose the same kind of tax or duty or do not contain a tax, duty, customs or exchange regulation of the same kind as the laws of the Requesting Party.<sup>15</sup>
- 2.10 If the offence has been committed outside the territory of the Requested Party, the extradition will be granted where the laws of the Requested Party provide for the punishment of an offence committed outside its territory in similar circumstances and if the requirements of extradition under the Treaty are otherwise met.<sup>16</sup>
- 2.11 To support a request for extradition, the no evidence approach requires the Requesting Party to provide:
- the details necessary to establish the identity and nationality of the person sought including, when possible, photographs and fingerprints and a statement of the current location of the person, if known;
  - a statement of each offence for which extradition is sought;
  - a statement of the acts and omissions which are alleged against the person in respect of each offence for which extradition is sought;
  - the text of the laws creating each offence;

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12 Article 1 Extradition Treaty with Malaysia.

13 Article 2(1) Extradition Treaty with Malaysia; NIA, para. 13.

14 Article 2(3) Extradition Treaty with Malaysia; NIA, para. 13.

15 Article 2(5) Extradition Treaty with Malaysia.

16 Article 2(6) Extradition Treaty with Malaysia.

- the text of the laws describing the penalty which may be imposed; and
  - a statement as to whether there is any limitation period in respect of proceedings or punishment.<sup>17</sup>
- 2.12 The Extradition Treaty with Malaysia provides for the provisional arrest of the person whose extradition is sought pending presentation of the request for extradition in situations of urgency.<sup>18</sup>
- 2.13 Where a person is the subject of an extradition request from more than one State, it is the decision of the Requested Party as to which State the person is to be extradited.<sup>19</sup> In making its decision, the Requested Party should, among other things, consider whether the request was made pursuant to a treaty, the time and place of each offence, the respective interests of the requesting States, the gravity of the offences and the nationality of the person sought.<sup>20</sup>
- 2.14 The Extradition Treaty with Malaysia contains the 'rule of speciality', the idea that a person can only be tried for the offence that they are extradited for.<sup>21</sup>
- Both the Extradition Act and the treaty have what is known as the speciality requirement. It is longstanding in extradition treaty law and practice...It sets out the requirement that, simplistically, you extradite a person back to face a particular charge. They cannot then be charged with completely unrelated offences without the consent of the party that agreed to the extradition.<sup>22</sup>
- 2.15 However, the rule of speciality can be waived with the consent of the Requested Party, where the person fails to leave the Requesting Party within 45 days of being free to do so, or having left, returns, and, where the offence is another extraditable offence of which the person could be convicted upon proof of the facts upon which the extradition was based, provided the offence does not carry a more severe penalty than that offence for which the extradition was sought.<sup>23</sup>

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17 Article 4 Extradition Treaty with Malaysia.

18 Article 8 Extradition Treaty with Malaysia; NIA, para. 18.

19 Article 9 Extradition Treaty with Malaysia; NIA, para. 19.

20 Article 9(2) Extradition Treaty with Malaysia.

21 Article 13 Extradition Treaty with Malaysia.

22 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 17.

23 Article 13(1)-(3)

- 2.16 Following an extradition, the Requesting Party is unable to re-extradite the person to a third State for trial or punishment for any offence that was committed before extradition to the Requesting Party without the consent of the Requested Party.<sup>24</sup>

## Human rights concerns

- 2.17 The Committee received a number of submissions concerned that human rights were not given sufficient consideration in the Extradition Treaty with Malaysia. The New South Wales Council for Civil Liberties (NSW CCL) was critical of the National Interest Analysis provided to the Committee by the Attorney-General's Department because of its failure to assess Malaysia's human rights record:

There is no assessment of the use of capital punishment, the fairness of criminal trials, the use of torture and compliance with other international human rights standards.<sup>25</sup>

- 2.18 The Human Rights and Equal Opportunity Commission (HREOC) reiterated these concerns but also recognised that 'concerns about Malaysia's human rights records do not, in and of themselves, provide a basis to refuse requests for extradition or mutual assistance.'<sup>26</sup> HREOC recommends that an extradition request should not be granted until the Australian Government is satisfied that there is no real risk that extradition may result in a breach of Australia's international obligations.<sup>27</sup>
- 2.19 Representatives from the Attorney-General's Department informed the Committee that although no specific assessment of Malaysia's human rights activities was undertaken prior to the negotiation of the Extradition Treaty with Malaysia, the treaty contains adequate human rights safeguards.

The Extradition Act itself includes a range of mandatory conditions which must be met before an extradition request

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24 Article 14 Extradition Treaty with Malaysia.

25 NSW CCL, *Submission 8*, p. 5.

26 HREOC, *Submission 12*, p. 2; reference to *Chipana v Venezuela* Committee Against Torture, Communication No. 110/1998, U.N. Doc. CAT/C/21/D/110/1998.

27 HREOC, *Submission 12*, p. 4.



will be granted. There is also a range of discretionary grounds upon which Australia can refuse to grant an extradition request. Underpinning all of that, the Minister or the Attorney making the decision has a remaining broad general discretion to refuse to grant an extradition request. Within the mandatory and discretionary grounds for refusal are covered all of Australia's international obligations in relation to the death penalty, torture and enforcement of the [International Covenant on Civil and Political Rights]. The Australian government has made a decision that it is appropriate to negotiate this treaty with Malaysia and that all of the grounds of refusal – both mandatory and discretionary and the general discretion – will provide sufficient and appropriate safeguards in that relationship.<sup>28</sup>

2.20 The Extradition Treaty with Malaysia provides a number of mandatory and discretionary grounds on which the Requested Party is able to refuse extradition.<sup>29</sup>

2.21 The Requested Party is obliged not to extradite a person:

- where the Requested Party determines that the request is politically motivated or regards the offence for which extradition is requested as being a political offence;
- if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person's race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status, or that that person's position may be prejudiced for any of those reasons;
- if the offence for which extradition is requested is regarded by the Requested Party as an offence under military law, but not an offence under the ordinary criminal law of the Requested Party;
- if, in respect of the offence for which the extradition of the person is requested: the person has been acquitted or pardoned under the laws of the Requested Party or a third state; the person has undergone the punishment provided by the laws of the Requested Party or a third state; or the person has been convicted under the laws of the Requested Party or a third state;

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28 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 27.

29 Article 3 Extradition Treaty with Malaysia.

- if the person, on being extradited to the Requesting Party, would be liable to be tried or sentenced in that Party by a court or tribunal that has been specially established for the purpose of trying the person's case; or
- if it may place the Requested Party in breach of its obligations under international treaties.<sup>30</sup>

2.22 The Requested Party has discretion not to extradite a person:

- if the person whose extradition is requested is a national of the Requested Party. Where the Requested Party refuses to extradite a national of that Party it shall, if the other Party so requests and the laws of the Requested Party allow, submit the case to the competent authorities with a view to having the person prosecuted under the laws of the Requested Party in respect of all or any of the offences for which extradition has been requested;
- if the offence for which extradition is requested is regarded under the laws of the Requested Party as having been committed in whole or in part within its jurisdiction;
- if a prosecution in respect of the offence for which extradition is requested is pending in the Requested Party against the person whose extradition is requested;
- if the competent authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is sought; or
- if the surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, particularly because of her or his age or state of health.<sup>31</sup>

## The death penalty

2.23 A number of submissions raised specific concerns regarding the death penalty in extradition requests, calling for a guarantee that the death

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30 Article 3(1) Extradition Treaty with Malaysia.

31 Article 3(3) Extradition Treaty with Malaysia.

penalty will not be imposed on a person who is the subject of an extradition request.<sup>32</sup>

2.24 The submission from Victoria Legal Aid drew attention to section 22(3)(c) of the *Extradition Act 1988* (Cth) (the Extradition Act). Section 22(3)(c) provides that an extradition request for an offence punishable by the death penalty will be refused unless the Requesting Country gives an undertaking that:

- the person will not be tried for the offence;
- if the person is tried for the offence, the death penalty will not be imposed on the person;
- if the death penalty is imposed on the person, it will not be carried out.

2.25 The Committee was informed by the Attorney-General's Department that the safeguards provided by the Extradition Act are also contained in the Extradition Treaty with Malaysia.

In this treaty, article 3 clause 2 has a specific requirement for consultation before any request is made for extradition of a person to face an offence which carries capital punishment. This clause enables Australia and Malaysia to come to an agreement as to the terms and conditions on which the person will be extradited, if at all. That enables us either to get an undertaking from Malaysia in accordance with the terms of section 22 of the Extradition Act or, alternatively, allows Malaysia to consider whether it wishes to change the charges for which it will seek the extradition to charges which do not carry the death penalty.<sup>33</sup>

## Implementation

2.26 The Extradition Treaty with Malaysia will be implemented through regulations under section 55 of the Extradition Act. The Extradition Act and regulations implement the terms of Australia's 34 other

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32 Law Institute Victoria, *Submission 7*, p. 1; Victoria Legal Aid, *Submission 10*, p. 3; Human Rights and Equal Opportunity Commission, *Submission 12*, p. 4.

33 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006 p. 29.

bilateral treaties on extradition and the terms of the Extradition Treaty with Malaysia are consistent with its safeguards and protections.<sup>34</sup>

## Costs

- 2.27 The Requesting Party bears the expense of transportation and document translation.<sup>35</sup> The Requested Party bears the expense of all other costs incurred in the Requested Party during extradition proceedings, such as through arrest and detention.<sup>36</sup>
- 2.28 The costs to be met by Australia will be met from the existing budgets of the Attorney-General's Department and the Commonwealth Director of Public Prosecutions.<sup>37</sup>

## Consultation

- 2.29 No public consultation occurred as negotiations with Malaysia on the Extradition Treaty were not in the public domain.<sup>38</sup> The Extradition Treaty with Malaysia was included on the schedule of the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) in January 2006 and SCOT met in May 2006. No comments were received by the Attorney-General's Department as a result of that meeting.<sup>39</sup>
- 2.30 In addition to writing to the Premiers and Chief Ministers of the States and Territories and the Presiding Officers of the State and Territory Parliaments, the Committee wrote to forty individuals and organisations inviting them to comment on both the Extradition Treaty with Malaysia and the Mutual Assistance Treaty with Malaysia. As a result of these invitations, the Committee received an additional seven submissions.<sup>40</sup>

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34 NIA, para. 26.

35 Article 16 Extradition Treaty with Malaysia; NIA, para. 27.

36 Article 16 Extradition Treaty with Malaysia; NIA, para. 27.

37 NIA, para. 27.

38 NIA, Consultation Annex, para. 2.

39 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 15.

40 The Committee received seven submissions as a result of its invitation from the: Office of the Privacy Commissioner, the Law Institute Victoria, the New South Wales Council for

## Conclusion and recommendation

- 2.31 The Committee recognises the key role extradition plays in building strong cooperative relationships between countries in the region to effectively combat transnational crime.

