



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION
COMMITTEE

ESTIMATES

(Budget Estimates)

THURSDAY, 3 JUNE 2004

CANBERRA

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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

Thursday, 3 June 2004

Members: Senator Sandy Macdonald (*Chair*), Senator Hutchins (*Deputy Chair*), Senators Chris Evans, Ferguson, Payne and Ridgeway

Senators in attendance: Senators Bartlett, Brown, Conroy, Chris Evans, Faulkner, Ferguson, Ferris, Kirk, Sandy Macdonald, Payne and Robert Ray

Committee met at 9.00 a.m.

FOREIGN AFFAIRS AND TRADE PORTFOLIO

Consideration resumed from 2 June 2004.

In Attendance

Senator Minchin, Minister for Finance and Administration

Senator Hill, Minister for Defence

Department of Foreign Affairs and Trade

Portfolio overview

Mr Doug Chester, Deputy Secretary

Mr Allan McKinnon, First Assistant Secretary, Corporate Management Division

Ms Anne Hazell, Chief Finance Officer, Assistant Secretary, Finance Management Branch

Output 1.1: Protection and advocacy of Australia's international interests through the provision of policy advice to ministers and overseas diplomatic activity.

1.1.1: North Asia (including Australia–China Council, Australia–Korea Foundation)

Ms Lydia Morton, First Assistant Secretary, North Asia Division

1.1.2: South and South–East Asia (including Australia–India Council, Australia–Indonesia Institute)

Mr Bill Paterson PSM, First Assistant Secretary, South and South East Asia Division

1.1.3: Americas and Europe

Mr David A. Ritchie, First Assistant Secretary, Americas and Europe Division

1.1.4: South Pacific, Africa and the Middle East

Mr Ric Wells, First Assistant Secretary, South Pacific, Africa and Middle East Division

Mr John Quinn, Assistant Secretary, Iraq Task Force

Ms Victoria Owen, Assistant Secretary, Middle East and Africa Branch

Mr Alistair Maclean, Assistant Secretary, New Zealand and Papua New Guinea Branch

Mr George Atkin, Assistant Secretary, Pacific Islands Branch

1.1.5: Bilateral, regional and multi-lateral trade negotiations

Mr Bruce Gosper, First Assistant Secretary, Office of Trade Negotiations

Mr Stephen Deady, Special Negotiator—Free Trade Agreements

1.1.6: Trade development/policy coordination and APEC

Mr Paul Tighe, First Assistant Secretary, Trade Development Division

Mr Nic Brown, Assistant Secretary, Trade and Economic Analysis Branch

Mr Justin Brown, former Head, Asia Trade Taskforce

1.1.7: International organisations, legal and environment

Ms Caroline Millar, First Assistant Secretary, International Organisations and Legal Division, and Ambassador for People Smuggling Issues

Dr Greg French, Legal Adviser

Mr Justin Brown, Ambassador for the Environment

1.1.8: Security, nuclear disarmament and non-proliferation.

Mr David Stuart, First Assistant Secretary, International Security Division

Mr Les Luck, Ambassador for Counter-Terrorism

Output 1.2: Secure government communications and security of overseas missions.

Ms Penny Williams, First Assistant Secretary, Diplomatic Security, Information Management, and Services Division

Output 1.3: International services to other agencies in Australia and overseas (including Parliament, state representatives, business and other organisations).**1.3.1: Parliament in Australia****1.3.2: Services to attached agencies****1.3.3: Services to business****1.3.4: Services to state governments and other agencies overseas and in Australia.**

Mr Ian Kemish AM, First Assistant Secretary, Public Diplomacy, Consular and Passports Division

Mr Paul Tighe, First Assistant Secretary, Trade Development Division

Ms Zorica McCarthy, Assistant Secretary, Executive, Planning and Evaluation Branch

Ms Glenda Gauci, Executive Director, Aichi Expo Unit

Output 1.4: Services to diplomatic and consular representatives in Australia.**1.4.1: Services to the diplomatic and consular corps****1.4.2: Provision of protection advice through liaison with the Protective Security Coordination Centre.**

Ms Louise Hand, Chief of Protocol, Assistant Secretary, Protocol Branch

Output 2.1: Consular and passport services.**2.1.1: Consular services****2.1.2: Passport services.**

Mr Ian Kemish AM, First Assistant Secretary, Public Diplomacy, Consular and Passports Division

Mr Bob Nash, Assistant Secretary, Passports Branch

Output 3.1: Public information services and public diplomacy.**3.1.1: Public information and media services on Australia's foreign and trade policy****3.1.2: Projecting a positive image of Australia internationally****3.1.3: Freedom of information and archival research and clearance.**

Mr Ian Kemish AM, First Assistant Secretary, Public Diplomacy, Consular and Passports Division

Output 4.1: Property management.**Output 4.2: Contract management.**

Mr Peter Davin, Executive Director, Overseas Property Office
Enabling services.

Mr Allan McKinnon, First Assistant Secretary, Corporate Management Division

Ms Zorica McCarthy, Assistant Secretary, Executive, Planning and Evaluation Branch

Ms Anne Hazell, Chief Finance Officer, Assistant Secretary, Finance Management Branch

Australian Trade Commission (Austrade)**Portfolio overview****Outcome 1: Australians succeeding in international business with widespread community support.****1.1: Awareness raising****1.2: Government advice and coordination****1.3: Services and opportunities****1.4: Austrade administered: EMDGs for small to medium sized businesses and ITES loans and advances.****Outcome 2: Australians informed about and provided access to consular, passport and immigration services in specific locations overseas.****2.1: Consular, passport and immigration services.**

Ms Margaret Lyons, Corporate Services Director, Canberra

Ms Margaret Ward, General Manager, Export Finance Assistance Program, Sydney

Mr Tim Harcourt, Chief Economist, Sydney

Mr Greg Field, Chief Finance and Information Officer, Canberra

Mr Michael Crawford, General Manager, Strategic Marketing and Communications

Mr Anthony Fernando, Manager, International Liaison Americas

Ms D. Wilkes-Bowes, Acting Manager, Government, Industry and Policy

Australian Agency for International Development (AusAID)**Outcome 1: Australia's national interest advanced by assistance to developing countries to reduce poverty and achieve sustainable development.****1.1: Policy****1.2: Program management****Administered items—Australia's development cooperation program.**

Mr Bruce Davis, Director General

Mr Scott Dawson, Deputy Director General, Asia and Corporate Resources Division

Mr Charles Tapp, Deputy Director General, Papua New Guinea, Pacific and Partnerships
Division

Ms Annmaree O'Keeffe, Deputy Director General, Policy and Global Programs Division

Ms Jacqui Delacey, Assistant Director General, Papua New Guinea Branch

Mr Dereck Rooker-Smith, Assistant Director General, Australian Partners Branch

Mr Murray Proctor, Assistant Director General, East Branch

Mr Alan March, Assistant Director General, East Timor, Humanitarian and Regional
Programs Branch

Mr Robin Davies, Assistant Director General, Indonesia Branch

Mr Peter Versegi, Assistant Director General, Policy and Multilateral Branch

Mr Mark Fleton, Assistant Director General, Office of Review and Evaluation
Mr Peter Jensen, Acting Assistant Director General, Resources Branch
Ms Catherine Bennett, Acting Assistant Director General, Pacific Branch
Mr Jeremy Guthrie, Director, Budget Unit
Mr James Sweeting, Director, Budget Unit
Ms Rachael Moore, Policy Officer, Strategies and Program Planning Section, Papua New Guinea Branch
Ms Bernadette Mihaljevic, Policy Officer, Budget Unit
Mr Dominic Morice, Public Affairs Officer

CHAIR—I declare open this meeting of the Senate Foreign Affairs, Defence and Trade Legislation Committee. I welcome Senator Minchin, the Minister for Finance and Administration, representing the Minister for Foreign Affairs and the Minister for Trade, and officers of the Department of Foreign Affairs and Trade. When the committee adjourned last night it was dealing with output 1.1.2, South and South-East Asia. This morning we will resume hearing from Mr Paterson on output 1.1.2, so I welcome Mr Paterson back to the table.

Senator FAULKNER—The first issue that we did want to canvass was those matters held over by Senator Hill last evening, which the minister indicated would be subject to report back to the committee this morning. Senator Minchin might care to explain how we might deal with those issues, because they are important ones. I do not expect you to know the detail of them, Senator Minchin. Obviously I appreciate that you would have had other responsibilities last night. But I think we need some guidance as to how those might be dealt with.

Senator Minchin—Senator Hill has asked me to fill in for him this morning until 12.30 p.m. I am sure he wants to return to the committee to fulfil his undertaking to you, but that would have to be post your luncheon break when he returns.

Senator FAULKNER—Our problem is a serious one—that is, the examination of the estimates for Foreign Affairs are due to be completed by 11 o'clock today under the committee's scheduling of business. I suppose I now have to depend on Mr Chester and ask him if he is able to assist us in those matters that were left in abeyance last night. For the minister's benefit, could I just explain that in the broad these questions go to the head of power, if you like, that exists in relation to the capture of Iraqi POWs when Australian forces are involved. It is an important issue, and Senator Hill gave a commitment he would respond on that this morning. I assume that has been left with Mr Chester or Mr Paterson. Perhaps we could hear from the witnesses in that regard.

Senator Minchin—You heard Mr Downer no doubt, as I did, on *AM* speaking on the subject—

Senator FAULKNER—No, I did not hear Mr Downer on *AM*.

Senator Minchin—He had some remarks to make on that score. I am aware that is the issue you want to address but I do not have any relevant information myself, although I understand Senator Hill—

Senator FAULKNER—I do not take Mr Downer seriously so I would not listen to anything he said on *AM*.

Senator Minchin—I think you should take him seriously, Senator Faulkner. He is the foreign minister and I think he knows a lot about these matters, probably more than you. I just made that point in passing but, as I understand it, Senator Hill has asked for information and Mr Chester may be able to add to that. If anything arrives while I am here and before Senator Hill returns we will put that on the table.

Mr Chester—Yes, my understanding is that Senator Hill has asked for advice from his department on that issue. We do not have that advice at this time so unfortunately I am unable to provide any further information on those issues at present.

Senator FAULKNER—It seems to me that what is going to happen here is a very serious problem. Senator Hill apparently is not attending at this committee until the estimates for Trade are being dealt with. We will not have an opportunity to address him on these very important issues in relation to the capture of prisoners by Australian forces in the Iraq conflict. I think this leaves the committee in an extremely difficult position given the commitments that Minister Hill made to us last night.

Senator BROWN—I wonder whether we could delay this item until immediately after lunch so that Senator Hill will be here to be questioned on the matter.

CHAIR—No. The program has been set down. I appreciate, Senator Faulkner, the difficulty that you face—

Senator BROWN—It is a very important matter.

CHAIR—as to whether there was an arrangement with the US. But it is a Defence issue and, clearly, Senator Hill is the appropriate person to provide the answer.

Senator FAULKNER—I do take issue with that, Mr Chairman. I accept that there are—

Senator ROBERT RAY—On a point of order, I do suggest that if this committee wants to discuss this we should have a private meeting rather than having a confab that is broadcast throughout the building. I think it would be a more appropriate way to deal with it.

Senator FAULKNER—Given that Senator Hill is not going to be present at a time when Foreign Affairs officials are at the table and given the commitments that Senator Hill made last night that he would respond to these very important issues this morning, I think that Senator Ray's proposal for a private meeting is appropriate. Obviously it needs to be a brief meeting because there are other important issues that need to be dealt with.

CHAIR—We will have a private meeting now then.

Proceedings suspended from 9.08 a.m. to 9.15 a.m.

CHAIR—Order! The estimates is now back in session. The program will continue until 11 o'clock, when we will move to the trade outputs. The unresolved matters that are the concern of Senator Faulkner will be resolved when Senator Hill returns after the luncheon break.

Senator Minchin—I am assured that he will be here at that time.

CHAIR—Thank you, Senator Minchin. We now continue on output 1.1.2.

Senator BROWN—Mr Paterson, I want to complete the questions about East Timor from last night. We had it established that there has been \$225 million in aid from Australia to East Timor since 1999. I asked to get a check on the figure of \$1.5 billion that Australia, in return, had taken in royalties from Corallina-Laminaria, the disputed oil and gas development on the western side of the agreed zone, and if that does not mean that in effect the money flow has gone in Australia's direction by in excess of \$1 billion. I want to ask what comment you have on the Oxfam CAA report that flagged the worrying possibility of East Timor, in its poverty, becoming a failed state.

Mr Paterson—Further to your query last night about the revenue flow, that is a question for the Department of Industry, Tourism and Resources, as I understand it. We do not hold that precise information. As to the Oxfam report, we believe the report lacks balance and accuracy and appears to adopt, in full and quite uncritically, East Timor's position and ambit claims in respect of maritime boundaries in the Timor Sea. For instance, a section in the report headed 'Spin city' adopts in full the views and indeed the spin, if I may put it that way, currently emanating from the office of the Prime Minister of East Timor. The report's underlying premise is that all resources in the Timor Sea belonged to East Timor. We believe that is erroneous and false. It completely ignores the points made by my colleagues last night about Australia's longstanding and valid claims under international law based on the natural prolongation of the continental shelf of Australia.

Further in relation to this report, there is no prospect—as I think I outlined last night in referring to the aid program—of Australia and the international community allowing East Timor to become a failed state. We are in continual contact with the government of East Timor about its development assistance needs and priorities; indeed, a senior delegation of AusAID officials and our ambassador participated in an international development partners meeting in Dili only last week. So, in essence, we believe that this is a tendentious report which lacks balance and accuracy.

Senator BROWN—I am quite frustrated here because of the time scheduling today, and I know there are very important matters coming up. But I note, on the figures I have seen, that \$150 per head spending by the government in East Timor and a 90 per cent unemployment rate in Dili points to a very troubling potential future unless we can lift that income. Mr Paterson, can you say in short where you see that income for East Timor coming from in view of Australia flattening, if not reducing, its overseas aid and not giving access to either the Corallina-Laminaria royalties or the majority of the Greater Sunrise royalties?

Mr Paterson—Many of these questions you are asking should have been addressed to AusAID when they appeared before this committee yesterday. They are questions relating to our development assistance program, and we are not the group well equipped to respond to your queries in detail.

Senator BROWN—It is not the numbers that I am concerned about, though; it is the policy outcome from the very worrying scenario that comes out of those figures.

Mr Paterson—As I set out last night, our view is that the aid program is a very substantial and adequate one. I think I mentioned that we will have spent \$235 million by the end of this financial year on a range of programs developing from, as you say, a very low base—a range

of basic capabilities in East Timor. This government—I think any Australian government, if I can be so bold as to predict—is not about to leave East Timor behind in that sense. East Timor is likely to remain a large aid recipient and, indeed, a significant Australian responsibility for as far ahead as we can see.

Senator BROWN—The aid budget to East Timor is less than the public relations budget of this government.

Mr Paterson—I have no comment on that.

Senator BARTLETT—Is it still the government's policy to not engage with Kopassus personnel involved in human rights violations?

Mr Paterson—That is correct. We are committed to developing over time and as circumstances permit a productive relationship with Kopassus in the area of hostage recovery and counter-hijack operations, because these are considered to be a high priority for the Australian government. Within that, however, we are committed to limiting our cooperation to exclude those Kopassus personnel we know to have been involved in serious human rights abuses.

Senator BARTLETT—How does that work in practice? Can you identify individual personnel?

Mr Paterson—Yes, broadly.

Senator BARTLETT—And the engagement with Kopassus that you are seeking to develop is solely in the area of hostage recovery and counter-hijack operations?

Mr Paterson—That is my understanding. The management of that relationship is, as you will appreciate, principally for the Department of Defence. But I think I have given you an accurate reading of the policy framework within which that takes place.

Senator ROBERT RAY—Chair, we apparently indicated last night that we are to move on to some set topics, so we are jumping around a bit.

CHAIR—We did. Your questions are not concerned with outcome 1.1.2 are they, Senator Ray?

Senator ROBERT RAY—No, I think we have indicated some of our future issues: Hicks and Habib, Mr Hendy and Mr Voigt, some outstanding Bali issues and what I am about to move on to, which is disciplinary action within the department.

CHAIR—That is what I understood was your line of questioning. That concludes outcome 1.1.2. Thank you, Mr Paterson.

Senator ROBERT RAY—We have indicated that some of our future issues are Hicks and Habib, Mr Hendy and Mr Voigt and some outstanding Bali issues plus the one I am about to move to at the moment which deals with disciplinary action within the department.

CHAIR—That is what I understood your line of questioning to be about.

Senator ROBERT RAY—How many employees of DFAT are currently under suspension for any reason? We might then break down the reasons for them being under suspension.

Mr Chester—There are two employees of the department under suspension.

Senator ROBERT RAY—Two? The last time we spoke were there three?

Mr Chester—There is a third who technically is not suspended from the department but who is, because of issues surrounding a security clearance, prevented from access into the department.

Senator ROBERT RAY—Let us go to that case first. That means the person is still being paid?

Mr Chester—That is correct.

Senator ROBERT RAY—But cannot enter the R.G. Casey building or any building occupied anywhere by the Department of Foreign Affairs and Trade—is that right?

Mr Chester—I think the latter is the case. Is that correct, Ms Williams?

Ms Williams—Yes, that is the case.

Senator ROBERT RAY—How long has that person who is on full pay been unable to turn up to work? Is that a fair description?

Mr Chester—That is correct.

Senator ROBERT RAY—How long?

Ms Williams—I do not have that information in front of me. I could check for you.

Mr Chester—It has been over a year.

Senator ROBERT RAY—I am not going to ask the person's name obviously but at what staff level are they? What is the normal approximate salary that goes with that?

Ms Williams—The employee is an APS3 or 4, a relatively junior officer.

Senator ROBERT RAY—The issue here is security clearance, is it?

Mr Chester—That is correct.

Ms Williams—It is an issue in relation to another agency. It was taken to the Administrative Appeals Tribunal. It was in relation to a finding by another government agency. I understand that those proceedings were not public.

Senator ROBERT RAY—I will not go to those proceedings but that may, in part, answer my next question which is: why is it taking so long to resolve an issue of a security clearance?

Mr Chester—Because of the need to go through an AAT process.

Senator ROBERT RAY—Which was initiated by the person affected?

Mr Chester—That is right. And another agency was party to that AAT hearing.

Senator ROBERT RAY—Do you have any idea about when this may be resolved?

Ms Williams—A security clearance review is now under way following the outcome of that AAT hearing. We have given, on the request of the employee, an extension and expect to finalise that in the very near future.

Senator ROBERT RAY—On an administrative policy matter, is it not possible in the case of these suspended employees to allocate them a workload that does not necessarily entail them having access to your more secure systems?

Mr Chester—It is really access to the department rather than the systems.

Senator ROBERT RAY—I understand that, once you get access to the inner sections of the building, it raises a whole range of issues. Have you ever thought of assigning work for them to do at home? You are paying people full pay. The cynical would argue that what you are really doing is depriving them of all meaningful employment as an incentive for them to leave. That may not be true but that may be regarded as a possible motive. I cannot understand why they cannot be delegated some work to do at home or elsewhere. There may be difficulties with that.

Mr Chester—In the Department of Foreign Affairs and Trade it is very difficult for staff to do productive work outside or away from the building, given the nature of the work right across the work of the department.

Senator ROBERT RAY—Do you think over the last few years you have had a lot more cases of suspending people on pay than other departments? Have you ever checked with the Public Service Commission to see whether, for some reason, you seem to be suspending more—or are they more effective in getting rid of troublemakers?

Mr Chester—I would not classify these people as troublemakers. I guess we do not look at it by comparing ourselves to others. We look at the circumstances of an individual case and we make a call that we think is appropriate in those circumstances.

Senator ROBERT RAY—Of the other two cases that are actually under suspension, we have canvassed the name of one here before. I do not think we have canvassed the name of the second one, so let us deal with the second one. How long has that person been under suspension on full pay?

Mr Chester—It is around six months, I think, but I cannot be sure.

Senator ROBERT RAY—Are you able to indicate to the committee what the problem is in a broad sense?

Mr Chester—No.

Senator ROBERT RAY—Have you any prospective timetable for an expectation as to when that particular matter might be resolved?

Mr Chester—No.

Senator ROBERT RAY—What is the approximate staff level that person is being employed at?

Mr Chester—I believe he is an EL1, a BB3 officer in the department.

Senator ROBERT RAY—You have told me it is a bloke now. I did not ask for that. Too much information!

Mr Chester—It possibly is, Senator.

Senator ROBERT RAY—The third case we have discussed here before. Last time I think you gave me the approximate costs—they were approximate then and they will remain approximate—of the case overall. Are you able to give me an update on whether any further expenses have been incurred?

Mr Chester—If I remember rightly, I think we indicated last time the costs at that stage were around \$300,000.

Senator ROBERT RAY—That is right.

Mr Chester—They are now, I understand, \$350,000 to \$360,000.

Senator ROBERT RAY—What is involved in that increase—obviously another few months salary?

Mr Chester—Yes, a few months salary and some payments to Peter Kennedy and to the legal advisers to Peter Kennedy.

Senator ROBERT RAY—Can we have a breakdown of the payment to legal advisers to Mr Kennedy. What expenses have been involved there? While you are looking that up, if you have the page open at the right spot you may tell us how much has been paid to Mr Kennedy so far.

Mr Chester—Total payments to Mr Kennedy are around \$33,700. That is over the two financial years.

Senator ROBERT RAY—Could I just refine that question: was any of that money included in the \$300,000 figure?

Mr Chester—Yes, it was. I do not have the increased costs; I am giving you the total of the \$360,000.

Senator ROBERT RAY—I understand.

Mr Chester—The cost of legal advice to Mr Kennedy is \$66,900, roughly. What was the other question? Do you want me to account for the whole \$360,000?

Senator ROBERT RAY—That would be good. Rather than extract 10 teeth, why don't we just go for the lot?

Mr Chester—Salary costs were roughly \$98,000. That was for Mr Smith's salary. Mr Kennedy's costs were \$33,700. The total legal costs were around \$229,000. Sorry: I said salary costs for Mr Smith were \$98,000; Mr Smith's salary costs were \$83,000 and then there are salary costs from DFAT staff that were involved in this issue of \$15,000.

Senator ROBERT RAY—I think that is a better way of breaking it down.

Senator FAULKNER—Are you able to break down those legal costs of \$229,000? Can you disaggregate that at all?

Mr Chester—Yes, I can to some extent. As I said, the legal advice to Mr Kennedy was \$66,900, roughly. Legal advice to the department over the two financial years—and most of this was last financial year—totalled around \$121,000. Then as I said at the last hearing, there were legal counsel costs of \$13,700 and court costs of \$27,500. I think all that adds up to around the \$360,000.

Senator ROBERT RAY—What commitments have you made—if you have made any—to pay Mr Smith's legal expenses, remembering that the decision was vacated and resumed and we had those complexities over a year ago.

Mr Chester—As we said last time, in relation to the Federal Court proceedings we did agree to pay legal costs at that time for that hearing.

Senator ROBERT RAY—Yes, I recall that. Are there any extant commitments by the department to assist Mr Smith with his legal expenses in relation to the Kennedy inquiry, or is that something that he has to bear himself?

Mr Chester—No, Senator, there are no commitments in that regard.

Senator ROBERT RAY—Has there been any precedent of assisting—at least after the inquiry—with the legal expenses of anyone who has gone through this? I am not aware of how many cases you have had.

Mr Chester—I am not aware but I am probably not the expert on that.

Senator ROBERT RAY—Is there any presumption that the department would consider paying the legal expenses of someone they have suspended and had an inquiry into?

Mr Chester—It is not an issue that we have considered at this point in time.

Senator ROBERT RAY—You have had no requests from the person concerned?

Mr Chester—Not that I am aware of, but maybe I should take that on notice. I am advised that we have not received any request.

Senator ROBERT RAY—I notice that when someone is suspended under regulation 310 of the Public Service Act it refers to that suspension being reviewed regularly. Am I right in saying that this was last reviewed on 19 September 2003?

Mr Chester—I think that is correct. Yes, that is right. The review was completed on 19 September 2003.

Senator ROBERT RAY—I am just wondering what the department's interpretation is of 'regularly' when it has not been at least addressed in the last eight months.

Mr Chester—In that decision of September 2003 the delegate advised Mr Smith that he had also decided that the suspension should remain in place until the code of conduct investigation concluded.

Senator ROBERT RAY—That is interpreted as being consistent with regulation 310?

Mr Chester—I do not see how it is necessarily inconsistent with that. That decision was put to Mr Smith. I am not aware of whether he came back on that decision or not. I suspect not.

Senator ROBERT RAY—Has Mr Kennedy given you any progress reports—not necessarily in a direct sense of how his judgment is going on this matter—as to who has been interviewed?

Mr Chester—We have a fairly arm's-length relationship with Mr Kennedy. Recently I asked whether we could get some advice on how in general his investigation was proceeding and he has indicated to us that he has almost concluded the interview process, that he has had to re-interview a number of people and that he has had difficulty in interviewing some of the people because they are overseas or interstate. I believe he is in the process, whilst still finishing the interviewing, of preparing his report.

Senator ROBERT RAY—Has he made a decision as to whether it is appropriate to interview individuals who were employed under the MOPS Act at the time the allegations apply to, even if they were at some stage, then or in the future, members of the staff of the Department of Foreign Affairs and Trade?

Mr Chester—He has made the decision that it is appropriate to ask those people whether they would attend an interview. I believe that is what he has done.

Senator ROBERT RAY—But he has not compelled them?

Mr Chester—No, and DFAT employees—people working in the department—are not compelled.

Senator ROBERT RAY—Is the instruction issued by the department to MOP staff, that they are not to discuss this matter with anyone, still in force? I think you issued the instruction, Mr Chester.

Mr Chester—That is right. I will need to check whether that is the case. I am told that they are still in force but once the interview process is finalised they will cease to be in force.

Senator ROBERT RAY—I will be taking that up elsewhere—not at this committee. I assume, because Mr Kennedy is an extremely thorough person, that records of interview have all been transcribed?

Mr Chester—I do not know. I am not very closely involved in this process. I am advised they have all been recorded.

Senator ROBERT RAY—Are transcripts sent on to the—

Senator FAULKNER—The interviewee?

Senator ROBERT RAY—Have transcripts been sent on to both the interviewee and Mr Smith? I do not know how to describe him in these circumstances: the officer suspended with pay, the suspect or the witch-hunt victim.

Mr Chester—The records of interview have been prepared and copies of those records, we understand, have been provided to those individuals who have been interviewed. I am not aware that they have been passed on beyond that to the suspended officer. I have just been advised that we are not sure whether they have been provided to those who have been interviewed. So we will need to take that on notice.

Senator ROBERT RAY—I would like to know—for completeness sake you could take this on notice—whether the records of interview have been passed on to those who have been interviewed. Have they been passed on to Mr Smith or his legal representatives and, if so, have they gone in a timely manner? What has been the time gap between the interview, transcription and delivery to any of those individuals? I think that will cover that. Did the Public Service Commission conduct an investigation of how DFAT runs code of conduct investigations?

Mr Chester—The Public Service Commission are doing a survey of a number of government agencies, I think as part of their upcoming *State of the service report* that looks at the issue of APS values, code of conduct and how various agencies deal with those issues.

Yes, the department of foreign affairs is one of the agencies—because the process is still ongoing—that is providing assistance to the Public Service Commission in that area.

Senator ROBERT RAY—Are you one of those officials who responded on behalf of the department?

Mr Chester—I had a discussion with the staff that were doing that work for the APSC, yes.

Senator ROBERT RAY—Did you indicate to them that there were any impediments to code of conduct investigations?

Mr Chester—In what sense?

Senator ROBERT RAY—I have been told that you indicated that there was one major impediment to code of conduct investigations.

Mr Chester—I am not aware of that but I do not have a record of what was said at that meeting.

Senator ROBERT RAY—If you do not have a record of it, and I have only been informed of it by one source, we will not progress it any further. Like all soap operas, we will return to this one. Hopefully the next time we meet it will be resolved one way or another.

Senator FAULKNER—You cannot be any more definitive than you have been with Senator Ray in answer to his earlier question about your expectation of when Mr Kennedy's report will be provided? I have heard what you have said, but can you be any more definitive than that?

Mr Chester—No. Mr Kennedy has not given us that indication of when he thinks his report will be finalised.

[9.47 a.m.]

CHAIR—We move now to output 2.1, Consular and passport services.

Senator BARTLETT—I think there will be a fair few questions in this area. I just have a couple first and then I will vacate the field for others. I just wanted to clarify the situation regarding the issuing by the department of Australian travel documents. What are the criteria or circumstances under which those documents are provided?

Mr Kemish—It very much depends on which travel documents you are talking about. Are you able to be more specific?

Senator BARTLETT—I can use a specific situation as an example, if you like, although I am not particularly wanting to use this to pursue one particular person's case. I appreciate a lot of this derives through the immigration department. In certain circumstances people are put on bridging visas by the immigration department and instructed to seek travel documents from Foreign Affairs where they are not able to get a passport from their own country. For example, in this case a couple originally from the former Yugoslavia who cannot get a passport from there are being told to apply to DFAT to get travel documents which are then not being issued. What is the role of those documents and what is the criteria that apply?

Mr Kemish—I think you may be referring to a travel document called a ‘titre de voyage’. These are documents for which we are responsible to the extent that we are the issuing authority, and our role is to check the identity of the individual if we are asked to issue the document. Decisions as to who should be issued these documents are made by the Department of Immigration and Multicultural and Indigenous Affairs, as you suggest.

Senator BARTLETT—What is the nature of a titre de voyage document?

Mr Kemish—I will ask Mr Nash, the head of Passports Branch, to respond.

Mr Nash—The titre de voyage, or the convention travel document as it is more commonly known, is issued in accordance with the convention on refugee status, dating back, I think, to about 1951. The document itself is based on a design approved by the UNHCR, and it is produced in accordance with ICAO standards for international travel documents. It looks, for all intents and purposes, very much like an Australian passport on the inside but on the outside it is quite readily distinguished, being a blue colour and having black print, which is a feature of these documents, as I said, as set down by the UNHCR. I actually have one with me if you would care to see one. That is what they look like.

Senator BARTLETT—That would be handy. Is it a mock-up copy or something like that?

Mr Nash—It is a specimen.

Senator BARTLETT—I would appreciate that. So there are four people who are under UNHCR mandate—the approved format of the UNHCR?

Mr Nash—Yes—and in accordance with the convention.

Senator BARTLETT—What procedure do you use to determine whether or not someone is entitled to receive one of these documents?

Mr Nash—These documents are issued under the convention to those people who have been recognised by Australia as having refugee status.

Senator BARTLETT—So you do not need to determine what country they are a citizen of or anything like that?

Mr Nash—No, we do not. We leave that to DIMIA, as has already been said.

Senator BARTLETT—Would it be a problem if DIMIA says that you have to get one of these from DFAT? If they are mandated by UNHCR as a refugee, why would there be a problem in their being issued one?

Mr Nash—There should not be a problem with their being issued one provided they have the required recognition or refugee status.