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### Recommendation 1

**The Committee supports the *Treaty between the Government of Australia and the Government of Malaysia on Extradition (Putrajaya, 15 November 2005)* and an *Exchange of Notes between the Government of Australia and the Government of Malaysia on the Treaty on Extradition (Kuala Lumpur, 7 December 2005)* and recommends that binding treaty action be taken.**

## Treaty between Australia and Malaysia on Mutual Assistance in Criminal Matters and an Exchange of Notes between Malaysia and Australia on the Treaty on Mutual Assistance in Criminal Matters

- 3.1 *The Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005) and an Exchange of Notes between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Kuala Lumpur, 7 December 2005) (the Mutual Assistance Treaty with Malaysia) creates a formal process enabling Australia and Malaysia to assist each other in investigations, prosecutions and proceedings related to criminal matters, including terrorism, drug trafficking, fraud, money laundering and people trafficking.<sup>1</sup>*

### **Background**

- 3.2 The National Interest Analysis (NIA) states:

Mutual assistance in criminal matters is a formal process whereby the Government of one country requests assistance from the Government of another country in relation to a

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1 National Interest Analysis (NIA), para. 3.

criminal investigation or prosecution of a serious crime. Assistance may also extend to locating, restraining and forfeiting the proceeds of criminal activity in the Requested Party's jurisdiction in relation to criminal activity that took place in the Requesting Party.<sup>2</sup>

- 3.3 Australia has similar mutual assistance treaties with 24 other countries.<sup>3</sup> The Mutual Assistance Treaty with Malaysia is based on Australia's mutual assistance in criminal matters treaty model which is based on the provisions of Australia's *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the Mutual Assistance Act).<sup>4</sup>
- 3.4 The Mutual Assistance Treaty with Malaysia will assist Australian efforts to combat transnational crime in the Asia-Pacific region.<sup>5</sup>

## Obligations

- 3.5 The key obligation of the Mutual Assistance Treaty with Malaysia is for both Parties to grant each other the widest measure of mutual assistance in connection with investigations, prosecutions and proceedings related to criminal matters over which the Requesting Party has jurisdiction at the time the assistance is requested.<sup>6</sup>
- 3.6 Assistance under the Mutual Assistance Treaty with Malaysia includes:
- taking of evidence, including testimony, documents, records and things, by way of judicial process;
  - taking of voluntary statements of persons;
  - providing relevant documents and records, including bank, financial, corporate or business records;

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2 NIA, para. 6.

3 NIA, para. 3; Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 24; NIA 'Australian bilateral mutual assistance agreements' Annex: Australia has mutual assistance agreements with Argentine Republic, Republic of Austria, Canada, Republic of Ecuador, Finland, French Republic, Greece, Hong Kong, Republic of Hungary, Republic of Indonesia, State of Israel, Republic of Italy, Republic of Korea, Grand Duchy of Luxembourg, United Mexican States, Monaco, Kingdom of the Netherlands, Republic of the Philippines, Republic of Portugal, Spain, Sweden, Switzerland, United Kingdom, United States of America.

4 NIA, para.5

5 NIA, para. 9.

6 Article 1(1) Mutual Assistance Treaty with Malaysia.

- locating and identifying persons;
- executing search and seizure;
- identifying, locating, restraining dealings in and forfeiting the instruments derived from or used in the commission of an offence and proceeds of crime;
- recovering pecuniary penalties in respect of an offence;
- seeking the consent of persons and making arrangements for such persons to give evidence or to assist in criminal investigations in the Requesting Party and, where such persons are in custody, arranging for their temporary transfer to the Requesting Party;
- effecting service of judicial and related documents;
- examining objects and sites, to the extent that it is not inconsistent with the laws of the Requested Party; and
- other assistance consistent with the objects of this Treaty which is not inconsistent with the laws of the Requested Party.<sup>7</sup>

3.7 Assistance under the Mutual Assistance Treaty with Malaysia does not include the arrest or detention of any person with a view to the extradition of that person or the extradition of any person; the enforcement in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the laws of the Requested Party and this Treaty; the transfer of persons in custody to serve sentences; and the transfer of proceedings in criminal matters.<sup>8</sup>

3.8 The Mutual Assistance Treaty with Malaysia provides a number of mandatory and discretionary grounds on which the Requested Party can refuse to provide assistance.<sup>9</sup>

3.9 The Requested Party must refuse to provide assistance where:

- the request relates to offences of a political character;
- the request relates to a military offence;
- the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the person has been

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7 Article 1(3) Mutual Assistance Treaty with Malaysia.

8 Article 1(4) Mutual Assistance Treaty with Malaysia.

9 Article 4 Mutual Assistance Treaty with Malaysia.



finally convicted, acquitted or pardoned or has undergone the punishment provided by the laws of that Requesting Party;

- the prosecution is on account of the person's race, sex, religion, nationality, ethnic origin or political opinion;
- it would prejudice the sovereignty, national security, national interest, public order or other essential interests of the Requested Party;
- there is an absence of dual criminality;
- the provision of assistance could prejudice an investigation, prosecution or proceedings of the Requested Party.<sup>10</sup>

3.10 The Requested Party may refuse to provide assistance where the provision of assistance could prejudice the safety of any person, where the provision of assistance could impose an excessive burden on the resources of the Requested Party, and where the prosecution or punishment is for an extraterritorial offence which would not be punishable under the laws of the Requested Party if it took place in similar circumstances outside the requested Party.<sup>11</sup>

## The death penalty

3.11 The NIA notes that Malaysia retains the death penalty for a wide range of offences.<sup>12</sup> The Committee received a number of submissions concerned that the provision of mutual assistance to Malaysia might result in the imposition of the death penalty.

3.12 The Law Institute of Victoria (LIV) policy's on this matter advocates the refusal of mutual assistance where the death penalty might arise unless a guarantee is given:

The LIV is opposed to the Australia Government, through the Australian Federal Police, providing mutual assistance in criminal matters to foreign jurisdictions which have the death penalty where such assistance may lead to the arrest of an Australian resident for an offence subject to punishment by

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10 NIA, para. 13; Article 4(1) Mutual Assistance Treaty with Malaysia;

11 Article 4(2) Mutual Assistance Treaty with Malaysia; NIA, para. 14.

12 NIA, para. 15.

death, unless an appropriate undertaking between the Australian and foreign government is given.<sup>13</sup>

- 3.13 The Human Rights and Equal Opportunity Commission (HREOC) proposed that mutual assistance should be refused if it exposes a person to the risk of the death penalty and at present, the risk of a person being exposed to the death penalty is not listed as a mandatory or discretionary ground for refusing assistance in the Mutual Assistance Treaty with Malaysia.<sup>14</sup>
- 3.14 However safeguards are provided through sections 8(1A) and 8(1B) of the Mutual Assistance Act and are applicable through Article 1(1) of the Mutual Assistance Treaty with Malaysia which provides that Parties will provide mutual assistance to each other 'in accordance with their respective laws'.<sup>15</sup>
- 3.15 Section 8(1A) of the Mutual Assistance Act provides that a request for mutual assistance *must* be refused if it relates to the prosecution or punishment of a person where the death penalty may be imposed, unless the Attorney-General, having regard to the special circumstances of the case, is of the opinion that the assistance should be granted.<sup>16</sup>
- 3.16 Section 8(1B) of the Mutual Assistance Act provides that a request for mutual assistance *may* be refused if the Attorney-General believes that the provision of assistance may result in the death penalty being imposed and, having taken into consideration the interests of international criminal cooperation, is of the opinion that assistance should not be granted.<sup>17</sup>
- 3.17 The Committee is satisfied that the Mutual Assistance Treaty with Malaysia and the Mutual Assistance Act provide adequate safeguards to ensure that the provision of assistance by Australia will not inadvertently result in the imposition of the death penalty.

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13 The Law Institute Victoria, *Submission 7*, p. 1.

14 Human Rights and Equal Opportunity Commission, *Submission 12*, p. 6.

15 NIA, paras 15 and 16.

16 NIA, para. 15.

17 NIA, para. 15.

## Mutual assistance and police-to-police assistance

- 3.18 The Committee is aware that mutual assistance in criminal matters is often confused with assistance provided under police-to-police agreements. However, there are distinct differences between police-to-police assistance and mutual assistance.

The primary distinction is that the mutual assistance arrangements allow governments to make requests to another government for that government to exercise coercive powers to obtain evidence or information for the purposes of an investigation or a prosecution. The range of other agency-to-agency relationships, which are usually done in the form of a memorandum of understanding – they are not treaty-status documents – are for essentially the voluntary exchange of information. None of those arrangements can include arrangements for the use of coercive powers.<sup>18</sup>

- 3.19 Mutual assistance and police-to-police assistance were commonly confused in media reports of the arrest of the ‘Bali Nine’ by Indonesian police. For instance, the submission from the New South Wales Council for Civil Liberties (NSW CCL) referred to a media report that suggested that evidence obtained through coercive procedures, such as the execution of a search warrant on Myuran Sukumaran’s Sydney home on 26 April 2005, was handed to Indonesian officials voluntarily.<sup>19</sup>

- 3.20 If correct, this would mean that the Australian Federal Police passed on information obtained through coercive means to the Indonesian National Police outside of the mutual assistance framework. However, the Australian Federal Police informed the Committee that this media report was in fact incorrect.

The Australian Federal Police categorically refute this allegation. All information provided to the Indonesian National Police was obtained through voluntary means.<sup>20</sup>

- 3.21 Representatives from the Attorney-General’s Department later reiterated that the AFP cannot provide assistance to another country on a police-to-police basis which requires the exercise of coercive

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18 Ms Joanne Blackburn, *Transcript of Evidence*, 19 June 2006, p. 33.

19 NSW Council for Civil Liberties, *Submission 8*, p. 3.

20 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 3.

powers.<sup>21</sup> The AFP also cannot voluntarily share information which has been obtained using coercive powers for the purposes of an Australian investigation in the absence of a mutual assistance request.<sup>22</sup>

## Police-to-police assistance and the death penalty

3.22 Under AFP guidelines, police-to-police assistance can be provided, without reference to the Minister, until charges are laid for the offence, even where there is the potential that the investigation will result in a charge for which the death penalty can be imposed.<sup>23</sup> After charges have been laid for which the death penalty can be imposed, the general rule is that no information is to be shared under police-to-police agreements. However, under the AFP guidelines, the Minister for Justice and Customs can allow police-to-police assistance to continue.<sup>24</sup>

3.23 The Committee was informed that prior to a charge being laid, the AFP does not attempt to second-guess the likely outcome of an investigation.

...generally speaking, we would not refuse a police-to-police request because there was a potential that one of the persons subject to the investigation may be subject to a charge that could attract the death penalty some time at a later date.<sup>25</sup>

3.24 The Committee was concerned that some investigations in particular countries can only result in a limited number of outcomes, for instance, successful drug trafficking investigations are very likely to result in the death penalty in particular countries.

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21 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 4.

22 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 6.

23 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 5; Australian Federal Police, *Exhibit 3-AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, p. 2.

24 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 5; Australian Federal Police, *Exhibit 3-AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, p. 2.

25 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 8.