Senator BARTLETT—So you do not need to have a nationality or you do need it but you get it from DIMIA or from the person—

Mr Nash—DIMIA provide a sponsoring letter that provides all the details of the individual concerned. What we have to be sure of when we issue one of these documents is the identity of the individual concerned.

Senator BARTLETT—The situation I would use by way of example—and I know we are tight for time—is basically one of someone being bounced backwards and forward between

two departments, which is always infuriating for anybody. But when people have been put on a bridging visa pending making arrangements to leave the country, they have not been able to get a passport and have documentation saying they will not get a passport from their country of origin, but are being told they have to make arrangements to leave the country by going to DFAT and getting one of these, and then DFAT say that they cannot issue them, do they have to provide a ticket showing they are leaving or anything like that?

Mr Nash—Not for one of those documents, but I am wondering here whether we are actually talking about that document or a certificate of identity.

Senator BARTLETT—I am advised that it is one of these.

Mr Nash—Just to make that clarification, a certificate of identity is issued to a permanent resident who is not an Australian citizen to enable them to travel overseas. The issue of these documents, as I said before, is restricted to people with refugee status.

Senator BARTLETT—So the certificate of identity is a different document?

Mr Nash—Yes, it is.

Senator BARTLETT—Is that for travel purposes as well?

Mr Nash—Yes, it is, but it is issued only to those people who can demonstrate that they have a need to travel overseas and who can demonstrate that they cannot get the travel document from their country of nationality.

Senator BARTLETT—If people are being told to get out of the country then I guess that is a need to travel overseas.

Mr Nash—DIMIA will sometimes request the issue of a certificate of identity on behalf of the individuals that they are deporting.

Senator BARTLETT—So the documentation you require to issue one of these titre de voyage documents is confirmation that they are under UNHCR mandate and able to verify their identity in some shape or form? Is that all you need?

Mr Nash—That is correct.

Senator BARTLETT—To produce a certificate of identity do you need anything extra? Do you need to be able to establish the country of destination?

Mr Nash—We need to be able to establish the identity of the individual concerned, and we need proof of the fact that they cannot get a travel document from their country of nationality.

Senator BARTLETT—And that proof would be a letter from the embassy of the relevant country or something like that?

Mr Nash—That is the preferred document. It does not always happen that way, of course, because some embassies will not issue such a letter. We have to deal with these on a case by case basis.

Senator BARTLETT—So you would need adequate identification documents before you could give the titre de voyage?

Mr Nash—That is correct.

Senator BARTLETT—Then the validity of these is a matter for DIMIA?

Mr Nash—That is correct. Those documents—the titre de voyage, which you have in your hand, and the certificate of identity—do not bestow right of re-entry to Australia. A re-entry visa is then required to be entered into that document in order for the traveller to be able to return to Australia.

Senator BARTLETT—As you say, this document looks like a normal passport. Are they potentially able to be put to multiple use? They do not have any re-entry or other component to them as far as Australia is concerned?

Mr Nash—No, they do not. They are valid for travel to all countries, and it is up to the countries concerned to determine whether or not they are prepared to put a visa into that document. Of course, it is up to DIMIA to decide whether or not they are prepared to put a re-entry permit into that document.

Senator BARTLETT—Thank you.

[9.57 a.m.]

Senator FAULKNER—Mr Kemish, I wonder if I could briefly receive an update or a status report on what the departmental involvement has been in the extradition matter between Australia and the Hong Kong government regarding Carl Voigt and David Hendy. Obviously I appreciate there are other departmental responsibilities here, but I am interested in the perspective—

Mr Chester—This is not an issue for Mr Kemish's area. I will get the experts to come to the table.

Senator FAULKNER—Isn't it? I thought it was 2.1.

Mr Kemish—No, it is a matter that relates to the extradition of an Australian citizen. It is a law enforcement issue, not a consular one.

Senator FAULKNER—That is fine. If it is not 2.1, what is it?

Mr Chester—I guess it is a combination of—

Senator FAULKNER—This is for future reference.

Mr Chester—our legal area, ILD, which I think is 1.1.6, and our North Asia Division, given that it is about Hong Kong. I will ask Dr French to start off answering questions.

Dr French—Carl Voigt and David Hendy, both Australian citizens, were the subjects of separate extradition requests from Hong Kong for numerous fraud related offences. The charges stem from Voigt's and Hendy's work on a Hong Kong building project in the late 1990s. Voigt and Hendy were both found by a magistrate to be eligible for surrender and were remanded in custody to await the final determination of the Minister for Justice and Customs.

The Minister for Justice and Customs determined not to surrender both men. The minister has broad discretion under the Extradition Act not to surrender someone. The minister made his determination and we were advised by the Attorney-General's Department in this area—which of course is primarily within that department's jurisdiction—that he made his determination on the basis of all the information before him, including submissions from

representatives of Mr Voigt and Mr Hendy on a number of issues relating to their potential extradition and submissions in reply from Hong Kong. Neither the act nor the extradition agreement between Australia and Hong Kong imposed an obligation to provide reasons for the refusal of an extradition request. The minister's decisions were internal decisions of the Australian government. As a matter of course the reasons for these decisions are not generally disclosed.

Senator FAULKNER—Thank you for that. This useful background. There have been some recent media reports that the Hong Kong government has lodged a formal diplomatic protest to the Australian government over this matter. I wonder if you, Mr French, or one of the other officials at the table, could confirm whether that is the case.

Ms Morton—Yes, I can confirm that there has been an exchange of diplomatic notes, notes verbales, between the Hong Kong government and the Australian Consulate-General in Hong Kong about the decision not to extradite Mr Voigt and Mr Hendy. The first such note was a note from the Australian Consulate-General to the Hong Kong government dated 17 October which conveyed to the Hong Kong authorities that the decision had been not to extradite Mr Voigt. The Hong Kong government then sent a note verbale on 24 October 2003 asking for the reasons for that decision. The Australian Consulate-General referred that note back to the Attorney-General's Department and gave the reply on 26 November declining to give reasons. There was an Australian Consulate-General note verbale on 6 January which advised of the decision not to extradite Mr Hendy. So the first decision was on Mr Voigt on 17 October; on 6 January was the decision on Mr Hendy. On 24 February there was a note verbale from the Hong Kong authorities—from the Permanent Secretary for Security, who is the equivalent of the Attorney-General—saying that the Hong Kong government was not satisfied with the decision in relation to the giving of reasons and that it was determining how it would respond to the Australian government on this question.

Senator FAULKNER—Does that relate to the giving of reasons in relation to both Voigt and Hendy?

Ms Morton—Formally they only asked for reasons for Mr Voigt.

Senator FAULKNER—That is 24 February 2004. Has there been any more recent communication from Hong Kong?

Ms Morton—The Australian side replied to that note on 9 March, confirming that the decision not to give reasons was consistent with the agreement between the two sides. Then the Hong Kong government replied with a note on 20 May.

Senator FAULKNER—And that note of 20 May from the Hong Kong government, would it be fair to say that that is what has probably led to the recent media reports? Would that be right?

Ms Morton—That would seem to be so.

Senator FAULKNER—It seems logical. I appreciate you cannot be certain but there is obviously a logicity to that. The words used—'not satisfied'—by senior Hong Kong authorities is pretty strong diplomatic language, isn't it? I stress that I am not an expert in diplomatic language.

Senator Minchin—That is an understatement.

Ms Morton—A diplomatic note can be about a very wide range of issues. It can be about a very minor administrative matter right up to what would be a very strong protest. This definitely indicates dissatisfaction. There could have been stronger language.

Senator FAULKNER—I noticed the aside from you, Senator Minchin, about diplomatic language.

Senator Minchin—Sorry, I could not resist it.

Senator ROBERT RAY—I seconded it.

Senator FAULKNER—You would agree, wouldn't you, Senator Minchin, that those words do appear to be, as Miss Morton has said, very strong in the rarefied air of diplomatic circles?

Senator Minchin—I am not go to pass comment on that.

Senator FAULKNER—I thought you were, given your aside. Can we get more detail about that note of 20 May from Hong Kong to Australia. What is the flavour of that particular note?

Ms Morton—That note does two things: it reiterates the Hong Kong government's disappointment and concern at the decision. It is also a very positive and forward-looking document which says that the Hong Kong side now look forward in a positive fashion to developing further the international legal cooperation.

Senator FAULKNER—Where does it go from here?

Ms Morton—I believe there is also a letter that has gone to the secretary of the Attorney-General's Department from the Hong Kong Department of Justice, suggesting that there be high-level consultations on extradition procedures and related matters. I understand from the Attorney-General's Department that they will be responding quickly and positively to that invitation.

Senator FAULKNER—Is it, in the view of the department, an extraordinary situation when we have got a spokesperson from the Hong Kong government giving such public detail about the strength and content of the Hong Kong protest? It seems unusual to me, but I do not pretend to be an expert in this. You, no doubt, can help me.

Ms Morton—There are cases where, if one government needs to make a point to another government, they make that point either by diplomatic note or some other means, and then they make the contents of that communication public. That is not an unusual thing to happen in international relations.

Senator FAULKNER—What you have outlined to the committee—and I appreciate the thoroughness with which you have done it—is, if you like, a series of diplomatic notes to and from Australia and Hong Kong on this issue; is that right?

Ms Morton—That is correct.

Senator FAULKNER—In relation to diplomatic notes, can you assure the committee that it is a complete record that you have provided?

Ms Morton—Yes, I can assure the committee that that is a complete record.

Senator FAULKNER—The reason I asked that question is that I wanted to understand whether there had been other cable exchanges or meetings or representations that may have occurred during this process that perhaps are not necessarily reflected in that exchange of notes. Are you able to assist us there at all?

Ms Morton—That is certainly the only formal exchange of written correspondence between the two governments on these issues.

Senator FAULKNER—Is it possible to have these sorts of diplomatic notes tabled at the committee?

Ms Morton—That would not normally be the practice.

Senator FAULKNER—Normal practice, for the government, appears to have gone out the window. You are going to help me; I can see that, Mr Chester.

Mr Chester—We would not normally do that. I would like to take that question on notice and we can consider whether it is appropriate.

Senator FAULKNER—I am just asking what the normal practice is.

Mr Chester—Normal practice is not to, but you—

Senator FAULKNER—Help me with this please, Mr Chester. I would like you to reflect on this answer. Are these diplomatic notes, by definition, from Hong Kong or are they more than that? They sound like they are diplomatic protests, which is a different thing. Is that a fair characterisation in this circumstance?

Mr Chester—No, it is not. I do not believe they are protests; they are notes that express a view and seek information.

Ms Morton—I do note that the Hong Kong press has described them as protest notes but the word ‘protest’ does not appear at all in the diplomatic note.

Senator FAULKNER—What impact has this had? We seem to be getting more and more enmeshed in this. It is becoming a more difficult issue in terms of our relationship. I assume you have responsibility for the North Asia desk, Ms Morton?

Ms Morton—That is correct.

Senator FAULKNER—What sort of priority has this issue now got as far as you are concerned?

Ms Morton—I believe that this last note, combined with the letter to the Secretary of the Attorney-General’s Department, is a very positive, forward-looking note. I believe that, based on that note and on the letter, the Hong Kong authorities remain disappointed with the decision but have decided to move on in relation to cooperation on international legal matters with Australia.

Senator ROBERT RAY—Has no suggestion ever been made that in the reverse circumstance Hong Kong may—in terms of straight-out retribution, I am suggesting—not deport someone to Australia? I think you would be aware that much of the illegal fishing in Australia’s zone off Herd Island, Macquarie Island and the Antarctic has been financed and

organised out of Hong Kong. There would be people of interest to us in Hong Kong in that regard. Has there been no indication that cooperation for their remittance back to Australia would not be barred because of our lack of cooperation in this Hendy case?

Ms Morton—Absolutely not. I believe that the last two pieces of correspondence are very forward looking, that they wish to develop this very valuable relationship which they believe they have with Australia—and which they do have with Australia—in relation to matters regarding criminal activities—

Senator ROBERT RAY—Ms Morton, have you had an indication as to what extent—you describe it as their disappointment, and I think that is a good phrase—their disappointment is driven by the failure to extradite or the failure to give reasons to extradite? Where are they concentrating in terms of those two issues: that is, failure to extradite as opposed to failure to give reasons to extradite?

Ms Morton—I believe that they accept the decision not to extradite and that their disappointment relates to the failure to give reasons. I believe that they will most likely be pursuing that aspect of our extradition arrangements with the Attorney-General's Department.

Senator ROBERT RAY—Via you or directly?

Ms Morton—Directly. The request to extradite came directly to the Attorney-General's Department under the treaty that we have. It did not go through the consulate general. The first we heard of it was the decision not to extradite. That was when we conveyed that decision to the Hong Kong authorities. They have a close cooperation under the extradition treaty.

Senator FAULKNER—There has been a lot of negative media and press commentary about Australia's decision in Hong Kong, hasn't there?

Ms Morton—There has been a lot of press in Hong Kong, yes.

Senator FAULKNER—But it is fair to portray that as negative coverage of Australia.

Ms Morton—It is negative coverage of the decision.

Senator FAULKNER—You monitor that, of course, with your responsibilities for the North Asia desk?

Ms Morton—That is correct.

Senator FAULKNER—Are you able to say to the committee today what impact you think this has had more broadly in terms of our relations with Hong Kong and our standing there?

Ms Morton—We have not discerned any evidence that this matter has spilled out from the international legal cooperation into the wider relationship. We have no evidence that there has been any effect on the wider relationship.

Senator FAULKNER—Are you monitoring that closely?

Ms Morton—We are.

Senator FAULKNER—Has DFAT had much formal engagement with the Attorney-General's Department or the responsible ministers—the Minister for Justice and Customs and

the Attorney-General—on this matter? Have any advices been provided by DFAT to the Attorney-General or the Attorney-General's Department?

Ms Morton—Prior to the decision, there was no contact.

Senator FAULKNER—I think you had indicated that before, but what about subsequent to the decision? Has this issue started to cause ripples and then waves? Let us hope no tidal waves.

Senator ROBERT RAY—Tsunamis.

Senator FAULKNER—Yes, not tidal waves. As always, I am being corrected by Senator Ray, who is a pedant on these sorts of matters.

Senator ROBERT RAY—It is a first.

Senator FAULKNER—Are you able to indicate what interface you have had with the Attorney-General's on this after the decision?

Ms Morton—We have had meetings between the Attorney-General's and the North Asia division on this matter on how to handle the request for reasons and on handling the repercussions for the international cooperation on international legal matters.

Senator FAULKNER—How many meetings have you had.

Ms Morton—I personally have had one.

Senator FAULKNER—Have there been more?

Ms Morton—There have been others. People in my division have had telephone calls and meetings.

Senator FAULKNER—Are you providing more formal advices to A-G's or the responsible ministers?

Ms Morton—We have been encouraging the Attorney-General's Department to react positively to this last minute to this last letter and note verbale. They are very ready and willing to do that and they are reacting very positively to it.

Senator FAULKNER—One of the issues here is what the repercussions of all this might be. That is obviously something you more than keep a weather eye on, isn't it?

Ms Morton—We do, yes.

Senator FAULKNER—Are you able to say at this stage what you think they might be?

Ms Morton—So far we have no evidence that there has been any flow-on into other areas of the relationship. We believe that this positive response now from the Hong Kong authorities means that they wish to move forward on this area of international legal cooperation.

Senator FAULKNER—The reason I do not doubt that what you are saying is absolutely right is that it is in part a positive response, and it is good to hear that. It is useful to know. But there is obviously a very considerable degree of discontent, dissatisfaction and concern on the part of the Hong Kong government and Hong Kong authorities. That can be acknowledged too, can't it?

Ms Morton—They are certainly disappointed with the decision, yes.

[10.20 a.m.]

CHAIR—I think we might move on to Hicks and Habib and output 2.2.1.

Senator BROWN—I have a series of questions. I will move through these quickly but I will be looking for clear answers to them. I am talking about Hicks and Habib in Guantanamo Bay and their detention there for over two years now. You will be aware, Minister and gentlemen, that the lawyers for Mr Habib have given a description of his mistreatment from fellow prisoners including British born prisoner Mr Derghoul. That evidence says:

On one occasion Mr Derghoul witnessed a five man Extreme Reaction Force enter Mr Habib's cell and attack him. Mr Derghoul stated that he saw our client sprayed with pepper spray and start moaning in pain. Immediately, the five military personnel entered the cell and Mr Derghoul was aware that our client was being punched and kicked. While this was occurring Mr Derghoul could hear our client crying out in pain. When the assault in the cell had finished Mr Derghoul observed the military personnel drag Mr Habib by chains attached to his feet along the cell block corridor and out of the complex. All the time our client was screaming in agony. Mr Derghoul stated that he saw this assault on our client being recorded by a video camera.

What has the government established about those claims of clear abuse of Mr Habib?

Mr Kemish—Senator, I would like to thank you and the rest of the committee for the interest in the welfare of Mr Hicks and Mr Habib. The welfare of Australian citizens overseas, as I think you will know from dialogue with me and others over time, is of very considerable importance. I personally have no interest in the politics surrounding this but what I am responsible for is communication, with other agencies, with the families of these people about their circumstances. It is clearly very distressing to them when there are quite—and I do not refer to what you just said, Senator—conspiratorial suggestions in the Australian media about the welfare of these individuals incarcerated overseas. I respond very strongly on these issues because I take these issues very seriously. We communicate with the families and we do our very best to check on the welfare and the treatment of these individuals. I think it might actually help the committee if I were able to give you a brief but comprehensive statement on the basis of my personal investigation of all the records and discussion with our consul general, who has been visiting these men, about the issues that you mention.

Senator BROWN—In view of the time, how long do you think it might take?

Mr Kemish—About three minutes.

Senator FAULKNER—You want to commence this questioning with a quick briefing or status report for the committee?

Mr Kemish—Absolutely.

Senator FAULKNER—I think that is sensible, Mr Chairman, because it may well save a great deal of time and questioning later.

Mr Kemish—That is the motivation for the suggestion. As you all know, in relation to the specific allegations raised by the lawyer, we have worked to obtain, and have obtained in the last week, clearance with the US authorities to speak directly to the lawyers about those allegations. Every time these allegations are raised we track them down.

To return to the status report—as Senator Faulkner describes it—about the treatment of these individuals: first of all, David Hicks. David Hicks has never complained about mistreatment in Guantanamo Bay to us at all. He has described his treatment there—he volunteered this remark—as fair and professional. He has expressed satisfaction with the medical services provided, with the food and the privileges provided to him for exercise, with the reading material he has been able to obtain with our support and the communication with families that we help him with. He has been grateful to Australian officials for their interest in his welfare. He has used the opportunity of the discussions with Australian officials to catch up on current issues, including news and sports in Australia. The discussions, I know from my colleague Derek Tucker, have been easy, flexible, good discussions without any particular concern about what might be said.

During a visit in May 2003 to Guantanamo Bay by law enforcement officials, by ASIO officials, Hicks made a brief remark during that discussion to the effect that he had been beaten in late 2001. As you will recall, Hicks was in Northern Alliance custody in Afghanistan until December 2001 and was transferred to Guantanamo on 11 January after a brief period in US custody in Afghanistan. He did mention that. He did not provide details and he has never referred to it in previous or subsequent meetings. I am able, in response to questions from you later, to talk about issues prior to Guantanamo Bay if you are interested.

I now turn to Mr Habib. Mr Habib has not been communicative and he only provides feedback on his welfare in response to direct questions. He does not always answer them. He can be belligerent in discussion with our consul general, but for the most part is simply reluctant to communicate. In November 2003, during one of the welfare visits there, Mr Habib referred to his general circumstances in Guantanamo Bay, the fact that he was in detention there, as torture. We quickly asked him to elaborate. When we asked him to elaborate he complained about the vaccinations he was receiving, for flu and TB, and that he was being made to wait in rooms that were too cold—that is, too airconditioned—for non-specific periods of time. He has also complained about being mocked on arrival in Guantanamo Bay. It is important to note that we very assertively raised that immediately, as we do in any such cases involving the 214 prisoners overseas, with the holding authority. We received a very direct and very clear assurance that all prisoners on arrival were being treated with respect in these circumstances. In response to your questions I can go to how those remarks were made and so on.

To give you a complete picture, I think it is important to say that on the first Australian visit to Mr Habib in Guantanamo Bay, which was only 10 days after his transfer there from Egypt, Mr Habib made some serious complaints about maltreatment during his time in Egypt—and I would like to return to that in a second. In the same language he used on that first visit he has referred back to that and made the same set of comments, I believe, one subsequently in a visit in February 2004.

As for Egypt, I think you know that we were extremely disappointed not to be provided with access to Mr Habib during his period in Egypt. Indeed the Egyptian government never confirmed his presence in Egypt, and this was despite repeated representations at the highest level in the Egyptian government. The ambassador protested in the most vigorous terms I have seen in my career to the Prime Minister, to the head of the security service, to the interior

minister and to many other officials. I personally called in the Egyptian ambassador about this, and you can take it from me that we made our objections and expectations very clear— notwithstanding Mr Habib being regarded by Egypt as an Egyptian citizen. That is a complete picture.

Senator BROWN—Could you answer the question about the extraordinarily worrying description of Habib's treatment at Guantanamo Bay, whether that has been put to the US authorities and what the response has been.

Mr Kemish—As I explained to you earlier, we have now obtained permission to speak directly to the lawyer. It has been a matter of public record that we are very interested in speaking, and prepared to speak, to the lawyer about these allegations.

Senator BROWN—I am not asking you about speaking to the lawyer. He has laid this down. We do not need corroboration of that. What I am asking is about the approach to the US authorities.

Mr Kemish—In my business we do not communicate with people through the newspapers; we speak to them directly.

Senator BROWN—The date of this is 28 May. You have just described the situation in Egypt with Mr Habib. You are aware that one of your officials visited Mr Habib in Pakistan before he went to Egypt.

Mr Kemish—Yes, I can tell you about that.

Senator BROWN—No, it is on the record. The government was aware that he was to go to Egypt, according to that record. That is so, isn't it?

Mr Kemish—I certainly was not aware that he was going to Egypt. I do not know any Australian official who was.

Senator BROWN—I will get you to check on that. There have been videos taken of all interrogation sessions with the two Australians in Guantanamo Bay. Have you asked to see those videos and, if not, why not?

Mr Kemish—You state as fact that there were videos taken of each of these interrogations. Can I ask what basis you have for that?

Senator BROWN—Your representatives have been there at least a dozen times. Have you asked about the evidence that there were videos, and have you asked to see those videos?

Mr Kemish—Personally I have only been aware of suggestions of videos in very recent weeks when I have seen them in the newspaper.

Senator BROWN—So have you asked about the videos?

Mr Kemish—We have a very clear plan to ask a series of serious questions, having obtained permission to speak to the lawyers.

Senator BROWN—Will you be seeking those videos?

Mr Kemish—I am reminded by Dr French that our ambassador in the United States has asked for a formal investigation of all these matters and has obtained agreement that one will be undertaken. That is in quite recent times.

Senator BROWN—Has he asked to see the videos?

Mr Kemish—That will be part of the investigation, I am sure.

Senator BROWN—For an Australian official to see the videos?

Mr Kemish—Sorry. This seems to be based on a bit of a misunderstanding of conventional law and the way the world works. There are, as I say, 214 prisoners overseas. They are held by the authorities of the jurisdictions in question. You seem to be suggesting that Australia itself should undertake an investigation in the United States about matters relating to the United States.

Senator BROWN—And how the prisoners are held, and the extremely grave evidence of abuse and—

Mr Kemish—What evidence?

Senator BROWN—It is coming from the lawyers of the two people concerned. That is very clear evidence and it needs substantiation, doesn't it?

Mr Kemish—It certainly bears investigation when we see media reports of people making claims. For that reason we have obtained an assurance at the highest level in the United States that a full investigation will be conducted. We are entirely confident that that is under way and that it will canvass all the matters of interest to you.

Senator BROWN—Have you sought the Red Cross reports on these prisoners or has the government been given them?

Senator FAULKNER—Before you go there, Senator, could I ask what issues the investigation will canvass. You said all matters of interest to Senator Brown; I think it would be better if you said what they were, Mr Kemish, and then Senator Brown can continue his questioning.

Mr Kemish—I will ask Dr French to help me in a moment. I will be making sure that all allegations, public or otherwise, are considered as part of that investigation.

Senator FAULKNER—Dr French, can you be more specific?

Dr French—The terms of the investigation essentially, as we understand it, although I do not have the terms verbatim in front of me, as expressed to us, are all the conditions relating to the detention of Mr Hicks and Mr Habib while in US custody, including before their arrival in Guantanamo and including and in light of recent allegations.

Senator FAULKNER—When will these occur?

Dr French—As we understand it, it is already commencing. We understand that it is a short time frame—in the course of June. I am not sure of an exact date when it should be completed but we were assured that the investigation would be commenced in a very short time frame.

Senator FAULKNER—And the conducting authority?

Dr French—I am not aware that we have been advised of the exact conducting authority.

Senator FAULKNER—No, I am not either.

Mr Kemish—We have requested that it be done and we are awaiting the details. This matter has occurred over recent days.

Senator FAULKNER—Are you able to assist us in relation to who the conducting authority will be?

Dr French—We have no advice on that yet but we do have an assurance that it will be a thorough investigation from the highest levels.

Senator BROWN—Will there be a request about the existence of videos and for those videos to be made extant if they are there?

Dr French—The request has been made in the context of the recent and serious allegations of maltreatment. We certainly understand that clearly to refer to any allegations that have been made.

Senator BROWN—There have been clear allegations made that videos were taken of all these interrogation sessions. Will Australia be requesting to establish whether that is the case and, if so, have a viewing of those videos?

Dr French—As I mentioned, the existence of serious allegations is now a fact. The existence of evidence will be a matter for the investigating authorities. We have been assured that any matters that have been raised—and they would include the kinds of treatment that are alleged to have occurred, including any records, which may comprise videotapes—and any evidence which existed would be taken into account by the authorities. It is not for us, however, as the Australian government, to determine what evidence may be found. But we would expect that any evidence which exists would be thoroughly investigated.

Senator BROWN—The expectation and the confirmation of that are two different things. Firstly, has a direct request gone to the US government as to whether videos exist of these interrogation sessions? Secondly, will a request follow, or go with that, to ensure that Australian officials see the videos if they exist?

Mr Kemish—Your first question was whether a direct request has gone to the US government about the inclusion of any video that might exist in this investigation. We have made it clear that all issues are to be considered. If you are asking whether we have specifically asked about videos in our communication, at this stage of the communication there has been no need to. We will ensure that all issues, including the issue of interest to you, is considered. On the second issue of whether Australian officials will be allowed to view the video, it is not our expectation that we will do so, and we will not be asking at this stage. We are entirely confident that the United States will undertake a comprehensive investigation. This actually goes to a couple of other issues that seem to be underlying your questioning, Senator.

Senator BROWN—Just before we go to those other issues, can I say here that it is not acceptable to me that you say there is no need to establish whether those videos—

Senator FERGUSON—Mr Chairman, I raise a point or order. Senator Brown has made statements for three days. He is here to ask questions, not to give his point of view on particular issues. If he wants to make those points of view, he can make them in the Senate

chamber. This is a period where we question officials and seek answers, not a time for Senator Brown to debate or state his point of view in front of the committee.

CHAIR—Point taken, Senator Ferguson.

Mr Kemish—If you consider the circumstances, are we to undertake our own investigations in relation to the circumstances of the other 214 prisoners overseas? I have to say, as someone who has been running this area conscientiously for several years now, there are many others I am more concerned about.

Senator BROWN—The point I put to you, Mr Kemish, is that it is in Australia's interests to ensure that Australians, wherever they are held, are being held in conditions which are humane. There are very serious allegations of breaches of the Geneva convention by the US authorities, not just with these prisoners but also with prisoners who have been released. Despite that, the US has repeatedly said that the Geneva convention is being upheld in Guantanamo Bay. You are saying there is no need to establish whether these videos exist. If the Geneva convention is being upheld, there is no concern about having these videos brought forward.

Senator FERGUSON—That is if they exist.

Senator BROWN—What I want to establish here is whether or not they do exist. I cannot believe that that has not been established and that you are not going to ask that question directly.

Senator FERGUSON—The question has already been answered.

Mr Kemish—I think I have made our position on that pretty clear. What I would like to do—

Senator BROWN—Just on that point: that position is not acceptable.

Senator FERGUSON—Mr Chairman, on a point of order: it is not in order for Senator Brown to—

Senator BROWN—It is very important that we get reasons for not asking about the videos being brought forward—establishing whether they exist and then whether we can see them.

CHAIR—Order, Senator Brown!

Senator FERGUSON—Mr Chairman, on a point of order: it is not in order for Senator Brown to interrupt Mr Kemish when he starts his answer and then for him to say what his point of view is when Mr Kemish has not even answered the question in the first place. It is just not acceptable.

CHAIR—Senator Brown, in view of the lateness of the time, you have a short period left to you for questions. My suggestion to you is to ask the questions and to stop the rambling. Please proceed.

Senator BROWN—The editorial we can stop too, Chair. This is a very serious matter.

CHAIR—Just ask your questions, please, Senator Brown, or I will call somebody else.

Senator BROWN—The next question to Mr Kemish is that we have established that it is not Australia's business to seek these videos but that the—

Senator FERGUSON—Mr Chairman, on a point of order: that is simply not true.

Senator BROWN—Mr Howard said overnight that it was ‘ridiculous’ that some people were calling for the prisoners to be tried in Australia. He said:

If an American commits a crime in Australia that person is tried in Australia.

I ask you about the two US marines who are currently in Japan, one of whom has been charged with attempted murder in Australia, who were released on bail from the Townsville Magistrate’s Court. According to yesterday’s wires, the Townsville Magistrate’s Court was told:

... the Federal Government has consented to a request from US authorities that they be granted jurisdiction to deal with the two.

How do we get into this situation where two Australians are left entirely in the hands of the US authorities but when it comes to two Americans, one of whom has been charged with attempted murder in Australia, their extradition to Australia to appear before the Australian courts is not being pursued by the government. Surely there is a double standard here.

Senator FERGUSON—What about the other 212 prisoners around the world—not worried about them?

Mr Kemish—That is not a question for me, Senator.

Senator Minchin—Mr Chairman, I do not think that is a question relevant to this office. It is for another committee.

Senator BROWN—It is a very relevant question.

Senator FERGUSON—In your opinion.

Senator BROWN—The Prime Minister said:

If an American commits a crime in Australia that person is tried in Australia.

Why is it that the Americans who have committed the alleged crimes in Townsville are not being tried in this country?

Senator Minchin—I am sorry, Senator Brown, I do not have information on that case that I can give you.

Senator BROWN—You should have.

Senator Minchin—What do you mean, I should have?

CHAIR—Senator Brown, ask your questions.

Senator BROWN—I want to ask about the military commission trial that Mr Hicks, we hear, may be brought to in August, and Mr Habib may well come to, too. Will Mr Habib be given legal counsel before he determines whether or not he accepts a military commission?