- 3.25 Conditions are sometimes attached to the use of information provided through police-to-police agreements however the Committee was informed that this was not normal practice.<sup>26</sup>
- 3.26 The Committee remains concerned that information shared lawfully through police-to-police assistance may inadvertently result in the imposition of the death penalty. However, this matter is outside the scope of the Committee's inquiry into the Mutual Assistance Treaty with Malaysia.

## Human rights

- 3.27 HREOC's submission to the Committee's inquiry was concerned that the provision of mutual assistance could result in a breach of a person's human rights in the Requesting Country. In particular, HREOC pointed out that Malaysia has not signed or ratified the *International Covenant on Civil and Political Rights (ICCPR)*, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* or the *Convention Relating to the Status of Refugees (the Refugee Convention)*. To ensure that Australia did not breach its international obligations by granting a request of mutual assistance HREOC recommended:

Mutual assistance shall not be granted unless the Requested Country has made reasonable inquiries to satisfy itself that there is no real risk that providing assistance may result in a breach of a person's rights under the ICCPR, CAT or the Refugee Convention.<sup>27</sup>

- 3.28 The Attorney-General's Department informed the Committee that although no specific assessment of Malaysia's human rights record was undertaken, the terms of the Mutual Assistance Act cover Australia's international obligations.

...the Extradition Act and the Mutual Assistance Act contain within their provisions both full reflection of Australia's international human rights obligations and a wide range of safeguards which are applied on a case-by-case basis to

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26 Federal Agent Tim Morris, *Transcript of Evidence*, 4 September 2006, p. 7.

27 HREOC, *Submission 12*, p. 3.

determine whether in the particular case the extradition or the mutual assistance will be granted.<sup>28</sup>

- 3.29 As mentioned above, these provisions are sections 8(1A) and 8(1B) of the Mutual Assistance Act and Article 1(1) of the Mutual Assistance Treaty with Malaysia. The Committee is satisfied that the Mutual Assistance Treaty with Malaysia and the Mutual Assistance Act provide adequate human rights safeguards.

## Costs

- 3.30 The Requested Party bears all ordinary costs associated with providing assistance under the Mutual Assistance Treaty with Malaysia.<sup>29</sup> Australia and Malaysia are to consult if, during the course of executing a request, it becomes apparent that expenses of an extraordinary or substantial nature will be necessary to fulfil the request.<sup>30</sup>
- 3.31 The costs incurred by Australia will be met from the existing budget of the Attorney-General's Department.<sup>31</sup>

## Implementation

- 3.32 The terms of the Mutual Assistance Treaty with Malaysia will be implemented through regulations under the Mutual Assistance Act.<sup>32</sup> The Mutual Assistance Act and regulations implement the terms of Australia's 24 other bilateral mutual assistance treaties and the terms of the Mutual Assistance Treaty with Malaysia are consistent with the terms of the Mutual Assistance Act.<sup>33</sup>

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28 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 11.

29 Article 23 Mutual Assistance Treaty with Malaysia.

30 NIA, para. 21.

31 NIA, para. 22.

32 NIA, para. 26.

33 NIA, para. 20.

## Consultation

- 3.33 No public consultation occurred as negotiations with Malaysia on the Mutual Assistance Treaty were not in the public domain.<sup>34</sup> The Mutual Assistance Treaty with Malaysia was included on the schedule of the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) in January 2006 and SCOT met in May 2006. No comments were received by the Attorney-General's Department as a result of that meeting.<sup>35</sup>
- 3.34 In addition to writing to the Premiers and Chief Ministers of the States and Territories and the Presiding Officers of the State and Territory Parliaments, the Committee wrote to forty individuals and organisations inviting them to comment on both the Extradition Treaty with Malaysia and the Mutual Assistance Treaty with Malaysia. As a result of these invitations, the Committee received an additional seven submissions.<sup>36</sup>

## Conclusion and recommendation

- 3.35 The Committee recognises the importance of international cooperation in combating transnational crime and supports the establishment of a framework which will ensure Australia and Malaysia can provide and receive timely assistance in accordance with clearly defined and mutually agreed terms.

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34 NIA, Consultation Annex, para. 2.

35 Ms Joanne Blackburn, *Transcript of Evidence*, 4 September 2006, p. 15.

36 The Committee received seven submissions as a result of its invitation from the: Office of the Privacy Commissioner, the Law Institute Victoria, the New South Wales Council for Civil Liberties, the Australian Federal Police, Victoria Legal Aid, the Human Rights and Equal Opportunity Commission and the Solicitor-General.

## **Recommendation 2**

**The Committee supports the *Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters (Putrajaya, 15 November 2005)* and an *Exchange of Notes between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Kuala Lumpur, 7 December 2005)* and recommends that binding treaty action be taken.**





# Double Taxation Conventions with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol with France and Norway

## Introduction

- 4.1 This chapter reviews two double taxation conventions with respect to taxes on income and the prevention of fiscal evasion and protocol with the Governments of France and Norway. These conventions are:
- *Convention between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol, done at Paris on 20 June 2006 (French Convention); and the*
  - *Convention between the Government of Australia and the Government of the Kingdom of Norway for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, done at Canberra on 8 August 2006 (Norwegian Convention).*
- 4.2 The French Convention will replace the 1976 Australia-France tax Agreement as amended by the 1989 protocol and the 1979 Australia-France Airline Profits Agreement.<sup>1</sup> The Norwegian Convention will replace the 1982 Australia-Norway Convention.<sup>2</sup> The Conventions

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1 French Convention National Interest Analysis (FCNIA), para. 2.

2 Norwegian Convention National Interest Analysis (NCNIA), para. 2.

reflect changes in tax treaty policy and business practice and follow the recommendations of the Board of Taxation's Review of International Tax Arrangements.<sup>3</sup>

## Purpose of the Conventions

- 4.3 Both Conventions will reduce rates of withholding taxes on dividends, interest and royalties and bring into line the treatment of capital gains tax with OECD<sup>4</sup> practice and its improved integrity measures. This includes rules to allow for the cross-border collection of tax debts and rules for the exchange of information on tax matters.<sup>5</sup>
- 4.4 The Conventions are expected to: meet Australia's most favoured nation obligations with both France and Norway; reduce barriers to trade and investment caused by overlapping taxing jurisdictions between Parties thus promoting closer economic cooperation with France and Norway; and help prevent tax evasion.<sup>6</sup>
- 4.5 Reduced withholding tax rates on interest and royalty payments will make it cheaper for Australian businesses to obtain business loans and intellectual property from France and Norway. The Conventions will also reduce the withholding tax rate on dividend payments from an Australian subsidiary to its parent company in both France and Norway. This is expected to encourage businesses in France and Norway to directly invest in Australia.<sup>7</sup>
- 4.6 A representative of the Treasury informed the Committee of the purpose of the Conventions:
- Firstly, they aim to promote the flow of investment, trade and skilled personnel between the two countries by eliminating double taxation and providing a reasonable element of legal and fiscal certainty for commerce between the respective countries. Secondly, they aim to improve the integrity of the tax system by creating a framework through which tax administrations of both countries can prevent international

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3 Mr Michael Rawstron, *Transcript of Evidence*, 11 September 2006, p. 3.

4 Organisation for Economic Cooperation and Development

5 FCNIA and NCNIA, para. 4.

6 FCNIA and NCNIA, para. 5; Mr Michael Rawstron, *Transcript of Evidence*, 11 September 2006, pp. 3-4.

7 FCNIA and NCNIA, para. 5; Mr Michael Rawstron, *Transcript of Evidence*, 11 September 2006, pp. 3-4.

fiscal evasion and eliminate double taxation. Thirdly, they aim to develop and improve bilateral relations with the countries concerned. Fourthly, they aim to maintain Australia's position in the international tax community. At the highest level, these treaties form part of the network of tax treaties that ultimately support Australia's geopolitical, strategic, security and regional interests.<sup>8</sup>

## Consultation

- 4.7 The Board of Taxation conducted a Review of International Taxation Arrangements on the direction of Australia's tax treaty policy. The Board's recommendations supported a move towards a more residence-based treaty policy in substitution for treaty policies (reflected in most of Australia's treaties, including the existing 1976 Australia-French treaty and the 1982 Australia-Norway Convention) based on the source taxation of income.<sup>9</sup>
- 4.8 Consultation with the business community occurred through the Tax Treaties Advisory Panel<sup>10</sup> and submissions from stakeholders and the wider community were invited in November 2003. Business and industry groups generally supported similar outcomes to those in the 2003 United Kingdom Tax Convention and the 2001 United States Protocol. The conventions provide similar outcomes to those treaties.<sup>11</sup>
- 4.9 States and Territory Governments were consulted via the Commonwealth-State/Territory Standing Committee on Treaties in October 2003.<sup>12</sup>

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8 Mr Michael Rawstron, Transcript of Evidence, 11 September 2006, pp. 2-3.

9 FCNIA and NCNIA, Attachment A, Consultation Annex, para. 1.

10 Members include: Business Council of Australia, CPA Australia, Corporate Tax Association, Institute of Chartered Accountants, International Fiscal Association, Investment and Financial Services Association, Law Council of Australia, Minerals Council of Australia, Taxation Institute of Australia, FCNIA and NCNIA, Attachment A, Consultation Annex, para. 2.

11 FCNIA and NCNIA, Attachment A, Consultation Annex, paras. 2 and 3.

12 FCNIA and NCNIA, Attachment A, Consultation Annex, para. 4.

## Costs

- 4.10 The net economic cost of the French Convention, calculated by offsetting the cost to revenue with the reduction in business costs and gains in revenue resulting from it, is expected to be approximately A\$5 million annually.<sup>13</sup>
- 4.11 Costs associated with the Norwegian Convention are expected to be negligible. Compliance costs are expected to be reduced and administrative costs associated with implementing the Norwegian Convention will be managed within the Australian Taxation Office and Treasury budgets.<sup>14</sup>
- 4.12 Treasury expects that the proposed interest withholding tax rate changes will reduce the effective cost of borrowing as Australian borrowers bear the burden of tax through gross-up<sup>15</sup> clause arrangements.<sup>16</sup>
- 4.13 As a result of the reduction in the cost of borrowing from France and Norway, Treasury expects that the conventions could lead to increased economic activity and foreign investment in Australia. The increase in economic activity is likely to lead to increases in other forms of tax collection.<sup>17</sup>

## Legislation

- 4.14 The *International Tax Agreements Act 1953* will be amended to include the Conventions as a schedule.<sup>18</sup>

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13 FCNIA, paras. 20 and 21.

14 NCNIA, paras 21 and 22.

15 While French and Norwegian companies would be liable for the interest and royalty income earned in Australia as a result of investment, contracts are often structured so that the Australian company absorbs the tax. The commercial practice of absorbing this tax is referred to as gross-up clause arrangements. FCNIA and NCNIA, para. 10.

16 FCNIA and NCNIA, para. 10.

17 FCNIA and NCNIA, para. 25.

18 FCNIA, para. 19 and NCNIA, para. 20.

## Entry into force and withdrawal

- 4.15 The French Convention will enter into force on the first day of the second month following the date of receipt of last notification after both Parties' domestic requirements have been met.<sup>19</sup>
- 4.16 The Norwegian Convention will enter into force on the date of receipt of the last notification that Parties' domestic requirements have been met. Parties must identify in an exchange of notes when Article 27 (assistance in collection of tax debts) will come into effect.<sup>20</sup>
- 4.17 Either Party may withdraw from either convention by giving at least six months notice before the end of any calendar year after 5 years from the convention's entry into force.<sup>21</sup> The French Convention would then cease to be effective at various times in the next calendar year.<sup>22</sup> The Norwegian Convention would then cease to be effective for different types of income from either 1 January or July in the following calendar year.<sup>23</sup>

## Future double taxation treaties

- 4.18 The Department of Treasury informed the Committee that approximately six double taxation agreements have been identified for revision and two are currently under consideration.<sup>24</sup>

## Conclusion and recommendations

- 4.19 The Committee acknowledges that the French and Norwegian Conventions are expected to reduce barriers to trade and investment by overcoming the difficulty of Parties overlapping taxing jurisdictions and aiding in the prevention of tax evasion.

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19 FCNIA, para. 1.

20 NCNIA, para. 1.

21 FCNIA, para. 27 and NCNIA, para. 28.

22 FCNIA, para. 27.

23 NCNIA, para. 27.

24 Mr Paul McBride, *Transcript of Evidence*, 11 September 2006, p. 6.

**Recommendation 3**

**The Committee supports the *Convention between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion and Protocol, done at Paris on 20 June 2006* and recommends that binding treaty action be taken.**

**Recommendation 4**

**The Committee supports the *Convention between the Government of Australia and the Government of the Kingdom of Norway for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, done at Canberra on 8 August 2006* and recommends that binding treaty action be taken.**

## Amendments to the Annex to the Agreement with China for the Protection of Migratory Birds and their Environment

## Amendments to the Annex to the Agreement with Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment

### Introduction

5.1 This chapter reviews two treaty actions that amend existing agreements on the protection of migratory birds and their environment with the Governments of China and Japan. These treaty actions are:

- *Amendments, agreed at Shanghai on 26 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, done at Canberra on 20 October 1986 (CAMBA Amendments); and the*
- *Amendments, agreed at Shanghai on 25 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, done at Tokyo on 6 February 1974 (JAMBA Amendments).*



## Background

- 5.2 Australia has led the conservation of migratory birds throughout the East Asian – Australasian Flyway<sup>1</sup> through the Asia Pacific Migratory Waterbird Conservation Strategy 1996-2005<sup>2</sup> and continues to do so as one of the initiating partners of the WSSD<sup>3</sup> Type II Partnership<sup>4</sup> for Migratory Waterbirds in the East Asian – Australasian Flyway. Australia is in the process of finalising an agreement with the Republic of Korea (ROKAMBA), which is similar to CAMBA and JAMBA.<sup>5</sup> A representative of the Department of Environment and Heritage (DEH) informed the Committee that ROKAMBA would come before the Committee early in 2007.<sup>6</sup>
- 5.3 In relation to Australia’s involvement in the Type II Partnership for Migratory Waterbirds in the East Asian – Australasian Flyway, DEH informed the Committee:

Australia’s policy position and philosophy on conservation of migratory birds and migratory shorebirds in particular have been that we need to work cooperatively across the entire range of the migration of these species. In the early nineties we pursued, through the Ramsar convention and also under the two bilateral agreements that are being considered today, a regional cooperative framework which was a very informal framework. It was known as the Asia-Pacific Migratory Waterbird Conservation Strategy. The Australian government has provided some significant funding to that and particularly to work on shorebirds under that. It has had some success. It has certainly been a very useful mechanism, but one of the major limiting factors has been that there has

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- 1 A flyway is the route that a migratory bird travels, including places where birds rest and feed along their journey. The East Asian - Australasian Flyway extends from within the Arctic Circle through South-east Asia to Australia and New Zealand. Department of the Environment and Heritage, viewed 15 September 2006, <[www.deh.gov.au](http://www.deh.gov.au)>.
- 2 This Strategy addresses major migratory waterbird conservation issues in the Asia-Pacific region and broadly covers the breeding, staging and non-breeding areas of migratory birds using its flyways. It covers the Asian continent east of the Ural mountains and Sea of Azov, south to the Caspian Sea and Persian Gulf across all the countries of Asia and the former Soviet Union, to Alaska (USA), Australasia, and island countries and territories of the Pacific Ocean east to the Pitcairn Islands. The Department of Transport and Regional Services, viewed 15 September 2006, <[www.daf.gov.au](http://www.daf.gov.au)>.
- 3 WSSD is the World Summit on Sustainable Development.
- 4 The Type II Partnership is explained in paragraph 5.3.
- 5 CAMBA National Interest Analysis (CNIA), para. 4 and JAMBA National Interest Analysis (JNIA), para. 3.
- 6 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 10.

been limited government buy-in across the flyway into the work. So when the world summit came along in 2002 we saw an opportunity to marry the sustainable development issues from that summit to the biodiversity work of the flyway. Australia and Japan, working with a non-government organisation, Wetlands International, put forward a proposal for what is called a type II partnership to shift the level of formality, if you like, of the flyway work up just one notch. It is still very much a voluntary arrangement, but at least in this new arrangement, which we hope to have endorsed by the countries of the flyway and up and running later this year, we hope to have government level buy-in and commitment to work on migratory waterbird conservation across the range, from their breeding grounds in Alaska through to Russia, China, down through East Asia and South-East Asia, and through to Australia and New Zealand.<sup>7</sup>

- 5.4 Both CAMBA and JAMBA Amendments oblige Contracting Parties to protect bird species (and their environments), which regularly migrate between Australia and China, and Australia and Japan.<sup>8</sup>
- 5.5 The CAMBA Amendments were agreed upon by Australia and China at the 7<sup>th</sup> Consultative Meeting on the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, which entered into force on 1 September 1988.<sup>9</sup>
- 5.6 The JAMBA Amendments were agreed upon by Australia and Japan at the 13<sup>th</sup> Consultative Meeting on the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, which entered into force on 30 April 1981.<sup>10</sup>

## Purpose of the Amendments

- 5.7 The CAMBA Amendments change the Annex to CAMBA to add the Roseate Tern (*Sterna dougalli*) and remove the Painted Snipe

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7 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 11.

8 CNIA, para. 7 and JNIA, para. 6.

9 CNIA, para. 1.

10 JNIA, para. 1.

(*Rostratula benghalensis*). The scientific nomenclature of 17 species currently listed in the Annex will also be amended.<sup>11</sup> Nomenclature changes to CAMBA are included in Table 1.<sup>12</sup>

Table 1 – CAMBA nomenclature changes

Common name	Current Scientific Nomenclature	Proposed Scientific Nomenclature
Streaked Shearwater	<i>Puffinus leucomelas</i> ( <i>Calonectris leucomelas</i> )	<i>Calonectris leucomelas</i>
Cattle Egret	<i>Bubulcus ibis</i> ( <i>Ardeola ibis</i> )	<i>Bubulcus ibis</i> ( <i>Ardea ibis</i> )
Great Egret	<i>Egretta alba</i>	<i>Egretta alba</i> ( <i>Ardea alba</i> )
Lesser Golden Plover	<i>Pluvialis dominica</i>	<i>Pluvialis fulva</i>
Little Curlew	<i>Numenius borealis</i> ( <i>Numenius minutus</i> )	<i>Numenius minutus</i>
Common Sandpiper	<i>Tringa hypoleucos</i>	<i>Actitis hypoleucos</i>
Grey-tailed Tattler	<i>Tringa incana</i> ( <i>Tringa brevipes</i> )	<i>Heteroscelus brevipes</i>
Terek Sandpiper	<i>Xenus cinereus</i> ( <i>Tringa terek</i> )	<i>Xenus cinereus</i>
Latham's Snipe	<i>Capella hardwickii</i> ( <i>Gallinago hardwickii</i> )	<i>Gallinago hardwickii</i>
Pin-tailed Snipe	<i>Capella stenura</i> ( <i>Gallinago stenura</i> )	<i>Gallinago stenura</i>
Swinhoe's Snipe	<i>Capella megala</i> ( <i>Gallinago megala</i> )	<i>Gallinago megala</i>
Sanderling	<i>Crocethia alba</i> ( <i>Calidris alba</i> )	<i>Calidris alba</i>
Grey Phalarope	<i>Phalaropus fulicarius</i>	<i>Phalaropus fulicarius</i> ( <i>Phalaropus fulicaria</i> )
White-winged Tern	<i>Chlidonias leucoptera</i>	<i>Chlidonias leucopterus</i>
Caspian Tern	<i>Hydroprogne tschegrava</i> ( <i>Hydroprogne caspia</i> )	<i>Hydroprogne caspia</i> ( <i>Sterna caspia</i> )
Greater Striated Swallow	<i>Hirundo striolata</i>	<i>Hirundo striolata</i> ( <i>Hirundo daurica</i> )
Great Reed-warbler	<i>Acrocephalus arundinaceus</i>	<i>Acrocephalus orientalis</i>

11 CNIA, para. 2.

12 CNIA, treaty text.

5.8 The JAMBA Amendments change the Annex to JAMBA to add the Roseate Tern (*Sterna dougalli*) and update the scientific nomenclature of 14 species currently listed in the Annex.<sup>13</sup> Nomenclature changes to JAMBA are included in Table 2.<sup>14</sup>

Table 2 – JAMBA nomenclature changes

Common name	Current Scientific Nomenclature	Proposed Scientific Nomenclature
Cattle Egret	<i>Ardeola ibis</i>	<i>Bubulcus ibis</i> ( <i>Ardea ibis</i> )
Great Egret	<i>Egretta alba</i>	<i>Egretta alba</i> ( <i>Ardea alba</i> )
Oriental Plover	<i>Charadrius veredus</i>	<i>Charadrius veredus</i> ( <i>Charadrius asiaticus veredus</i> )
Lesser Golden Plover (Pacific Golden Plover)	<i>Pluvialis dominica</i>	<i>Pluvialis fulva</i>
Sanderling	<i>Calidris alba</i>	<i>Calidris alba</i> ( <i>Crocethia alba</i> )
Grey-tailed Tattler	<i>Tringa brevipes</i>	<i>Heteroscelus brevipes</i>
Wandering Tattler	<i>Tringa incana</i>	<i>Heteroscelus incanus</i>
Common Sandpiper	<i>Tringa hypoleucos</i>	<i>Actitis hypoleucos</i>
Terek Sandpiper	<i>Tringa terek</i>	<i>Xenus cinereus</i>
Grey Phalarope	<i>Phalaropus fulicarius</i>	<i>Phalaropus fulicarius</i> ( <i>Phalaropus fulicaria</i> )
South Polar Skua	<i>Stercorarius maccormicki</i>	<i>Catharacta maccormicki</i>
Long-tailed Jaeger	<i>Stercorarius longicauda</i>	<i>Stercorarius longicaudus</i>
White-winged Tern	<i>Chlidonias leucoptera</i>	<i>Chlidonias leucopterus</i>
Caspian Tern	<i>Hydroprogne caspia</i>	<i>Hydroprogne caspia</i> ( <i>Sterna caspia</i> )