Dr French—The procedures that have been set out by the US are such that detainees are eligible to receive legal counsel once they have been designated as eligible for trial under the military commission process.

Senator BROWN—Who made the decision that we would accept that Habib would not get legal counsel in making that pivotal decision?

Dr French—It is a matter of US law, essentially; it is not for Australia to interpret the law or implement US law in this area.

Senator BROWN—Is it not for Australia to make representation that Habib get legal counsel before that pivotal decision, to allow himself to be brought before a military commission where many of his rights are removed, is made?

Dr French—We have consistently sought to expedite a process whereby the status and the fate of Australian detainees may be determined. We have emphasised our views on many occasions and engaged in constant dialogue with the United States to ensure that a process may be engaged in to allow a legal process to commence and be concluded such that their fate and their status may be determined.

Senator BROWN—Can you cite any other case in the world where Australia allows Australian citizens to be brought to a trial system without getting legal advice and accepts that they may not have legal advice in determining what to do before that trial system is decided?

Dr French—I think we need to distinguish here, Senator, between the commencement of a trial process and the point in time when access to legal counsel occurs. Clearly, it is extremely important that prior to the commencement of any legal judicial process persons subject to such process have access to legal advice and legal defence. The process that is foreseen with regard to military commissions does indeed see that. It is an initial step, as we understand it—and we are informed by the Americans—whereby an individual detainee is designated as eligible for military commission process. Once that step occurs and well before any issues—for example, with regard to the nature of charges or the possibility of a plea bargain—that go to the outcome of any process are determined, legal advice is available.

Senator BROWN—Can you tell me any other situation on earth where Australians are being held in prison and the Australian government has not sought to get them legal advice?

Mr Kemish—As you are aware, the whole approach by any government in the world is to accept the rules that apply within the jurisdiction where the individual is held. Legal practice ranges dramatically across the world. In the end, we ensure that, within the parameters allowed by the jurisdiction in question, the individual is aware of their legal entitlements and receives legal support equal to that received by anybody else.

Senator BROWN—Can you tell me anywhere else on earth where Australians are held and the Australian government has not sought to get them legal advice and legal representation?

Mr Kemish—I can tell you that, in regard to every case around the world—I am not going to mention every prisoner we have overseas—we do not represent the individuals legally. In every case, we do not get legal representation for them. That is the practice of all countries. What I am telling you, Senator, is that the role of government is not to represent legally individuals in prison overseas. It is to ensure that, within the jurisdiction where they are held, they receive whatever their entitlements are in that jurisdiction.

Senator BROWN—I would have thought that we would always seek to get legal advice for Australian prisoners held in prisons overseas.

Dr French—Could I add for completeness that we have been working very hard for quite a long time now to ensure that the processes foreseen with regard to the Australian detainees are expedited, which will indeed enable access to legal counsel at the earliest possible time. Of course, that access has been available to Mr Hicks now for some time. The defence counsel has been working very vigorously, as is their job, and as we would expect, to defend the rights of their client. We anticipate exactly the same will occur when Mr Habib is designated and he has access to his legal counsel.

Mr Kemish—Senator, I am anxious to reassure you on a question that you asked me earlier which has gone by the bye. It is in relation to the ICRC. I think it is important to put it on the record. I did not want to interrupt the flow. I simply want to make sure that it is addressed.

Senator BROWN—Please do.

Mr Kemish—The ICRC plays a very useful role in these issues. The ICRC is visiting very regularly all the prisoners in Guantanamo Bay, including Mr Hicks and Mr Habib. In fact, the new commander of Guantanamo Bay has, in discussion with us, referred to the ICRC as playing a very useful system check and balance role within his camp. It is worth mentioning that he, like his predecessor, clearly places very great importance on proper treatment. His predecessor was a reservist and a retired judge. He volunteered in remarks to us that there would be no maltreatment on his watch. That was in our early visit. They both have placed a lot of importance on the role of the ICRC.

We have spoken to the President of the ICRC. He has told our ambassador in Geneva that neither Mr Hicks nor Mr Habib were mentioned in the ICRC's reports on Guantanamo Bay. Our ambassador in Washington also discussed their cases with ICRC representatives in December last year. They confirmed that the ICRC was visiting these men and had no issues to raise in respect of them.

Senator BROWN—We have established that there is no legal representation before the decision is made to go before the military commission. I have two questions about the process of the military commission. Firstly, are there US domestic laws under which these men could be tried which do not exist in Australia? Secondly, is there an assurance that, when either man comes before the military commission, they will have the full legal back-up that is required to meet the weight of the US government as prosecutor? By that I mean going beyond the legal representative of Hicks—and, presumably in the future, Habib—in Australia and Major Mori in the United States? Will they have the full back-up of top-ranking legal assistance to meet the strength of that prosecution by the United States military authorities?

CHAIR—When you have answered this question, Dr French, I will be moving to Senator Faulkner.

Senator FAULKNER—I will not interrupt Senator Brown for long, Mr Chairman.

CHAIR—I will let Dr French answer Senator Brown but I note we are getting close to 11 o'clock.

Senator FAULKNER—I am sorry, I did not realise you were awaiting an answer. I only want to ask one question after Dr French's answer.

CHAIR—We will have Dr French's answer and then you can ask your question, Senator Faulkner.

Senator FAULKNER—Thank you.

Dr French—Senator Brown, we understand that the military commission process is entirely consistent with the overall corpus of US law. It is a component of—

Senator BROWN—There is no appeal process.

Dr French—There is an appeal process through a review panel which has already been named and which consists of four persons, three of whom are former judges and quite eminent judges; one is a former Attorney-General of the United States. Beyond that there would also be a final review at a higher level again.

Senator BROWN—By the President?

CHAIR—Thank you, Dr French. I call Senator Faulkner.

Senator BROWN—No, the second part of that question, Chair—

CHAIR—I am sorry, Senator Brown, but I have called Senator Faulkner.

Senator BROWN—I insist that the second part of that question be addressed.

CHAIR—You can insist all you like but on this occasion I think I have the numbers. I call Senator Faulkner.

Senator BROWN—Senator Faulkner, I just ask that that question about legal representation by Mori of Hicks be answered—as to the military commission and the strength of it.

CHAIR—Senator Faulkner, would you like to ask your question. Senator Brown, if he has time before 11 o'clock, can have another shot but at the moment you have the call, Senator Faulkner.

Senator FAULKNER—Let me quickly ask something and then Senator Brown can conclude. Mr Kemish, I would like to ask you a question. You have indicated that Habib had claimed that he had been mocked on arrival at Guantanamo Bay. I think that was part of the information you provided to this committee in your opening statement—is that correct?

Mr Kemish—Yes, that is right.

Senator FAULKNER—Could you indicate to the committee what the background to that was and what has happened as a result of the specific claims.

Mr Kemish—The way these things were delivered were as off-the-cuff, very brief remarks from Mr Habib, as I understand it, and part of the frustration is that he will not elaborate when asked. In any case, as to specifically what we did about it, our person immediately raised this issue with the authorities in the base and it was immediately denied. It was underlined to us that people arriving in Guantanamo Bay are treated with respect.

Senator FAULKNER—So can you give this committee an assurance that you have worked as hard as you are able in these circumstances to satisfy yourself that this did not occur?

Mr Kemish—The best we can do is raise these things assertively and immediately. If nothing else, doing so underlines our interest, and what we have found through our experience is that doing so at least sensitises the holding authorities to our views about such behaviour. I really cannot say any more.

Senator FAULKNER—If you cannot say any more, it is best that Senator Brown concludes what he wants to talk about.

CHAIR—As it is 11 o'clock—

Senator BROWN—I have two questions which I—

CHAIR—I am sorry, Senator Brown, but you do not have the call. In fact, it is 11 o'clock.

Senator FAULKNER—It is not 11 o'clock so let him go.

Senator BROWN—The question is about, firstly, the assurance that there will be equal legal representation to meet the firepower of the prosecutor and, secondly, in relation to the inquiries to the US regarding the long periods of solitary confinement, sleep deprivation, hooding and blindfolding of these Australians—activities which Senator Hill has said are inhumane, and therefore we must take it that they are in breach of the Geneva convention. What assurances have you got that these serious allegations are not true?

Dr French—I will answer the first question very briefly and ask my colleague to answer the second question because I think it is a bit more in his bailiwick. With regard to that, we have worked hard and regularly to ensure that the military commission process was augmented. We received additional assurances from the US with regard to the military commission process including, for example, the fact that an Australian legal consultant has been able to become part of the legal team of any Australian detainees. In the case of Mr Hicks, already Mr Kenny has been identified as that legal consultant to provide additional support to the US defence team. We expect and anticipate that the Australian detainees will be defended very vigorously and we are already seeing evidence of that through the public and the private work of the defence counsel.

Senator BROWN—Will there be backup?

Dr French—That is beyond our ken. But we certainly anticipate that they will continue to be defended vigorously and well.

CHAIR—Order! It being 11 o'clock—

Senator BROWN—I ask that they do get backup.

CHAIR—the time allocated for this inquiry has finished.

Senator BROWN—I move that the time allocated for this inquiry be extended.

CHAIR—You would have to do that in a private meeting, Senator Brown.

Senator BROWN—I move that there be a private meeting to do that.

CHAIR—I think we will discuss that later. I thank the DFAT officials for their attendance.

Senator BROWN—Before you do so, I move that this session be extended by 30 minutes.

CHAIR—You cannot do that, I am sorry, Senator Brown. This part of the hearing is concluded.

Proceedings suspended from 11.04 a.m. to 11.16 a.m.

CHAIR—I welcome back Senator Minchin, Mr Chester and officers of the Department of Foreign Affairs and Trade. The committee has moved to trade programs. We are dealing with outputs 1.1.5, Bilateral, regional and multilateral trade negotiations and 1.1.6, Trade development/policy coordination and APEC.

Senator CONROY—How are the Doha negotiations going? What stage are we up to? There has been a fair bit of activity since we last met.

Mr Gosper—The Doha negotiations are now focused on the period leading up to a meeting of the General Council of the Trade Negotiations Committee at the end of July with the specific objective of developing what is called a framework agreement to essentially capture some of the results of the negotiation process thus far and to chart the way ahead for the remainder of the negotiations. The key issue that is being addressed as part of these discussions to develop a framework is agriculture.

Senator CONROY—Where are we at with the Singapore issues? Are they still kicking around or have they just been put aside for the moment in this process?

Mr Gosper—There seems to have been some movement on the Singapore issues in the sense that a number of the proponents of these issues have made clear they can accept three of the Singapore issues—that is, those issues other than trade facilitation—moving outside the single undertaking that is the Doha agenda but remaining part of the WTO work program. Trade facilitation would be a subject specifically for negotiation, in other words. The response from others thus far is a little unclear in the sense that many members think this would be a suitable solution, although it is still I think true that some developing and least developed countries would prefer that some or all of the Singapore issues not only be outside the single undertaking but not part of the WTO work program. But with recent developments there is a good prospect that the Singapore issues will not be a particularly significant stumbling block over the next month or two.

Senator CONROY—You have mentioned the dreaded word—agriculture. How are we going? Have we put a proposition? Has the Cairns Group met, as we are pushing hard on this issue?

Mr Gosper—The Cairns Group has met 10 times since February at ministerial or head of delegation and senior official level to talk about how we take the negotiations forward, including with representatives of the G20 group. There have been a number of other processes that have been under way over the last few months, in particular a number of informal small group processes amongst some of the key players in the negotiations, all designed to see whether we can move beyond the De Beers text that was tabled at the Cancun ministerial meeting last year and develop some consensus on how we achieve the specific objectives for cuts to export subsidies, domestic support and increases in market access.

Senator CONROY—What approach is the US taking? Everyone has always said we are not going to make too much progress because of the US presidential elections. Are they helping?

Mr Gosper—The US has been closely engaged in this process. You might recall that at our last estimates meeting one of the immediate developments we talked about then was the letter from Bob Zoellick at the beginning of this year, which was a very significant factor in building some momentum and establishing the basis for the effort we are now engaged in. It remains true, I think, that the US are actively looking for the basis for a framework—

Senator CONROY—So Mr Zoellick is actively engaged?

Mr Gosper—He is indeed.

Senator CONROY—Will he be at this meeting?

Mr Gosper—You might clarify which meeting in particular you are talking about.

Senator CONROY—It was the meeting this weekend or early next week.

Mr Gosper—There are a variety of meetings under way this week in Geneva. For the most part, they are at senior official level, as is par for the course. Ministers were last engaged explicitly on the margins of the Paris OECD meeting a few weeks ago, and we expect that there will be some opportunity for further ministerial discussion on the margins of the UNCTAD meeting, which will be held the week after next in Sao Paulo, Brazil, including USTR Zoellick.

Senator CONROY—What has been the overall reaction that you have detected to the EU's letter of 9 May on the key areas requiring movement?

Mr Gosper—There has been a very positive reaction, for the most part. Certainly the clarification of the EU's position on Singapore issues has been helpful. But, more particularly, its indication that it is willing to move to a negotiation on the elimination of all export subsidies has been a very significant development for the negotiations and has added a good deal of political momentum to the process.

Senator CONROY—In terms of the agriculture and the framework text that we work towards, what will it entail? Will it be an outline, an ambition or actual numbers in terms of tariff cuts and reductions in subsidies? What are we aiming for?

Mr Gosper—It is not yet clear. We would like as much specificity as possible if, of course, that specificity reflects the appropriate level of ambition. But it is not clear to us yet whether the framework will be one that sets the basic parameters, formulas and explicit approaches on tariff reduction or subsidy decrease or whether it will be one that includes those formulas and approaches but also with specific numbers to indicate, for instance, by how much tariffs will be cut or what sort of reduction in particular sorts of subsidies might be achieved. It is still very unclear which of those we can achieve in the next two months.

Senator CONROY—Is the Cairns Group preparing a response to the EU's blended approach to tariff cuts?

Mr Gosper—The Cairns Group has been responding, if you like, for more than six months now by making clear that the blended approach that was proposed in the EU-US paper and

replicated to some extent in the De Beers paper tabled at the Cancun conference is unacceptable. There have been various alternative approaches that have been discussed within the Cairns Group and with other major players in these negotiations.

Senator CONROY—What options is the Cairns Group looking at?

Mr Gosper—These are negotiations, so I will describe it in general terms. What we are looking for is an approach to tariff reduction which would not allow the sorts of carve-outs or loopholes that are provided by the blended formula. The blended formula, if I can remind you, has the specific weakness that it would allow flexibility for, potentially, a large number of sensitive tariff lines. It does not take many tariff lines to cover a large proportion of trade. For instance, something like only five per cent of tariff lines could potentially cover 60, 70 or 80 per cent of a country's imports. So a specific objective has been to close loopholes as provided through this blended formula. We have talked about a number of approaches to achieve that, including proposals that have been talked about previously in the negotiations—such as the proposal that was tabled earlier by Stuart Harbinson, the then chair of the agriculture negotiating group, and other options. But I think it is very true to say that at this point no-one has been able to identify a specific approach that is acceptable to the key players.

Senator CONROY—What is Australia pushing? What is our preferred option?

Mr Gosper—Our preferred option would be, in a perfect world, a Swiss based approach, without necessarily relying specifically on that approach. It would be an approach which would achieve not just the greatest level of tariff reduction but also much stronger tariff reductions for the highest tariff lines, and that is the specific outcome of those sorts of approaches. Australia is looking for the most ambitious approach. The Cairns Group, which is, as you know, a group of developed and developing countries, looks at it in a way that also seeks to provide some level of flexibility for developing countries. As I said, we have not yet been able to find an approach which is acceptable to all the key parties.

Senator CONROY—The EU has made it clear that there must be full parallelism on all forms of export competition, including state trading enterprises. Does this mean the Wheat Board is on the negotiating table?

Mr Gosper—We do not know precisely what is meant by parallelism: whether, for instance, it is intended to address the subsidy element of export credits and state trading enterprises in addition to export subsidies of the sort predominantly used by the EU or whether it is intended to be something that addresses export credits or state trading enterprise single-desk operations in totality. It is not yet clear to us precisely what the EU intends for this concept, and that is the subject of much of the discussion that is taking place this week.

Senator CONROY—When do you think we will know exactly what is meant? What is Geneva saying?

Mr Gosper—I would hope sooner rather than later, because we have barely two months left to develop this framework.

Senator CONROY—I understand there have been a couple of findings by the WTO disputes tribunal—allow me to call it by its wrong name, and you might tell me what its

official title is. One revolves around the Canadian wheat board. I wonder if you could just outline that to us.

Mr Gosper—There was a panel finding on Canadian Wheat Board practices and Canadian rail freight subsidies. The panel found against the rail freight subsidy element of those arrangements. In other words, it found on the basis of discrimination as between imported and domestic product. It did not make a clear finding in relation to the basis of the operation of the single desk itself. In the last couple of days that panel finding has been appealed and will now go through the appellate body process.

Senator CONROY—What is that one? I know a bit about it but I am still relatively new, as you know, in this area. What is the next step above the actual panel? You said ‘appellate process’. Who is involved and how does that work?

Mr Gosper—The appellate body will now consider the case from the vantage point of the WTO agreements and panel findings and consider whether in essence the panel has got the legal case right. The appellate body is a standing body. There are seven members of that body and three of them will sit on a case. It works on a much tighter time frame than a panel process so it will take a number of months, but we will probably know before the end of the year the outcome of its deliberations.

Senator CONROY—Does that give you heart that the Australian Wheat Board would survive a challenge?

Mr Gosper—This case is an interesting one for us. Of course AWB Ltd is somewhat different, in fact we would say quite different, from the Canadian Wheat Board.

Senator CONROY—I meant that we were much purer, if I can use that word—but not in its absolutist sense—than the Canadian Wheat Board. So if they survive a challenge we would have to be looking pretty good, I would have thought.

Mr Gosper—We are watching the case with a good deal of interest, because it raises a number of issues that we have interests in and it may have some significance for the US’s overall approaches to STEs. But I think it is quite clear that, notwithstanding the panel finding on the Canadian Wheat Board, the US negotiating objective on STE single-desk operations is still a very strong objective. The other case I think you are referring to, if I could go on, Senator, is an as yet unreleased report—

Senator CONROY—That was exactly where I was going next. A very exciting finding.

Mr Gosper—on the challenge taken by Brazil against the US cotton regime. The findings of that report are not yet available to other parties.

Senator CONROY—But you are aware of what they are.

Mr Gosper—They are available to the US and Brazil, yes, and there is plenty of speculation around that the findings have to a large degree gone the way of Brazil, but we do not—

Senator CONROY—Against the export subsidies of the US for cotton.

Mr Gosper—What elements of the challenge we are not aware of, because we do not have the specific findings.

Senator CONROY—That would be a very far-reaching case.

Mr Gosper—It would be.

Senator CONROY—That is about as good a result as we could finally get, if it stands up and if it is as it has been reported to me at least.

Mr Gosper—Potentially it would have some significant implications for the way in which WTO agreements are implemented, but I am speculating because we do not have the specific findings and we cannot look at the specific argumentation that has been applied—

Senator CONROY—So you are working up the cases?

Mr Gosper—and of course we expect that the US will appeal.

Senator CONROY—I have no doubt they will appeal. They will probably abolish the WTO. Would we look at taking some cases?

Mr Gosper—We will, once we have the details of the cotton panel report, examine it with a great deal of interest, not just from the perspective of the case itself but of course—

Senator CONROY—Does a country take the case or would it be, say, our wheat farmers taking the case?

Mr Gosper—No, the cases are taken by members—by member governments.

Senator CONROY—There will be a queue of people knocking on your door soon.

CHAIR—If I could interrupt you for a moment, I would like to bring to the attention of the committee and the officials that we have some master's students at the Asia-Pacific College of Diplomacy at the ANU and diplomats from Indonesia as visitors. Welcome to our estimates committee meeting. Thank you for coming.

Senator CONROY—I was just saying I think there will be a queue at the door of people who have been duded by both EU and US export subsidies. It is a very exciting development.

Mr Gosper—You are aware also, Senator, that we have ourselves taken a case against the EU sugar export regime.

Senator CONROY—Hopefully it gives strength to our arm.

Mr Gosper—We will expect to know the outcome of that panel process probably around September this year.

Senator CONROY—Thanks for that. Has the government agreed that the Wheat Board can be traded off as part of the Doha Round?

Mr Gosper—No, the government has indicated it will defend the arrangements because it sees no particular subsidy arrangement provided. It has said that it will consider this issue in the context, however, of the overall package on agriculture, including substantial disciplines on domestic support and the elimination of export subsidies.

Senator CONROY—I will take that as a yes. If it is to be considered as part of the overall package then it must be part of the negotiations, albeit not right at this moment but down the track.

Mr Gosper—I would not characterise my answer as a yes. What I was saying is that the government is willing to consider the requests that have been made in this area but it would only be on the basis of a very substantial outcome on agriculture that it would consider this issue.

Senator CONROY—What role is Japan playing in the negotiations?

Mr Gosper—In the agriculture negotiations? Japan, of course, participates in many particular parts of the negotiations in various formal and informal discussions. However, it is no secret that many countries, including Australia, are of the view that Japan is taking an extremely defensive role in these agriculture negotiations that is not commensurate with the advantages Japan has derived from an open multilateral trading system for many years, that it is far too narrowly occupied with carve-outs for sensitive sectors, for reflecting its ambitions on non-trade concerns on multifunctionality and just generally not being as helpful as we would hope such a significant economy would be.

Senator CONROY—Whose camp would you characterise Japan to be in? Is it in the EU's or is it out on its own doing its own thing?

Mr Gosper—To some extent Japan has a common interest with the EU but more particularly it has a shared interest with other economies such as Norway and Switzerland, which are giving particular voice to non-trade concerns and the multifunctionality agenda in the agriculture negotiations. I would not say that it is in the camp of the EU. It has some common interests but I think it works perhaps as closely or even more closely with the sorts of members that I have mentioned.

Senator CONROY—What tariff formula does Japan want?

Mr Gosper—It probably does not matter as long as they have the capacity to carve out a number of sectors from essentially any tariff reduction.

Senator CONROY—Which sectors are they, just for entertainment value?

Mr Gosper—Probably rice, dairy, beef and a few others.

Senator CONROY—Shall I start over the other side and ask if there are any other agricultural products they are prepared to let in?

Mr Gosper—They are a very large importer of many agricultural products so we do not mean to neglect that, of course.

Senator CONROY—What is Australia's view on the EU's 'round for free' proposal? Does the government consider that the G90 least developed countries should not have to open their markets beyond their existing commitments?

Mr Gosper—No, we do not. That proposal as it has been articulated does cause us a number of concerns. If we understand correctly that one of the key objectives of these is to give some comfort to the weak and vulnerable members of the G90 and that they are not the primary objective of the agriculture negotiations—and there are limited and reasonable expectations of what they themselves will commit to as part of the negotiations—I think that is a reasonable message to be sending. Our problem is that the proposal could be seen as divisive in the sense that there is no rational—

Senator CONROY—They are trying to bribe people out of our orbit and are generally supportive. A cynic would say that. You might not be able to.

Mr Gosper—We have not said that. Of course, many have observed the fact that there are no objective, rational criteria for the G90 group; it is a political group which includes a range of developing and least developed countries. But, for instance, the G90 group includes Mauritius, with a GDP per capita of \$15,000. It does not include Brazil, with a GDP per capita of some \$7,000 or \$8,000. It includes Fiji but not Tonga and so forth. So what would be the basis to exclude some countries, when countries which are perhaps weaker, less well developed and less able to take on specific reform commitments would not have the same exemptions?

The European Union has been very careful in how it articulates this proposal and has made it clear that it sees it as applying not just to the G90 overall but only to members which meet specific criteria—the weak and vulnerable members. But proposals like this can be subject to misinterpretation and can be seen as divisive by parts of the developing world in particular. So whether overall it has been a helpful part of the process is unclear.

Senator CONROY—I remember reading at the time the offer was put on the table that the government expressed a belief that it would not be an attractive offer and that people would not jump on board. Are there any signs that people are jumping on board?

Mr Gosper—Can you just clarify which offer you mean?

Senator CONROY—This is the round for free.

Mr Gosper—I think that has been the case. There was some discussion of this proposal amongst various groups of members on the margins of the OECD meeting in Paris and subsequently, and I think many have spoken against it. For instance, I understand Brazil is worried about the proposal.

Senator CONROY—So the bribe has not worked?

Mr Gosper—Again, I do not want to be characterising it as a bribe by any means. As I say, we can understand the objective as one of the objectives that was stated behind this proposal, but we are concerned that it can be seen as divisive and is not based on any objective criteria.

Senator CONROY—How many Australian negotiators will be in Geneva for the agricultural meetings in early June?

Mr Gosper—This week in Geneva we have a variety of meetings under way with our senior trade official, Deputy Secretary Joanna Hewitt; our special negotiator for agriculture, Chris Langman; and another member of the agriculture branch in the Office of Trade Negotiations. There will be colleagues from the Department of Agriculture, Fisheries and Forestry as well and, of course, our Geneva staff: Ambassador Spencer and other members of the Geneva mission. So it is quite a large delegation.

Senator CONROY—Are you heading off to join them?

Mr Gosper—Not this week, no.

Senator CONROY—Next week?

Mr Gosper—Someone had to be here.

Senator CONROY—Have we stopped you going to Geneva? My apologies if that is the case, but I appreciate your diligence to the estimates process. Who is heading up the team? Would it be the ambassador?

Mr Gosper—No, Ms Hewitt will be heading the team.

Senator CONROY—Now that the US FTA negotiations have been completed—and I see Mr Deady up the back with his feet up; he has nothing much to do—have we got more resources at our disposal to work on this?

Mr Gosper—As before, we have very adequate resources for these negotiations.

Senator CONROY—Surely we have got more, though. A lot of people were tied up. Ms Hewitt would have been working on the US FTA. She is now in Geneva, so we must have more resources than we did three months ago.

Mr Gosper—I just make the point that many of the issues that we talk about in the context of the US FTA negotiations are replicated by discussions we have in the context of a WTO negotiation. We are talking about how we get better market access to the US market and issues such as that. But the senior resources that I have talked about have always been available to this process and continue to be available to this process.

Senator CONROY—What is happening with the EU's non-trade concerns? You have mentioned some of those in Singapore.

Mr Gosper—Non-trade concerns within the context of the agriculture negotiations?

Senator CONROY—Those first.

Mr Gosper—A little unclear. The immediate focus of the negotiations is on the three pillars—that is, market access, domestic support and export subsidies. Our view is that in the approaches that are adopted on each of those issues, non-trade concerns will be taken into account. Others might prefer to develop specific modalities to do that but we have not yet addressed that part of the negotiations. I think, in a framework text, it is very difficult to see that they would be explicitly taken into account or reflected in any text.

Senator CONROY—How are we using this weekend's APEC meeting to progress Doha?

Mr Gosper—There are a number of issues that will be taken up in the context of the APEC trade ministers meeting, most importantly, as in previous APEC meetings, a communique which provides a very strong commitment to the WTO negotiation—to the Doha Round. This year the meeting is hosted by Chile which, like Australia, has a very strong interest in the Doha negotiations and in agriculture, particularly as a fellow Cairns Group member. So we are aiming for the strongest possible language on the Doha negotiations, focusing in particular on the need to capture the opportunity this year to develop some framework text on the need for the strongest possible outcome on market access generally, but specifically on agriculture and in particular seeking to lock in an APEC position on export subsidy elimination. That, of course, has always been reflected in APEC discussion of this issue because export subsidies are not used as extensively in this part of the world as they are in others.

Senator CONROY—The US are a part of APEC?

Mr Gosper—They are, yes.

Senator CONROY—Are they proving a stumbling block to getting a commitment?

Mr Gosper—No, the US is one of the stronger parts of the process on these sorts of discussions.

Senator CONROY—It is fairly well understood that we are not going to meet the Doha timetable. Are you expecting an announcement to defer the 1 January deadline?

Mr Gosper—Not any time soon. Most members would say that it is unlikely we will meet the deadline of the end of the year, but members have yet to decide how they will formally address that question or timing of the next ministerial meeting. The first objective is to develop a framework text.

Senator CONROY—Are there any WTO ministerial meetings in the pipeline for later this year or next year?

Mr Gosper—No, not formally scheduled.

Senator CONROY—Not formally, did you say?

Mr Gosper—No specifically or formally scheduled WTO ministerial conferences. But maybe you are talking about less formal ministerial gatherings.

Senator CONROY—Either.

Mr Gosper—There are a number of opportunities, such as the APEC meeting and such as the UNTAG meeting the week after. There is a G8 meeting of course.

Senator CONROY—So we are grabbing every opportunity?

Mr Gosper—Absolutely.

Senator CONROY—I want to move on to Vietnam's accession to the WTO. How are Vietnam's WTO negotiations accession negotiations with Australia proceeding?

Mr Gosper—They are proceeding reasonably well. As you understand, these accession negotiations involve both a multilateral and a bilateral process. The multilateral process involves the establishment of a working group that meets with the applicant country to look at the way in which it will bring its various laws, regulations and processes into line with WTO agreements and the disciplines that they provide. That has met on a number of occasions. Australia has always actively participated in that process. It is due to meet again on 11 to 15 June in Geneva. There is also a bilateral process where WTO members with a specific interest in an applicant country undertake negotiations on specific bilateral access interests.

Senator CONROY—We are a bilateral interest so we are engaged in discussions directly?

Mr Gosper—We have had a very extensive dialogue with Vietnam on the sorts of improvements to its trade regime to reflect the sorts of improvements that existing WTO members have made over the period of the membership. They are ongoing.

Senator CONROY—What are our objectives in the negotiations?

Mr Gosper—Our key objectives of course include better liberalisation of market access for goods and services, including through greater binding of tariffs and other WTO commitments. We would like to secure guaranteed MFN, most favoured nation, treatment for Australian exports. We have a range of non-tariff measures of concern that we would like to

see addressed and we would like appropriate commitments by Vietnam on agricultural subsidies as part of this process. So it is a fairly wide-ranging group of objectives for this negotiation.

Senator CONROY—What are Vietnam's objectives?

Mr Gosper—A country such as Vietnam seeks to accede to the WTO for a couple of reasons. One of course is that it is a process by which its own economy and the way it is regulated with respect to issues of trade can be brought into conformity with WTO rules and disciplines. That is usually seen as a very positive thing and that is the reason there are so many countries seeking to accede to WTO. An investor, for instance, would want to know that there are basic principles of transparency and fairness and so forth applied by a particular country and that they have the benefit of WTO rules in seeking access to that market. Vietnam of course also gains the protections of WTO rules by being a member—the basic protections that are provided for any member under the WTO rules and disciplines from the activities of the more powerful. So it gains those benefits. But of course in respect of market access, as you understand, Senator, it is not a reciprocal negotiation. Vietnam does not negotiate as part of this process better access to the Australian market.

Senator CONROY—To what markets in Vietnam is Australian seeking improved access?

Mr Gosper—On the agricultural and goods side there is a fairly wide range of agricultural and industrial products such as meat, dairy, horticulture, sugar, wine, fish and crustaceans, medical items, metals, and motor vehicles and parts. On services we seek improved access or reform of policies in areas such as professional services, telecommunications, engineering, education and services incidental to the mining, financial and distribution sectors.