5.9 Australia proposed the addition of the Roseate Tern following a bird banding and colour flagging study, which demonstrated that it regularly and predictably migrates between Swain Reef,

13 JNIA, para. 1.

14 JNIA, treaty text.

Queensland<sup>15</sup> and Chinese Taipei and Swain Reef and Okinawa, Japan.<sup>16</sup>

- 5.10 Australia proposed the removal of the Painted Snipe from the CAMBA Annex following a taxonomic study that revealed that Painted Snipe found in Australia are a different species to those found in Asia. Therefore, the species does not migrate between Australia and China and should not be included under CAMBA. The Painted Snipe is already protected and included as a threatened species under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Its removal from CAMBA will not lessen the protection afforded to the species and its habitat.<sup>17</sup>
- 5.11 Changes to nomenclature reflects taxonomy progress since CAMBA and JAMBA entered into force, and ensures that the scientific names of the species reflect the scientific names currently recognised by Contracting Parties for all species in the Annexes.<sup>18</sup>
- 5.12 Collectively, the Amendments ensure the accuracy of the Annexes to CAMBA and JAMBA and the accuracy of the list of migratory species under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).<sup>19</sup>

## Obligations

- 5.13 Under both CAMBA and JAMBA, Contracting Parties are prohibited to take, sell, purchase or exchange migratory birds or their eggs, except in the following cases:
- for scientific, educational, propagative or other specific purposes not inconsistent with the objectives of the Amendments
  - for the purpose of protecting persons and property
  - during hunting seasons established in accordance with Article II(3) and

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15 The Swain Reef is located at the southern end of the Great Barrier Reef system and is located about 10 nautical miles offshore with the closest mainland town being Gladstone or Rockhampton. Mr Jason Ferris and Dr Anna Lashko, *Transcript of Evidence*, 11 September 2006, p. 9.

16 CNIA, para. 11 and JNIA, para. 8; Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 9.

17 CNIA, paras 9 and 10.

18 CNIA, para. 5 and JNIA, para. 4.

19 CNIA, para. 6 and JNIA, para. 5.

- to allow the hunting and gathering of specified migratory birds or their eggs by the inhabitants of specified regions who have traditionally carried on such activities for their own food, clothing or cultural purposes, provided that the population of each species is maintained in optimum numbers and that adequate preservation of the species is not prejudiced.<sup>20</sup>
- 5.14 Contracting Parties are obliged to protect the species listed in the Annexes to CAMBA and JAMBA and to take measures to preserve and enhance the species' environment.<sup>21</sup>
- 5.15 Contracting Parties are obliged to undertake joint research programs and to exchange data and publications relating to species listed on the Annexes to CAMBA and JAMBA.<sup>22</sup>

## China and Japan's obligations under the Conventions

- 5.16 The Committee was interested to understand how China and Japan would fulfil their obligations under CAMBA and JAMBA. In relation to CAMBA DEH stated:

... these are birds that are found in sandy caves and areas that are not frequented by humans. In fact, the on-ground actions that are required to achieve the requirements of the agreement for this particular species are very limited. Australia will not be doing much because we have a population that is secure on Swain Reef and, apart from continuing our research effort to understand what is going on with that population and its movements, there is not much that we need to do in terms of protecting that population. I understand that the situation is similar in China.<sup>23</sup>

I think there is probably still some take of migratory birds in China, but I do not know that we have any data on the level of take.<sup>24</sup>

- 5.17 In relation to JAMBA, DEH stated:

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20 CNIA, para. 17 and JNIA, para. 12.

21 CNIA, para. 18 and JNIA, para. 13.

22 CNIA, para. 19 and JNIA, para. 14.

23 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 12.

24 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 13.

We have close contact with our Japanese colleagues in particular and they have national plans for migratory waterbird conservation and they have done some very high profile work for some of their migratory birds that do not come to Australia – for instance, cranes, which have iconic status, are used very effectively to achieve the communication messages about conservation of migratory birds.<sup>25</sup>

## Other issues

- 5.18 DEH informed the Committee about the type of research that is undertaken in respect to the Roseate Tern:

The Japanese put bands on about 8,000 birds and 97 of those have been recovered in Australia. Referring to the publication on this work that Dr Paul O'Neill published in the journal *Emu*, he reports that they did their first work in 1999 and then each year. They have captured some 3,731 birds, which includes the foreign-marked birds.<sup>26</sup>

- 5.19 In addition, DEH stated:

We have been aware of there being large numbers of roseate terns in the Swain Reef during the summer months for quite a while. But nobody had been capturing or banding them to know where they might be coming from. I think the first trip where they captured roseate terns was only in 2001; that trip was when the first birds that had been banded in Japan were captured.<sup>27</sup>

- 5.20 In relation to the number of birds that migrate annually, DEH informed the Committee:

We have reasonable numbers for some of the species of shorebirds, but with seabirds like terns it is much more difficult. Marking a large number of the population gives us the ability to estimate the likely size of the population, but I do not believe that the data is there yet to estimate the roseate tern population that has migrated.<sup>28</sup>

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25 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 13.

26 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 10.

27 Dr Anna Lashko, *Transcript of Evidence*, 11 September 2006, p. 14.

28 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 11.

- 5.21 The Committee was also interested to learn about the capacity of migratory birds to carry avian influenza. DEH informed the Committee:

There is some capacity, but the main species of concern elsewhere in the world are ducks, geese and swans. They are considered to be the natural reservoirs of avian influenza viruses generally. Their role in acting as a vector for the H5N1 highly pathogenic avian influenza is not well known; there is only circumstantial evidence of their acting as vectors for that particular subtype of the disease. Fortunately, we do not have large movements of ducks, geese and swans in and out of Australia, so our migratory shorebirds, which are the ones you have just mentioned, are a group that, while they do carry avian influenza viruses, carry the viruses at a much lower level and are therefore considered a much lower risk.<sup>29</sup>

## Consultation

- 5.22 The Australian Government consulted with Commonwealth, State and Territory agencies<sup>30</sup> in relation to the Annexes to CAMBA and JAMBA.<sup>31</sup>
- 5.23 The Department of the Environment and Heritage consulted with the Natural Resource Management Wetlands and Waterbirds Taskforce<sup>32</sup> (the Taskforce) and provided a paper to the Taskforce meeting in November 2004 summarising the state of affairs for Australia's bilateral migratory bird agreements. This paper included the proposed amendments to the Annexes to CAMBA and JAMBA.<sup>33</sup>

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29 Mr Jason Ferris, *Transcript of Evidence*, 11 September 2006, p. 10.

30 These agencies are: Land Water and Coasts Division, Australian Government Department of the Environment and Heritage, Department of Primary Industries Water and Environment (Tasmania), Department of Primary Industries (Victoria), Department for Environment and Heritage (South Australia), Department of Conservation and Land Management (Western Australia), Department of Environment and Conservation (New South Wales), Department of Infrastructure, Planning and Natural Resources (New South Wales), Environmental Protection Agency (Queensland), Department of Natural Resources, Environment and the Arts (Northern Territory), and Environment ACT.

31 JNIA and CNIA, Consultation Annex, para. 1.

32 The task force comprises the agencies listed.

33 JNIA and CNIA, Consultation Annex, para. 2.



- 5.24 The Queensland Environmental Protection Agency supported the addition of the Roseate Tern to the Annexes to CAMBA and JAMBA and was responsible for the research used to determine that Roseate Terns regularly migrate between Australia and Chinese Taipei and Australia and Japan. No agencies raised any concerns regarding the CAMBA and JAMBA Amendments.<sup>34</sup>

## Costs

- 5.25 No additional costs are expected for Australia to meet its obligations under the CAMBA and JAMBA Amendments.<sup>35</sup>

## Legislation

- 5.26 The EPBC Act will be amended to update the list of migratory species pursuant to Division 2 of Part 13 of the EPBC Act.<sup>36</sup>

## Entry into force and withdrawal

- 5.27 The Amendments will enter into force 90 days after the date upon which each Party informs the other through diplomatic notes that it accepts the Amendments.<sup>37</sup>
- 5.28 Further amendment to the Annexes would require agreement between Contracting Parties. The Annexes may be amended by the addition of species where there is reliable evidence of migration of a species between Australia and China and Australia and Japan. The removal of species from the Annexes would require evidence that a species does not migrate between Australia and China or Australia and Japan.<sup>38</sup>
- 5.29 Either party may give 12 months written notice to terminate CAMBA or JAMBA at the end of the initial 15-year period or at any time thereafter.<sup>39</sup>
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34 JNIA and CNIA, Consultation Annex, paras 2 and 3.

35 CNIA, para. 24 and JNIA, para. 18.

36 CNIA, para. 22 and JNIA, para. 16.

37 CNIA, para. 3 and JNIA, para. 16.

38 CNIA, para. 26 and JNIA, para. 22.

39 CNIA, para. 28 and JNIA, para. 23.

## Conclusion and recommendations

- 5.30 The Committee believes that the changes to the annexes to CAMBA and JAMBA incorporate and reflect current scientific research in relation to certain species and more broadly allow Parties to continue to protect species of birds that migrate between their territories.

### Recommendation 5

**The Committee supports the *Amendments, agreed at Shanghai on 26 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, done at Canberra on 20 October 1986* and recommends that binding treaty action be taken.**

### Recommendation 6

**The Committee supports the *Amendments, agreed at Shanghai on 25 May 2006, to the Annex to the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, done at Tokyo on 6 February 1974* and recommends that binding treaty action be taken.**



## Air Services Agreement with China

- 6.1 The *Agreement between the Government of Australia and the Government of the People's Republic of China relating to Air Services, done at Canberra on 23 March 2004* (the Air Services Agreement with China) provides a framework for the operation of scheduled air services by designated airlines between Australia and China.<sup>1</sup>
- 6.2 The Air Services Agreement with China improves access for Australian airlines to the international Chinese aviation market and for Chinese airlines to the international Australian aviation market by, among other things, removing restrictions on the number of airlines that can enter the market and by allowing airlines to fly to international airports in Australia other than Sydney, Melbourne, Brisbane and Perth.<sup>2</sup>
- 6.3 The Air Services Agreement with China also includes reciprocal provisions on safety, security, customs regulations and commercial matters, including the ability to establish offices in the territory of the other Party and to sell fares to the public.<sup>3</sup>

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1 National Interest Analysis (NIA), para. 6

2 NIA, para. 7.

3 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

## Background

- 6.4 The Air Services Agreement with China used Australia's standard draft air services agreement as the basis of negotiations.<sup>4</sup> The Committee was informed that the Air Services Agreement with China does not differ substantially from the draft agreement.<sup>5</sup>
- 6.5 Less than treaty status agreements have been in operation since July 2003.<sup>6</sup> When the Air Services Agreement with China enters into force, it will supersede the existing treaty level arrangements between Australia and China, the *Agreement between the Government of Australia and the Government of the People's Republic of China relating to Civil Air Transport*, done at Beijing 7 September 1984.<sup>7</sup>
- 6.6 The Air Services Agreement with China is a result of negotiations in 2003 which followed several years of lobbying by Australian officials seeking to engage Chinese officials in renegotiating the previous air services agreement.
- 6.7 The Committee was informed that services between Australia and China have increased since the operation of the terms of the Air Services Agreement with China.<sup>8</sup>

At present, four airlines operate passenger services between Australia and China: Qantas, Air China, China Eastern and China Southern... Today Qantas operates seven services per week in its own right, and the three Chinese airlines operate a total of 21 services per week, giving a total of 28 – a doubling of flights since 2002. Qantas also operates seven weekly freight services to China ... The majority of passenger traffic to and from China is direct, and the majority of the market, representing almost 60 per cent, is visitors to Australia. In the year ending June 2006, 1,133,934 passengers travelled between Australia and China, an average of just under 11,000 passengers travelling each way each week.<sup>9</sup>

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4 NIA, para. 9.