Senator CONROY—What markets in Australia is Vietnam seeking?

Mr Gosper—As I explained, they are non-reciprocal negotiations. As part of these accession negotiations Vietnam is not negotiating access to the Australian market. The bilateral part of the negotiations provides an opportunity for WTO members to negotiate better access to an applicant country and, essentially, to ask the applicant country to take the sort of liberalising measures and reforms that the WTO members have themselves already taken as WTO members through successive rounds of trade negotiations or through accession processes. So it is a non-reciprocal process.

Senator CONROY—So Vietnam is not looking to—

Mr Gosper—They may well have particular access interests in the Australian market but they are not taken up as part of the accession negotiations.

Senator CONROY—That list you gave us before of what Australia is seeking—

Mr Gosper—From Vietnam.

Senator CONROY—Was that exclusive or are there are others? Was that the total list or are there others that you just didn't mention?

Mr Gosper—There are others, I have no doubt, or more specific descriptions, and we can provide that to you if you like.

Senator CONROY—Could I get a list?

Mr Gosper—Of course, yes.

Senator CONROY—Do services include media?

Mr Gosper—I would have to check that for you, but I understand not. There may be particular issues that could be said to have a media component—for instance, regulation in the telecommunications sector. That might be said to have a media—

Senator CONROY—I have just read that the Internet is fairly heavily regulated in Vietnam, as best you can.

Mr Gosper—That is right. But issues such as how the media operates or more controls on media ownership and the like are really not matters that are taken up in the context of a WTO negotiation. They are matters that are really not relevant to WTO accession.

Senator CONROY—But they are matters of bilateral trade agreements?

Mr Gosper—They are matters that may get taken up in the context of a bilateral negotiation but they are not governed specifically by WTO rules and are not part of a WTO accession process.

Senator CONROY—If you could give us that list perhaps with some explanations, depending on how broad the terms are, that would be very useful.

Mr Gosper—Sure.

Senator CONROY—What are the next milestones in the negotiation process? What is the timetable?

Mr Gosper—There are no milestones as such. The process is basically in the hands of Vietnam. In other words, it is really up to Vietnam to demonstrate that it is making the necessary adjustments to its overall trade regime or to find some way to meet the access requests of countries through the bilateral negotiations. Vietnam has said that it would like to achieve accession to the WTO by early 2005. As for ourselves, particularly because Vietnam is an important part of the region and an important trading partner, we would like to do all we can to facilitate Vietnam's accession and are willing to work with it as closely as possible. For instance, when there are the working party meetings in Geneva in a couple of weeks, there will be a series of plurilateral and bilateral meetings that we will participate in. So it is in Vietnam's hands. They seem to want to try to achieve this by early 2005. We are certainly willing to work with them and to assist them in this process, but it will have to be on the basis of them meeting the required standards for accession to the WTO.

Senator CONROY—Are there any planned meetings or negotiations?

Mr Gosper—The specific meeting that I have talked about in Geneva is from 11 to 15 June, and specific meetings on the margins of that include a plurilateral meeting on agriculture and some other bilateral negotiations.

Senator CONROY—How are Vietnam's negotiations going with the other WTO members?

Mr Gosper—It is undertaking bilateral negotiations with a range of other members. To our knowledge, no such negotiations have yet been concluded so they are still all ongoing at this point.

Senator CONROY—What WTO capacity building assistance has Australia given Vietnam?

Mr Gosper—We have given quite a bit. In fact, overall, Vietnam has been given quite a bit of assistance. We provide, for instance, through our AusAID Regional WTO Capacity Building Project, which I think is between \$3 million and \$5 million; our regional SPS capacity building project, another \$3 million; bilateral projects focused on capacity building and policy analysis in areas such as anti-dumping, \$370,000; and commitments on regional and world trade in the agriculture sector, some \$750,000. I can give you a list, if you would like it, of these sorts of commitments.

Senator CONROY—That would be great.

Mr Gosper—It is a fairly substantial amount. Quite a few millions of dollars are being put into helping Vietnam participate in this process and make the sorts of adjustments it will need to make to its trade regime.

Senator CONROY—Are you aware of what other WTO capacity building assistance other WTO members have given to Vietnam? I am happy for you to take that on notice and come back to me.

Mr Gosper—I can give you a table that will set some of this out but, in aggregate, on the estimates we have, about \$US57 million has been provided to Vietnam through bilateral donors and multilateral organisations for technical assistance that in some way relates to Vietnam's WTO accession.

Senator CONROY—Do you make an estimate of the dollar value of the Vietnamese market when preparing for the accession negotiations?

Mr Gosper—No, not as such. It is obviously a substantial market. I think we export something like \$600 million a year to that market. It is a strongly growing economy and a significant one in the region, so we have a number of interests there, particularly in food products and other areas of trade, that we see quite a bit of potential for growth in.

Senator CONROY—Would Vietnam make an assessment of our market in dollar terms?

Mr Gosper—No, because it is not a reciprocal negotiation they would not make such an assessment. Their assessment would be the importance to Vietnam of being a WTO member and taking on the obligations and the protections of being a WTO member.

Senator CONROY—What are the most difficult issues for negotiation with Vietnam?

Mr Gosper—For many such economies, just taking on the basic administrative and legislative requirements to reflect the basic disciplines of the WTO and rules and obligations. So, aside from market access commitments, which are always difficult for countries, things like reform of state owned industries, changes to its legal regime, addressing non-tariff measures that touch on issues like transparency, import licensing—things like that where you often find not just simple market access issues at heart but also different approaches to regulation, legislation or administration that need to be changed. This was certainly true for other economies such as China, which is still in part struggling with the obligations of transparency and due process that often come from WTO agreements, and it is certainly true of Vietnam at this point.

Senator CONROY—Are there any sensitive issues that Vietnam is pursuing with Australia?

Mr Gosper—Not that I am aware of.

Senator CONROY—Are there any no-go areas in the negotiations, issues that Australia has decided are so sensitive for Vietnam that we will not push them to liberalise?

Mr Gosper—Not that I am aware of.

Senator CONROY—I have a few questions about Australia-New Zealand CER. What are the current priorities for Australia-New Zealand CER?

Mr Maclean—Are you referring to the agreement itself or to the wider context of the agreement?

Senator CONROY—I know there was a leadership forum in Wellington last month and I was going to ask some questions around that. We can go to the wider ones later, but is there anything specific within the existing agreement?

Mr Maclean—Within the existing agreement there is currently a range of proposals relating to rules of origin for the agreement and there is a process of consultation and probably an upcoming negotiation with the New Zealanders about how best to restructure the rules of origin so that they are simpler, clarified and simpler to administer so that the costs for business can be reduced.

Senator CONROY—At the leadership forum in Wellington last month it was agreed to accelerate work. Were you there, Mr Maclean?

Mr Maclean—No, I did not attend.

Senator CONROY—Did someone from DFAT go?

Mr Maclean—Yes. The Deputy Secretary, Murray McLean—no relation—attended, as well as an officer of my branch.

Senator CONROY—So you are familiar with the issues that were kicked around?

Mr Maclean—Broadly, yes.

Senator CONROY—It was agreed to accelerate work on a single economic market with a view to creating a seamless transTasman business environment. What initiatives are being pursued in this area?

Mr Maclean—It might be worth stepping back a little bit. You will be aware that CER has been accompanied by a range of other agreements over the years. Most recently you have had agreements such as the mutual recognition arrangement between Australia and New Zealand, which provides, for example, that goods legally sold in one country can be sold in the other and that professional qualifications gained in either country are recognised in the other. Then there have been memorandums of understanding on things like business law coordination. There has been an open skies agreement between Australia and New Zealand. There have been agreements on food standards, on tax and on therapeutic goods. As you are aware, New Zealand participates in a number of standing bodies or regulatory authorities in Australia relating to things like therapeutic goods, food standards et cetera.

Earlier this year the treasurers met in January and they agreed to study the feasibility of a single market and how to take that forward. In March the two prime ministers met and affirmed their commitment to that concept. It is fair to say that the merits of single market and the issues relating to it have been debated perhaps more widely in New Zealand than they have here simply because of the profile of Australia in New Zealand as opposed to the other way around. A lot of the work now under way relates to the work undertaken mostly by Treasury on things like tax regulation, harmonisation of standards in accountancy et cetera. They are the broad developments that are part of the ongoing agenda under the broad rubric of CER even if they are not, strictly speaking, part of the agreement itself.

Senator CONROY—You mentioned ROOs before.

Mr Maclean—Yes.

Senator CONROY—How will ROOs fit with the US FTA and its ROOs? Do we look at them, compare and try to harmonise?

Mr Maclean—My understanding is that the system adopted under the US FTA is a change of tariff classifications system—the so-called CTC system. That is not the system that was adopted under the CER. Under the CER, we have a system of ROOs; I guess the broad rubric for it would be regional value content, if you like, whereby the rule of origin for transTasman trade is made on the basis of two basic rules or principles: the last place of manufacture and then an ex-factory or 50 per cent content. So there are two basic thresholds. The item must have been manufactured in Australia or New Zealand and 50 per cent of the value of that product must be of Australia or New Zealand origin.

Senator CONROY—Is it just too hard to harmonise them?

Mr Maclean—To harmonise what—the CTC with the CER ROO systems? My guess would be that you would not be looking at harmonising the two. You would be adopting one or the other, broadly speaking.

Senator CONROY—So they are not compatible in approaches?

Mr Maclean—They are compatible in terms of their purpose but not in their carriage.

Senator CONROY—What is New Zealand looking for in ROOs?

Mr Maclean—The same thing we are—in other words, as simple and transparent a system as possible and one that is broadly liberalising. It is worth noting that over half of transTasman trade is already tariff free because our MFN rates are zero. Almost the entire other half of transTasman trade is effectively tariff free because it qualifies and operates under the preferential rules, so it enters either country tariff free. So the ROOs really apply only to a fraction of the trade between Australia and New Zealand and obviously in sensitive sectors or sectors such as textiles, clothing and footwear, motor vehicles et cetera.

Senator CONROY—What initiatives are being considered to explore the scope for a common border for Australia and New Zealand? And in non-trade jargon, what does that mean?

Mr Maclean—Both good questions. The notion of a common border was a topical one at the recent leadership forum, as you might have picked up in the media reporting. It is a little

bit unclear to us what exactly is meant by a common border and how that would relate to the way in which we conduct trade or, indeed, other aspects of the relationship. But we are assuming that elements of what would come under the broad rubric of common border issues would be the things like customs arrangements, quarantine arrangements, visa standards, regulations for trans-Tasman movement of people, and issues of that nature. New Zealand have indicated to us that they will be developing a working paper or discussion paper on the kinds of elements that they see as part of a common border agenda, and we are doing the same ourselves.

Senator CONROY—In last month's budget the government announced the introduction of a WET, wine equalisation tax, rebate of up to \$290,000 for all Australian wine producers. Was DFAT consulted by Treasury on the introduction of this rebate?

Mr Maclean—No, it was not.

Senator CONROY—Have you subsequently given them some advice and told them what you think?

Mr Maclean—Both ministers have responded to New Zealand. Mr Downer and Mr Vaile have both been approached by their respective New Zealand counterparts, with the New Zealanders expressing concerns about the rebate and its application. Both ministers have undertaken to look at the New Zealand concerns and get back to them. It is on that basis that we have initiated discussions with Treasury, the Australian tax office, Customs and the Department of the Prime Minister and Cabinet.

Senator CONROY—I asked what advice you gave Treasury.

Mr Maclean—We have not given them any advice yet. We have sought their advice on what the WET is and how they envisage implementing it, and we have begun some discussions about what the New Zealand concerns might be and how they might apply in respect of the wine equalisation tax rebate scheme.

Senator CONROY—I have read reports, and you have mentioned, that the New Zealand government believes the rebate breaches CER. You must have had a look at it by now and formed a view. It has been a few weeks since the budget. We can confirm that New Zealand is certainly making that representation?

Mr Maclean—Yes, the New Zealanders have made that representation.

Senator CONROY—What are they actually saying?

Mr Maclean—Minister Sutton and Minister Cullen, the deputy prime minister and finance minister, have said that the rebate scheme breaches our obligations under the CER and possibly under the WTO. They have referred to particular articles in CER and the GAT, in particular CER article 7.2.

Senator CONROY—I was going to ask you about article 1(d). I was going to ask you whether DFAT believed the rebate was consistent with article 1(d) of CER, which is:

to develop trade between New Zealand and Australia under conditions of fair competition.

Mr Maclean—New Zealand has not raised article 1(d) as a particular issue, and I have not examined that in any detail with respect to their concerns. I could certainly do that.

Senator CONROY—Just going back a step, DFAT ministers are responsible for the CER. Why didn't Treasury consult? Were Treasury completely unaware that this may have a CER implication?

Mr Maclean—I cannot speak for Treasury.

Senator CONROY—When you contacted them alerting them that there was an issue, were they aware that there might have been an issue?

Mr Maclean—They had not indicated that they were aware there was an issue. They are now.

Senator CONROY—I hope so. I hope you got on the phone and pointed it out to them. Did you ring them yourself, or was it higher up the tree?

Mr Maclean—It first came to our attention after the budget was announced, and the New Zealanders indicated that Mr Sutton would be raising it with Mr Vaile. Mr Vaile was in Paris at the time and Mr Sutton, the New Zealand trade minister, was also in Paris. Both were attending an OECD ministers meeting. The New Zealanders also indicated that they would be raising it with Mr Downer, who happened to be visiting Wellington a couple of days after that for the leadership forum. It was on that basis that we sought—

Senator CONROY—So did you ring Treasury and tell them, 'Whoops'?

Mr Maclean—Yes.

Senator CONROY—You broke the news to them?

Mr Maclean—Yes, I called Treasury and said: 'The New Zealanders have expressed concern about the rebate scheme. Can we meet to discuss it, please?'

Senator CONROY—What has been their response? Did they say no?

Mr Maclean—We have met.

Senator CONROY—Who is coordinating the response to New Zealand? Is it Treasury replying or is it you—DFAT?

Mr Maclean—DFAT is coordinating the whole-of-government response to the New Zealanders.

Senator CONROY—Is that you, Mr Maclean?

Mr Maclean—I and a number of my colleagues. I work in what we call the bilateral division, with responsibility for New Zealand, but clearly we need to consult very closely with colleagues in the Office of Trade Negotiations in Mr Gosper's division and also with the Trade Development Division, which looks at economic issues.

Senator CONROY—Are you the point man or is Mr Gosper?

Mr Maclean—To date, I have initiated the contact with Treasury and chaired a meeting involving Treasury.

Senator CONROY—Have you seen the Treasury's latest advice?

Mr Maclean—Advice to whom?

Senator CONROY—About the issue. Are they sharing their advice with you, their thoughts on it?

Mr Maclean—Treasury have briefed us on what the rebate scheme is, which was of course the first of our questions.

Senator CONROY—Have they sought advice about whether they are in breach of CER three or four weeks after the budget?

Mr Maclean—I think it is fair to say that Treasury—

Senator CONROY—Or have they asked you if it breaches?

Mr Maclean—We have just said to them that we need to work together to look at the New Zealand concerns and they have agreed to do that.

Senator CONROY—I want to get to the substance of the issue, rather than the process that we are addressing. Has anybody yet formed an opinion about whether we are in breach of CER with this proposal?

Mr Maclean—The work that is being done to date is to look at the specific articles of the relevant agreements that New Zealand has raised that are of concern. It is not so much an opinion as just looking at the facts of the matter.

Senator CONROY—You form an opinion after looking at the facts though, Mr Maclean.