5 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

6 NIA, para. 4.

7 NIA, para. 4.

8 In accordance with Australian and international practice, aviation agreements of less than treaty status have been applied pending the completion of domestic requirements bringing the Air Services Agreement with China into force: NIA, para. 4.

9 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 18.

## Obligations

- 6.8 Under Article 2, Australia and China are able to designate, alter and withdraw airlines they wish to operate the agreed services.<sup>10</sup>
- 6.9 Designated airlines have the right to:
- fly without landing across the territory of the other Contracting Party;
  - make stops in the territory of the other Contracting Party for non-traffic purposes and the right to land in the territory;
  - land in the territory of the other Contracting Party for the purposes of taking on board and discharging international traffic in passengers and cargo while operating an agreed service.<sup>11</sup>
- 6.10 At points in the specified routes, each of the designated airlines have the right to use all airways, airports and other facilities provided by the Contracting Parties on a non-discriminatory basis.<sup>12</sup>
- 6.11 Either Contracting Party may revoke or limit authorisation of an airline's operations if the airline does not comply with conditions relating to international air transportation prescribed under its laws or regulations provided such conditions are consistent with the *Chicago Convention on International Civil Aviation*.<sup>13</sup> The National Interest Analysis (NIA) states that this provision also applies if either Party is not satisfied that substantial ownership and effective control of an airlines are vested in nationals of the Party designating the airline, or if airline operations are not in accordance with the Agreement.<sup>14</sup>
- 6.12 Article 6 of the Agreement confirms that each Contracting Party's domestic laws, regulations and rules relating to certain aviation matters apply to the designated airlines when they are entering, within or leaving the territory of that Party. The Contracting Parties must not give preference to their own or any other airline in their laws and regulations relating to matters such as entry, clearance, immigration, passports, customs, quarantine and mail services.<sup>15</sup>

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10 Article 2 Air Services Agreement with China.

11 Article 3(2) Air Services Agreement with China.

12 Article 3(5) Air Services Agreement with China.

13 NIA, para. 14.

14 NIA, para. 14.

15 NIA, para. 15.

- 6.13 Each Contracting Party is required to recognise certificates of airworthiness, competency and licences issued by the other Party provided such documents conform to the standards established by the International Civil Aviation Organisation (ICAO).<sup>16</sup>
- 6.14 The Committee was informed that international airlines operating in Australia must have a foreign air operators certificate issued by the Civil Aviation Safety Authority (CASA).
- In issuing that certificate CASA will ensure that the airline has in place appropriate safety oversight and systemic procedures that enable CASA to be satisfied that the airline is a safe airline.<sup>17</sup>
- 6.15 Australia and China may request consultations concerning safety standards maintained by the other Party.<sup>18</sup> If consultations are not successful then the Party concerned about safety may set out the steps required for the other Party to comply with the minimum standards deemed acceptable by the *Chicago Convention on International Civil Aviation*.<sup>19</sup> A failure to take the necessary steps to meet those minimum standards will allow the Party concerned about safety to withhold authorisation for the air services.<sup>20</sup>
- 6.16 The Air Services Agreement with China will remove restrictions on the number of airlines that can enter the market by allowing airlines to fly to international airports in Australia other than Sydney, Melbourne, Brisbane and Perth.<sup>21</sup>
- ...Under the China agreement airlines have two levels of capacity. To the four major gateway ports of Sydney, Melbourne, Brisbane and Perth they can operate up to 8,500 seats per annum, but to every other international airport – Adelaide, Darwin, Cairns and so on – there is unrestricted capacity of their choice.<sup>22</sup>
- 6.17 Information relating to restrictions on capacity for particular airports is found in the memorandum of understanding, a less than treaty status agreement which sits beneath the Air Services Agreement with
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16 Article 7 Air Services Agreement with China; NIA, para. 16.

17 Mr Iain Lumsden, *Transcript of Evidence*, 11 September 2006, p. 19.

18 Article 8 Air Services Agreement with China; NIA, para. 17.

19 NIA, para. 17. Article 8 Air Services Agreement with China.

20 NIA, para. 17. Article 8 Air Services Agreement with China.

21 NIA, para. 7.

22 Mr Iain Lumsden, *Transcript of Evidence*, 11 September 2006, p. 19.

China.<sup>23</sup> Information relating to the memorandum of understanding was not mentioned nor provided in the NIA although the Committee was informed that the information is available through the internet.

On the Australian side, the allocation of capacity is undertaken through the International Air Services Commission. They have a register of available capacity, which is contained on their website. So the information is, largely, publicly available.<sup>24</sup>

## Consultation

- 6.18 Prior to July 2003, an extensive list of stakeholders from the aviation and tourism industries were advised that an Air Services Agreement with China was proposed and invited to comment on issues important to them.<sup>25</sup>
- 6.19 Comments were received from a number of organisations.<sup>26</sup> All stakeholders supported the negotiation of a modernised air services agreement which would offer greater flexibility and improved market access.
- 6.20 Sydney Airport Corporation noted that the Chinese market was Sydney Airport's most consistent growth market.<sup>27</sup> The Department of Industry, Tourism and Resources and the Australian Tourist Commission each identified their two main objectives as additional market access for airlines and the removal of route restrictions in the Agreement.<sup>28</sup> Qantas sought liberalisation of the Agreement's route and code share arrangements, and more modern regulatory provisions relating to issues such as tariffs, in order to allow airlines

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23 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 20.

24 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 21.

25 NIA, Consultation Annex, para. 2; Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

26 Qantas, Sydney Airport Corporation, Brisbane Airport Corporation, Transport South Australia, the Western Australian Government, the Queensland Government, Tourism Victoria, the Australian Tourist Commission, the Department of Industry, Tourism and Resources, the Department of Foreign Affairs and Trade, Attorney-General's Department, Treasury, Department of Immigration and Multicultural Affairs, and Australian Customs Service.

27 NIA, Consultation Annex, para. 5.

28 NIA, Consultation Annex, para. 6.



operating on the route more flexibility to adapt their services to suit the market.<sup>29</sup>

- 6.21 Information on the Air Services Agreement with China was also provided to the Commonwealth-State/Territory Standing Committee on Treaties.<sup>30</sup>

## Implementation

- 6.22 The Air Services Agreement with China will be implemented through existing legislation, including the *Air Navigation Act 1920* (Cth), the *Civil Aviation Act 1988* (Cth) and the *International Air Services Commission Act 1992* (Cth).<sup>31</sup>

## Costs

- 6.23 No direct financial costs to the Australian government are anticipated in the implementation of these agreements.<sup>32</sup>

## Conclusion and recommendation

- 6.24 The Committee supports the modernisation of Australia's bilateral air services agreements and the provision of greater commercial flexibility for airlines to undertake their operations.

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29 NIA, Consultation Annex, para. 8.

30 NIA, Consultation Annex, para. 2.

31 NIA, para. 26; Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

32 NIA, para. 27; Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

**Recommendation 7**

**The Committee supports the *Agreement between the Government of Australia and the Government of the People's Republic of China relating to Air Services, done at Canberra on 23 March 2004* and recommends that binding treaty action be taken.**



## Air Services Agreement with India

- 7.1 The *Agreement between the Government of Australia and the Government of India relating to Air Services, done at New Delhi on 6 March 2006* (the Air Services Agreement with India) provides a framework for the operation of scheduled air services by designated airlines between Australia and India.<sup>1</sup>
- 7.2 The Air Services Agreement with India improves access for Australian airlines to the international Indian aviation market and for Indian airlines to the international Australian aviation market.<sup>2</sup>
- 7.3 The Air Services Agreement with India also includes reciprocal provisions on safety, security, customs regulations and commercial matters, including the ability to establish offices in the territory of the other Party and to sell fares to the public.<sup>3</sup>

### Background

- 7.4 The Air Services Agreement with India used Australia's standard draft air services agreement as the basis of negotiations.<sup>4</sup> The

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1 National Interest Analysis (NIA), para. 6.

2 NIA, para. 7.

3 NIA, para. 10.

4 NIA, para. 9.

Committee was informed that the Air Services Agreement with India does not differ substantially from the draft agreement.<sup>5</sup>

- 7.5 When the Air Services Agreement with India enters into force it will supersede the *Agreement between the Government of Australia and the Government of India relating to Air Services done at New Delhi on 11 July 1949*, as amended.

The previous air services agreement...was originally negotiated in 1949 and, while it had been amended over the years, was outdated and in need of modernisation. The new agreement, in contrast, is a modern agreement that will facilitate the development of air links between Australia and India for years to come.<sup>6</sup>

- 7.6 The Committee was informed that travel between Australia and India is growing.

The Indian market is also growing strongly with average annual growth between 2000 and 2005 of 13.5 per cent. In more recent times, however, growth has begun to accelerate markedly. In 2004, annual growth passed the 30 per cent mark, although it has subsequently dropped back to a little below 25 per cent.<sup>7</sup>

## Obligations

- 7.7 Australia and India can designate as many airlines as they wish to operate the agreed services.<sup>8</sup> The other Party must grant authorisation to designated airlines without delay provided that:

- the airline is incorporated and has its principal place of business in the territory of the Party designating the airline;
- the Government or nationals of the territory of the Party have the ownership of the major part of the equity of the airline;
- the airline is qualified to meet the conditions prescribed under the laws, regulations and rules normally and reasonably applied to the operation of international air transportation by the Party

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5 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

6 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 18.

7 Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 18.

8 Article 2 Air Services Agreement with India.

considering the application or applications, in conformity with the provisions of the Convention;

- the airline holds the necessary operating permits; and
- the Party designating the airline is maintaining and administering the standards set forth in Article 5 (Safety) and Article 6 (Aviation Security) of the Air Services Agreement with India.<sup>9</sup>

7.8 Either Party may withhold, revoke, suspend or limit the operating authorisations or technical permissions of an airline designated by the other Party at any time if the conditions specified above are not met, or if the airline fails to operate in accordance with the conditions prescribed under the Air Services Agreement with India.<sup>10</sup>

7.9 In addition to the rights otherwise specified in the Air Services Agreement with India, designated airlines have the right to:

- fly across its territory without landing;
- make stops in its territory for non-traffic purposes; and
- operate services on the route specified in the Annex and to make stops in its territory for the purpose of taking on board and discharging passengers, cargo and mail.<sup>11</sup>

7.10 Each Party's domestic laws, regulations and rules relating to the operation and navigation of aircraft apply to the designated airlines when they are entering, within or leaving the territory of that Party.<sup>12</sup>

7.11 Each Party is obliged to act in conformity with the aviation safety provisions established by the International Civil Aviation Organization and designated as Annexes to the Chicago Convention on International Civil Aviation.<sup>13</sup>

## Consultation

7.12 The Department of Transport and Regional Services holds regular formal consultations with stakeholders on a wide range of issues. The

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9 Article 2(2) Air Services Agreement with India.

10 Article 2(3) Air Services Agreement with India.

11 Article 3 Air Services Agreement with India.

12 Article 4 Air Services Agreement with India; NIA, para. 13.

13 Article 5 Air Services Agreement with India; NIA, para. 14.

proposed negotiations with India were first raised at stakeholder consultation forums in 2004.<sup>14</sup>

- 7.13 Prior to September 2004, when the draft text was settled, an extensive list of stakeholders from the aviation and tourism industries were advised that an Air Services Agreement with India was proposed and invited to comment on issues important to them.<sup>15</sup>
- 7.14 All stakeholders who commented supported the negotiation of a modernised air services agreement. Comments were received from a small number of stakeholders: Qantas Airways, Sydney Airport Corporation, the Department of Industry, Tourism and Resources, the Australian Tourism Commission and the South Australian Department of Transport and Urban Planning.<sup>16</sup>
- 7.15 Qantas supported updating the Agreement, including the liberalisation of routes, multiple designation of airlines and the inclusion of code sharing arrangements in the Agreement. Sydney Airport Corporation supported liberalised air services but requested that its comments be kept confidential.<sup>17</sup>
- 7.16 Both the Department of Industry, Tourism and Resources and the Australian Tourist Commission welcomed the opportunity to modernise the text of the air services agreement and supported route arrangements that would provide an opportunity for carriers of both sides to operate expanded services.<sup>18</sup>
- 7.17 Information on the Air Services Agreement with India was also provided to the Commonwealth-State/Territory Standing Committee on Treaties.<sup>19</sup>

## Implementation

- 7.18 The Air Services Agreement with India will be implemented through existing legislation, including the *Air Navigation Act 1920* (Cth), the

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14 NIA, Consultation Annex, para. 1.

15 NIA, Consultation Annex, para. 2.

16 NIA, Consultation Annex, paras 4 and 8.

17 NIA, Consultation Annex, para. 5.

18 NIA, Consultation Annex, para. 7.

19 NIA, Consultation Annex, para. 3.

*Civil Aviation Act 1988 (Cth) and the International Air Services Commission Act 1992 (Cth).*<sup>20</sup>

## Costs

7.19 No direct financial costs to the Australian government are anticipated in the implementation of these agreements.<sup>21</sup>

## Conclusion and recommendation

7.20 The Committee supports the modernisation of Australia's bilateral air services agreements and the provision of greater commercial flexibility for airlines to undertake their operations.

### Recommendation 8

**The Committee supports the *Agreement between the Government of Australia and the Government of India relating to Air Services, done at New Delhi on 6 March 2006* and recommends that binding treaty action be taken.**

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<sup>20</sup> NIA, para. 26; Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.

<sup>21</sup> NIA, para. 27; Mr Stephen Borthwick, *Transcript of Evidence*, 11 September 2006, p. 17.





## Protocol V on Explosive Remnants of War

- 8.1 *The Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects* (Protocol V) reduces the humanitarian risk posed by explosive remnants of war by obliging Contracting States to mark and clear, remove or destroy explosive remnants of war.<sup>1</sup>

### Background

- 8.2 *The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects* (the Convention) is an important instrument of international humanitarian law.<sup>2</sup> It prohibits and/or restricts the use of specific categories of conventional weapons, considered to be indiscriminate and to inflict superfluous injury or unnecessary suffering on both combatants and civilians.<sup>3</sup> The Convention has 100 Parties.<sup>4</sup>

This protocol is the fifth one under the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects. The

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1 Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 24.

2 National Interest Analysis (NIA), para. 5.

3 NIA, para. 5.

4 NIA, para. 5.

previous four protocols dealt with non-detectable fragments, mines, booby traps and other devices, incendiary weapons and blinding laser weapons. Australia is a signatory to the CCW and all of the four preceding protocols.<sup>5</sup>

- 8.3 Australia's delegation to the Group of Government Experts played an active role in the negotiation of Protocol V, advocated a balance between addressing the humanitarian impact of explosive remnants of war and legitimate military needs, as well as supporting a pragmatic approach to clearance responsibilities in territories outside a State's control.<sup>6</sup>
- 8.4 Twenty States are required to deposit notifications of consent to be bound before Protocol V enters into force.<sup>7</sup> Currently 23 States have notified their consent to be bound by Protocol V and it is expected to enter into force on 12 November 2006.<sup>8</sup>

## Protocol V

- 8.5 Protocol V is a legally binding instrument which applies to international and non-international armed conflict.<sup>9</sup> Its primary obligation is for High Contracting States to mark and clear, remove or destroy explosive remnants of war present in their territory after the cessation of hostilities.<sup>10</sup>
- 8.6 Under Article 4 of Protocol V, Parties must record and retain information on the use or abandonment of explosive ordnance in order to facilitate its post-conflict clearance. On the cessation of active hostilities, Parties must provide this information to parties in control of the affected area or to other organisations relevant to clearance operations.
- 8.7 Article 5 obliges Parties to protect the civilian population in the territory under its control from explosive remnants of war.

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5 Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 24.

6 NIA, para. 6.

7 NIA, para. 7.

8 NIA, para. 7.

9 Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 24.

10 Article 3 Protocol V; NIA, para. 8; Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 24.

- 8.8 Under Article 6 Parties must protect humanitarian missions and organisations from the effects of explosive remnants of war. This may include the provision of information upon request on the location of all explosive remnants of war.
- 8.9 Parties may seek and receive assistance in dealing with problems posed by existing explosive remnants of war and any Party in a position to provide assistance, must do so.<sup>11</sup>
- 8.10 Parties must use generic preventative measures to minimise the occurrence of explosive remnants of war. Suggested best practice is included within Section 3 of the Technical Annex.
- 8.11 The obligations under Protocol V are largely prospective and so do not apply to explosive remnants of war prior to the entry into force of the Protocol.<sup>12</sup> However, obligations related to the protection of humanitarian missions and the provision of assistance relate to existing explosive remnants of war.<sup>13</sup>

## Implementation

- 8.12 Implementation of Protocol V will not require any additional legislation.<sup>14</sup> The Committee was informed that responsibility for compliance with Protocol V is with the Australian Defence Force.

There would be no significant impacts on the conduct of military operations which are already conducted in accordance with Australia's law of armed conflict obligations...In order to ensure that the Australian Defence Force would be compliant with the fifth protocol, the Secretary of Defence and the Chief of Defence Force have issued a joint directive which instructs that Defence will be in full compliance with the protocol within 180 days of Australia depositing its instrument of consent to be bound by Protocol V, and that deadline coincides with our treaty obligations.<sup>15</sup>

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11 Article 7 Protocol V.

12 NIA, para. 10.

13 Articles 6 and 9 respectively; NIA, para. 9.

14 NIA, para. 18.

15 Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 25.

## Costs

- 8.13 Compliance with the obligations of Protocol V will not involve any immediate financial cost for Australia.<sup>16</sup>
- 8.14 The National Interest Analysis states that costs may be incurred in the event that Australia is in control of territory containing explosive remnants of war.<sup>17</sup>

The costs of any of those obligations would be part of the cost of maintaining a presence in the territory we occupied. If we were not in occupation of the territory over which we had fought, the obligation would be to provide information.<sup>18</sup>

## Consultation

- 8.15 Extensive consultation was undertaken within the Defence.<sup>19</sup>
- Defence provided members of the ADF to participate as part of the group of government experts that were responsible for negotiating the text. The individuals involved were operational lawyers and Army engineers. They closely assisted our Foreign Affairs colleagues and others in the negotiations and the development of the text. Subsequently we remain in close contact with other government departments about the implications of protocol V for the ADF.<sup>20</sup>
- 8.16 Protocol V was an agenda item on the annual National Consultative Committee on Peace and Disarmament meetings in both 2002 and 2003. Members of this Committee include representatives from the Australian Red Cross and the Australian Network of the International Campaign to Ban Landmines.<sup>21</sup>

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16 NIA, para. 20.

17 NIA, para. 21.

18 Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 25.

19 NIA, 'Consultation', para. 1.

20 Mr Murray Perks, *Transcript of Evidence*, 11 September 2006, p. 25.

21 NIA, 'Consultation', para. 3.

- 8.17 Information on Protocol V was provided to the Commonwealth-State/Territory Standing Committee on Treaties.<sup>22</sup>

## Conclusion and recommendation

- 8.18 Support for Protocol V is consistent with Australia's long-standing commitment to reducing the humanitarian impact of armed conflict, particularly on civilian populations.

### Recommendation 9

**The Committee supports the *Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects* and recommends that binding treaty action be taken.**

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<sup>22</sup> NIA, 'Consultation', para. 2.



# Amendments to the Australia-United States Free Trade Agreement to ensure compliance with changes to the Harmonized Commodity Description and Coding System

## Introduction

- 9.1 In its Report 77, the Committee reviewed two treaty actions that incorporate changes to the Singapore-Australia Free Trade Agreement (SAFTA) and the Australia-United States of America Free Trade Agreement (AUSFTA) resulting from changes to the Harmonized Commodity Description and Coding System that will come into effect on 1 January 2007 (HS2007).<sup>1</sup>
- 9.2 *The Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to amend Annex 2-B (Tariff Schedule of Australia), Annex 4-A and Annex 5-A of the Australia-United States Free Trade Agreement (AUSFTA) to ensure compliance with changes to the Harmonized Commodity Description and Coding System (Amending Agreement) incorporates further changes to AUSFTA resulting from HS2007.*<sup>2</sup>

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1 Mr Allaster Cox, *Transcript of Evidence*, 11 September 2006, p. 36.

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



## Background

### The Harmonised Commodity Description and Coding System

- 9.3 The Harmonized Commodity Description and Coding System (HS) is an international system for classifying goods traded internationally. The World Customs Organization<sup>3</sup> (WCO) of which Australia and its free trade partners are members, oversees HS. Revision and amendment to HS occurs every five years to reflect changes in commodities traded.<sup>4</sup>
- 9.4 The most recent changes to HS will come into effect on 1 January 2007 (HS2007). HS2007 create new HS tariff line numbers to reflect a new product entering the market; the deletion of a tariff line number where a commodity is no longer traded; or the movement of a tariff line number from one sub-heading (or category of goods) to another to account for changes in the use of the good.<sup>5</sup>
- 9.5 As HS2007 comes into effect on 1 January 2007, the Australian Government has proposed that the Amending Agreement also come into force on 1 January 2007.<sup>6</sup>

### Purpose of the Amending Agreement

- 9.6 The Australia-United States Free Trade Agreement (AUSFTA) includes annexes that detail the treatment of specific goods traded between Australia and the United States of America (US). The HS number assigned to a good or commodity is its identifier. Amendments to AUSFTA seek to avoid possible confusion and subsequent delays in processing by customs authorities.<sup>7</sup>
- 9.7 Specifically, the Amending Agreement replaces AUSFTA annexes with annexes that have tariff line numbers that comply with HS2007.

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3 The WCO was established in 1952 as the Customs Cooperation Council and consists of 169 member countries. The WCO is an independent intergovernmental body whose mission is to enhance the effectiveness and the efficiency of customs administrations. World Customs Organization, viewed 15 September 2006, <[www.wcoomd.org](http://www.wcoomd.org)>.

4 National Interest Analysis (NIA), para. 3.

5 NIA, para. 2.

6 NIA, para. 7.

7 NIA, paras 4 and 5.

The Amendments are administrative or technical and do not change the existing duty rates.<sup>8</sup> These are:

- **Annex 2B** (Tariff Schedule of Australia)
- **Annex 5-A** (Further HS2007 changes).<sup>9</sup>

9.8 Amendments to AUSFTA included in a previous treaty action resulting from HS2007 include:

- **Annex 4-A** (Textile and Apparel Specific Rules of Origin for Chapters 42, 50 – 63, 70 and 94) and
- **Annex 5-A** (Specific Rules of Origin).

9.9 The Amending Agreement will ensure AUSFTA continues to reflect internationally agreed HS as amended by HS2007.<sup>10</sup>

9.10 A representative of the Department of Foreign Affairs and Trade (DFAT) informed the Committee of the reason for separate treaty actions in relation to AUSFTA and SAFTA.

We were hoping to submit them all at once. What has happened is that Thailand and the US are both on different schedules to the schedule we are on. They are also looking at these amendments in light of all their other FTAs as we are looking at them in terms of our FTAs. So it is just the differences in schedules. They have not had the same sort of time pressures we have had here. We have been unable to submit them all to you at the one time because we have not reached agreement at the same time.<sup>11</sup>

9.11 DFAT also informed the Committee that a treaty action incorporating the Thailand-Australia Free Trade Agreement will come before the Committee for review, and is currently being negotiated.<sup>12</sup> In addition, there will be further amendments to SAFTA and AUSFTA.<sup>13</sup>

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8 Mr Allaster Cox, *Transcript of Evidence*, 11 September 2006, p. 37.

9 NIA, para. 1.

10 NIA, para. 4.

11 Ms Prudence Gordon, *Transcript of Evidence*, 11 September 2006, p. 38.

12 Mr Allaster Cox, *Transcript of Evidence*, 11 September 2006, p. 37.

13 Ms Prudence Gordon and Mr Allaster Cox, *Transcript of Evidence*, 11 September 2006, p. 38.

## Consultation

- 9.12 The changes contained in HS2007 have been under discussion by the WCO since 2002. In this period, the Australian Government consulted with the Department of Industry, Tourism and Resources, and other relevant government agencies when members of the WCO have raised issues pertaining to particular industries for consideration. Outcomes from these consultations then contributed to Australia's input into decisions taken in the WCO regarding HS changes.<sup>14</sup>
- 9.13 No specific consultation took place with State and Territory Governments because the impact of changes is expected to be negligible.<sup>15</sup>
- 9.14 The Australian Government consulted Australian industry early in the evaluation processes for changes to the annexes. In particular, consultation was undertaken with the chemicals and automotive parts industries, to ensure the required changes to the relevant tariff line numbers remained practical. No negative responses were received during consultations.<sup>16</sup>

## Costs

- 9.15 The costs associated with implementation of the Amending Agreement are expected to be negligible.<sup>17</sup>

## Implementation

- 9.16 The Australian Customs Service will formally notify affected parties of the changes to AUSFTA before the Amending Agreement comes into force. Those importers and exporters who have sought formal advance rulings as to the correct tariff line number in respect to their particular good will be advised of relevant amended tariff line numbers that will apply after 1 January 2007.<sup>18</sup>

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14 NIA, Consultation Annex, para. 1.

15 NIA, Consultation Annex, para. 2.

16 NIA, Consultation Annex, para. 3.

17 NIA, paras 12 and 13.

18 NIA, para. 10.

- 9.17 The *Customs Tariff Act 1995* will be amended to give effect to Australia's obligations under the treaty action.

## Entry into force and withdrawal

- 9.18 The Amending Agreement will enter into force on 1 January 2007 through an exchange of diplomatic notes. Withdrawal from AUSFTA is provided for in its treaty text.<sup>19</sup>

## Conclusion and recommendation

- 9.19 The Committee understands the importance of complying with changes to the International Harmonized Commodity Description and Coding System and believes the Amendments to AUSFTA continue to avoid confusion and delays for importers, exporters and customs authorities.
- 9.20 In addition, the Committee would have appreciated the opportunity to consider the amendments to AUSFTA, SAFTA and any further existing free trade agreements simultaneously to aid in the efficiency of inquiry.

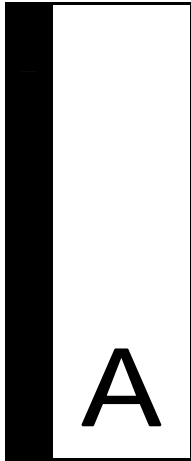
### Recommendation 10

**The Committee supports the *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America to amend Annex 2-B (Tariff Schedule of Australia), Annex 4-A and Annex 5-A of the Australia-United States Free Trade Agreement (AUSFTA) to ensure compliance with changes to the Harmonized Commodity Description and Coding System and recommends that binding treaty action be taken.***

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<sup>19</sup> NIA, paras 2 and 17.





## Appendix A - Submissions

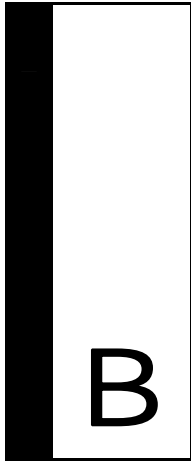
### Treaties tabled on 10 May 2006

- 1.1 Australian Patriot Movement
- 2 ACT Government
- 6 Office of the Privacy Commissioner
- 7 Law Institute of Victoria
- 8 NSW Council for Civil Liberties
- 9 Australian Federal Police
- 10 Victoria Legal Aid
- 11 Queensland Government
- 12 Human Rights and Equal Opportunity Commission
- 13 Attorney-General's Department
- 14 Mr David Bennett QC
- 14.1 Mr David Bennett QC

### Treaties tabled on 5 and 6 September 2006

- 1 Australian Patriot Movement
- 1.1 Australian Patriot Movement
- 1.2 Australian Patriot Movement
- 1.3 Australian Patriot Movement

- 1.4 Australian Patriot Movement
- 1.5 Australian Patriot Movement
- 1.6 Australian Patriot Movement
- 1.7 Australian Patriot Movement
- 1.8 Australian Patriot Movement
- 2 Department of Transport and Regional Services



## Appendix B - Witnesses

### Monday 19 June – Canberra

#### Attorney-General's Department

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division

Ms Catherine Hawkins, Assistant Secretary, International Crime Cooperation Branch, Criminal Justice Division

Dr Rachel Bacon, Acting Assistant Secretary, Office of International Law

#### Department of Foreign Affairs and Trade

Mr Andrew Rose, Executive Officer, International Law and Transnational Crime Section

Mr Peter Rayner, Director, Malaysia, Brunei and Singapore Section

Mr (Michael) Jonathan Thwaites, Executive Director, Treaties Secretariat, Legal Branch

### Monday 4 September – Canberra

#### Australian Federal Police

Federal Agent Tim Morris, Acting National Manager, International and Border

Federal Agent Bruce Hill, Manager, International and Border



### **Attorney-General's Department**

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division

Ms Catherine Hawkins, Assistant Secretary, International Crime Cooperation Branch, Criminal Justice Division

Mr Greg Manning, Assistant Secretary, International Security and Human Rights Branch, Office of International Law

### **Department of Foreign Affairs and Trade**

Ms Kate Duff, Assistant Secretary, South-East Asia (North) Branch

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

### **Monday 11 September – Canberra**

#### **Attorney-General's Department**

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division

Mr Stephen Bouwhuis, Assistant Secretary, International Security and Human Rights Branch, Office of International Law

Ms Catherine Hawkins, Assistant Secretary, International Crime Cooperation Branch, Criminal Justice Division

Mr Andrew Walter, Director, Criminal Justice Division

#### **Australian Customs Service**

Mr Wayne Baldwin, Manager, Valuation and Origin

#### **Department of Defence**

Mr Murray Perks, Acting Head, Strategic Policy

#### **Department of the Environment and Heritage**

Mr Jason Ferris, Acting Director, Migratory and Marine Biodiversity Section

Dr Anna Lashko, Senior Policy Officer, Migratory and Marine Biodiversity Section

## Department of Foreign Affairs and Trade

Ms Annabel Anderson, Assistant Secretary, Americas and Europe Division

Ms Margaret Adamson, Assistant Secretary, European Union and Western Europe Branch

Ms Pauline Bygraves, Executive Officer, WTO Regional and Free Trade Agreements Section

Ms Alice Cawte, Assistant Secretary, East Asia Branch

Dr Ada Cheung, Executive Officer, Arms Control and Counter-Proliferation Branch, International Security Division

Mr Allaster Cox, Assistant Secretary, United States Branch

Ms Sarah De Zoeten, Executive Officer, International Law and Transnational Crime

Ms Prudence Gordon, FTA Commitments and Implementation Section

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Ms Angela Robinson, International Law and Transnational Crime Section

Mr Michael Sadleir, Acting Director, China Economic and Trade Section

Mr John Sullivan, Assistant Secretary, Arms Control and Non-Proliferation Branch

Ms Charlene Watego, Executive Officer, United States Trade Section

Mr Michael Wood, Director, Japan Section

## Department of Industry, Tourism and Resources

Mr Ken Miley, General Manager, Trade and International Branch

## Department of Transport and Regional Services

Mr Stephen Borthwick, General Manager, Aviation Markets

Mr Iain Lumsden, Section Head, Bilateral Aviation, Aviation Markets Branch

Mr Samuel Lucas, Assistant Section Head, Bilateral Aviation, Aviation Markets Branch

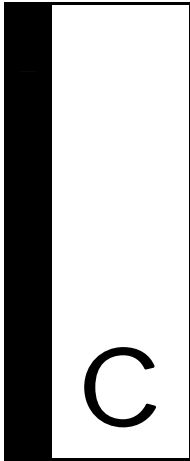
## Department of the Treasury

Mr Paul McBride, Manager, Tax Treaties Unit

Mrs Ariane Pickering, Principal Adviser - Treaties

Mr Colin Brown, Manager, Costing and Quantitative Analysis Unit

Mr Michael Rawstron, General Manager, International Tax and Treaties Division



## Appendix C – Exhibits

### **Treaties tabled on 10 May 2006**

- 1 Attorney-General's Department
- 2 Office of the Privacy Commissioner
- 3 Australian Federal Police

### **Treaties Tabled 5 and 6 September 2006**

- 1 Department of Transport and Regional Services