Mr Maclean—Yes.

Senator CONROY—So, after three or four weeks of discussions with Treasury, what opinion have you reached?

Mr Maclean—We have not yet reached an opinion on the extent to which the New Zealand claims have validity. It is an extremely complex area. We are still talking through with Treasury—and they are discussing it with the ATO, I understand—just what the rebate scheme is, how it is applied—

Senator CONROY—It has been three or four weeks, Mr Maclean. As you said, you were the person who phoned them a few days after the budget. I cannot believe that nearly four weeks later they are still explaining WET to you.

Mr Maclean—We now have a reasonable understanding of what the rebate scheme is. We are now going through a process internally in the department of assessing that against the obligations which New Zealand has pointed to as being of potential concern—CER and WTO.

Senator CONROY—You must have some thoughts about the situation. Mr Gosper, you are an acknowledged expert in this area. It looks to me like we are in breach of CER, so I just want to ask the experts: are we in breach?

Mr Gosper—We have not concluded preparation of our advice to the minister on the claims that have been made by New Zealand. As Mr Maclean has said, they have made references to CER and WTO aspects of the proposed measure. The proposed measure itself—that is, the WET rebate scheme—is still the subject of consideration by Treasury, as I understand it, as to exactly how it would be applied. We hope to conclude that process shortly.

Given that we are talking about important issues here, our opinions are not something that we can share at this point until we do conclude our view and provide the advice to the minister.

Senator CONROY—My problem is that once you give the advice to the minister you then hide behind it being ‘advice to the minister’, Mr Gosper, so the parliament does not get the benefit of your experience. So there is a bit of a conundrum for us on this side of the table. I know it gives you two perfect defences from answering any questions to do with the issue.

Senator Minchin—Senator Conroy, I think it is a bit rough to accuse the officials of hiding behind their minister. Their job is to advise the government, they will do so accordingly, and the government will presumably at some point announce its position on the question. It is not fair to seek to extract information from officials by accusing them of hiding behind their minister. I think you could rephrase that. I appreciate your right to seek to extract information.

Senator CONROY—I think you misheard slightly what I said. I was not accusing them of hiding behind the minister. I was accusing them of being able to hide behind both forms of his answer. One is: ‘We haven’t reached a decision because we haven’t told the minister yet.’ Then if I were to ask once he had told the minister he would say, ‘That forms advice to government and I can’t tell you.’ That rounds the circle off rather beautifully, I am sure you agree. Mr Gosper and Mr Maclean are the acknowledged experts in this field. We have a complaint from the New Zealand government that we are in breach of CER, it has been a month, and I am just seeking to understand from the experts their view.

Senator Minchin—I appreciate your understandable impatience. But I think you should also understand that their obligation is to form a considered view and advise the government accordingly. Then it is a matter for the government to make known the position of the government. Once that is known and out, then when officials return to this table they can be examined on the conclusion that is reached. At this stage they are going as far as they reasonably can.

Senator CONROY—Robust as I am, I do not think I have ever tried to elicit information that has been given to the minister. I understand the forms of the Senate estimates processes—you have attended many estimates I have been at—and I do not normally seek that. I am not actually seeking to establish the government’s position. What I am seeking to establish are the facts. Those facts may contribute to a government decision down the track. I am entitled to ask about what the facts of the matter are.

Senator Minchin—Yes, sure.

Senator CONROY—And I am asking Mr Gosper: what are the facts in this case. Are we in breach?

Senator Minchin—Officials could indicate what the New Zealand argument is.

Senator CONROY—‘Are we in breach?’ is asking for a fact. You may have a policy response to the facts. What I am seeking to establish is whether, in fact, we are in breach of CER. That is not a government policy. It is not a government response.

Senator Minchin—That is a judgment. That is not going to be a matter of fact; it is going to be a matter of judgment. The officials can indicate to you, I presume, what the New

Zealand arguments are on this matter, but it will be a matter of judgment in due course as to whether or not their argument has any—

Senator CONROY—But that does not become government policy. I am entitled to ask. You have been there when we have asked many officials what is their judgment of the facts. That does not elicit a government policy.

Senator Minchin—They are in a difficult situation where they have been asked to advise the government on the matter, not to speculate in public here in an estimates committee about the nature of their advice to the government.

Senator CONROY—I am not asking about the nature of their advice. I am asking them to give me their judgment on the facts before them.

Senator Minchin—But, given that they are in discussions internally on the advice to be given to the government on that matter, they are not really at liberty to just, in this forum, loosely indicate any personal views on the matter.

Senator CONROY—But every conversation that they have presumably goes to the concept of providing advice to the government. It is possible to draw that veil over every single conversation that a departmental official is involved in, if you seek to. Other ministers are not as good as you. I have never known you to want to draw the veil so tightly. In fact, if anything, you have been quite prepared in the past to sit there and allow lengthy discussions of judgments about your own department. I am not sure why you are so sensitive about this one. In your own department I have had hours and hours of conversations about judgments and facts and those sorts of things and what has gone on and you have never had a problem.

Senator Minchin—I am not sure whether to take that as a compliment or not—I might be in trouble with the Prime Minister.

Senator CONROY—You should.

Senator Minchin—In this case, New Zealand has, as I understand it, made some representations about the matter and obviously the officials are therefore in a situation where they are being required to give advice to the government on their view of the New Zealand—

Senator CONROY—But you understand my point: once the advice is given, Mr Gosper cannot answer any of my questions.

Senator Minchin—The government will then form a view about the New Zealand representations and you will be able to quiz officials as to the nature of the government position.

Senator CONROY—I just want to understand the process. In the future, officials cannot answer any questions at all until after the government have made a decision? Is that the sort of sweeping position that—

Senator Minchin—No, I am not saying that. We are talking about this particular case, where the officials are in a difficult position. They obviously want to help you as much as they can, but they are in a situation where they have been—and I can understand it—asked to advise the government about the veracity or otherwise of New Zealand's representations on this matter. So they are in the middle of a process of advising the government, and I would

have thought you would understand that they are not at liberty to just speculate about their unformed and not finalised views on the matter, because they are in a formal process of advising the government.

Senator CONROY—It would be fair to say that it is possible to argue that there is no finite point to forming a judgment. You can always make a case, sitting there on that side of the table, for saying, ‘I’m still considering,’ and you can do that for years. If your view is that they do not have to answer a question until after they have sent a letter off to the government, then it makes a farce of the estimates process.

Senator Minchin—But you are seeking to extract, in a sense, personal views on New Zealand’s representations prior to any finalisation of departmental advice to the government on that matter. That is really what you are asking them to do. You can ask them about the nature of New Zealand’s representations, what clauses of the agreement they are indicating they think may be in question—those sorts of, as you say, factual questions. But you are asking them to express personal views on an issue which is the subject of formulation of advice to the government.

Senator CONROY—I do not disagree with you on everything you say but I do disagree when you say I am asking for their personal views. I am asking for their expert views as officials who are paid by the Australian taxpayer—

Senator Minchin—To advise governments.

Senator CONROY—Yes, to advise government. I ask many questions. I have just spent the day yesterday asking Treasury about their opinion about the state of the macroeconomy. Are you seriously trying to suggest that they should not give any responses because they are their personal views? They are departmental views. It is a bit of an absurd proposition to say that I cannot ask for their views on something.

Senator Minchin—No, the Treasury publishes its assessment of the economy. So, naturally, they having published their assessment of the economy, you can ask them about it. This department has not published a view on the New Zealand representations as to the government’s decisions on wine equalisation tax and its implications for the CER. There are a number of factual questions you could pursue, but I am intervening because I think you are unfairly putting the officers in a difficult position of commenting on advice they are formulating to the government on that matter.

Proceedings suspended from 12.31 p.m. to 1.53 p.m.

CHAIR—Welcome back, Minister. We were about to continue with our trade questions but there is a matter unresolved from last night when you indicated to the committee that you would provide some answers to matters raised in the discussion then. We would like to hear from you.

Senator Hill—I thank the committee for accommodating me, in particular the fact that I could not be here this morning. The issue raised last night was about the arrangement with the United States in relation to detention of prisoners. I said that I would see if I could get some further information for the committee on that issue. I was also asked if I could get further information on what I referred to as the four occasions on which Australians participated in

the capture of Iraqis but the Iraqis were detained by the United States. I have some information. I do not regard it as complete, and I want to state that caveat from the start. When I have a full brief, I am happy to share all the detail with the committee. What I have at the moment is that the arrangement was one that was reached between military commanders at the time of the Afghanistan conflict, the war on terror, and was—

Senator FAULKNER—Did you say at the time of the Afghanistan conflict?

Senator Hill—Yes.

Senator FAULKNER—It is very hard to hear.

Senator Hill—For me, I thought I was speaking quite loudly.

Senator FAULKNER—No, you are not; you are mumbling.

Senator FERGUSON—You can never be accused of that, Senator Faulkner.

Senator FAULKNER—Thank you for that kind comment.

Senator Hill—It was at the time of the Afghanistan conflict, and was recorded in a letter between Admiral Barrie as Australian CDF and General Tommy Franks, and with some reference to General Richard Myers also, as chairman of the joint chiefs of staff. The letter covers a range of different issues and is classified, but I can say to the committee that Franks agreed with Barrie's proposal that, wherever practicable, US forces operating with Australian forces should effect formal capture of detainees and take responsibility for their subsequent treatment. That, as I understand it, was communicated to our forces through a CDF directive—I do not have that directive at the moment—and that practice continued in the war in Iraq. The guidance that our forces had was that where it was practicable it was better for the US to take detainees, and that was for the practical reason that I outlined last night—that Australia did not have the facilities in theatre for the management of prisoners.

In relation to the four incidents, I think what the committee was seeking last night was a detailed sequence of each event. Not even I would describe what I have been given as a detailed sequence, so I have asked for further information. The advice I have today reiterates that Australian forces captured no prisoners during the recent war in Iraq and it gives me some information on the incidents that I referred to last night. It refers to two incidents—it describes it in terms of the first two incidents—and that they involved the apprehension of nine prisoners of war by US forces on 21 March 2003. I am told that those prisoners of war were later transported by HMAS *Kanimbla*, during which time three received medical attention. It reiterates what I have been told earlier: that the US was the detaining power for all nine prisoners on board *Kanimbla*.

The third incident, I am told, involved the apprehension of approximately 45 prisoners of war by US forces, also on 23 March 2003. Those prisoners of war were transported by the Australian landing craft attached to HMAS *Kanimbla*, where they remained in the custody of US forces at all times. The fourth incident that I was referring to last night involved the capture of approximately 60 Iraqi prisoners of war on 11 April 2003. I am told that Australian special forces provided security so that a member of the US forces could formally effect capture of those prisoners of war and that the prisoners thereafter remained in US custody.

One other incident has been drawn to my attention. I do not think it is really of the same character as the four that I have mentioned, which were the four that I was referring to last night, but I will nevertheless mention it in case the committee has a different view to mine. That involved a section from 4RAR assisting US forces in escorting six prisoners of war on board a US C130 aircraft used to transfer the prisoners to a detention facility. I am told that the prisoners remained in the custody of US forces and that this occurred on the night of 2 April 2003.

The reason I think that is of a different nature is the fact that there is nothing to suggest to me that Australians were actually involved in the capture of those individuals. It seems that their role was rather in helping escort them. That is basically the information that I have been given in this short time. I think that I need to provide some more detail and I have asked that that be prepared for me; but I have also asked that it be prepared carefully, and that will take some time.

Senator FAULKNER—In the circumstances of this material perhaps being finalised out of session of this committee, are you prepared to establish any extraordinary arrangements for it to be made available? You are indicating that it may not be available by the time this committee concludes its deliberations this evening. That is certainly a possibility in what you are saying. You might indicate to us whether it is likely to be available by then. If not, would you be planning to provide it to the committee secretariat as soon as possible?

Senator Hill—I have said publicly that I intend to make a statement to the Senate when the Senate resumes to clarify certain matters in relation to Australian contact with Iraqi prisoners. Many of those clarifications have really come forth within this committee process in the last few days. I also have what I believe is a comprehensive search taking place of any other records, and I have asked that all the relevant personnel be reinterviewed. The secretary and the CDF have established a team to carry out that task so that it is officials who are taken off line to carry out that task. That is my best assurance that the job will be done thoroughly. If any further relevant information comes to hand through that process, I would include it in that Senate statement.

It was not my intention to address this specific issue. Although it has been referred to in passing, it did not receive any intense debate until last night. But one option for me is to set out the further information that I am able to glean on these matters as well. It is another issue relating to Iraqi prisoners where Australia had some contact with them. I can do that in the Senate. I think I would propose to do that in the Senate statement. I understand that this committee is planning to meet again later that week. If there is further cross-examination on those matters, that might be the best occasion to do it.

Senator FAULKNER—I commend to you a different approach—to try to provide that information to the committee secretariat as soon as it is available on the specific issue that you have just been addressing in your statement. You have indicated that the letter signed by Admiral Barrie, then CDF, and General Franks, and possibly General Myers—

Senator Hill—No, it is not signed by General Myers.

Senator FAULKNER—What was his role, just so we are clear? You mentioned his name.

Senator Hill—Yes. It refers to correspondence being forwarded to General Myers. I interpret that to mean that it has the imprimatur of the chairman of the joint chiefs of staff even though it is not a letter from them.

Senator FAULKNER—Is it an exchange of letters between Admiral Barrie, the then CDF, and General Tommy Franks or is it one piece of correspondence outlining an agreed position?

Senator Hill—At the moment I have one piece of correspondence, which is a reply to Admiral Barrie from General Franks, which confirms the arrangement.

Senator FAULKNER—Are you able to say in what written form the arrangement is? You have a confirmation of it. Surely that indicates what was being confirmed.

Senator Hill—What was being confirmed was what I said—an understanding that, wherever practicable, US forces operating with Australian forces should effect formal capture of detainees and take responsibility for their subsequent treatment.

Senator FAULKNER—We will come back to that qualification ‘wherever practicable’. The first thing I want to ask you—

Senator ROBERT RAY—I just want to follow up Senator Faulkner’s request for information. Correct me if I am wrong. What I interpret you as saying is that today you have announced out at Defence—this is Foreign Affairs, but it has implications here—

Senator Hill—There are Foreign Affairs aspects.

Senator ROBERT RAY—You have announced a review team headed up by the CDF and Mr Smith, the secretary of that department, to review a number of aspects. Am I right in saying that you are going to add this to one of the aspects they review? You would have finalised this before it emerged as an issue last night. You would have finalised what they were looking at. Are you going to add these two or three aspects to what they are going to review? That is the first part of my question.

Senator Hill—The answer to that is yes, they are currently working on this issue as well.

Senator ROBERT RAY—I presume they are working towards a conclusion to allow you to make a statement in the Senate, presumably about 15 June—the first available opportunity—or thereabouts.

Senator Hill—That is correct.

Senator ROBERT RAY—Would it be possible, having done all that but before this committee meets again as a Defence estimates committee, to supply that information to the committee? It may only form a small part of your statement to the Senate. I do not know what documentation you will attach or anything else—I dare say you do not know yet—but, whatever it turns up, it would be useful if you could supply that information, at least after that point, before the committee meets.

Senator Hill—I am happy to provide the information separately and beforehand to the committee through the secretariat, provided I have that information and I am confident that it is in a form that I can put to the committee.

Senator ROBERT RAY—Just to formalise this, are any members of the Department of Foreign Affairs and Trade going to assist in this review, or is it completely internal to Defence?

Senator Hill—The review is internal to Defence, but I have asked them to double-check all of the material that they are able to garner with whatever Foreign Affairs has. I have not asked them to do so but I presume that they will do the same with Attorney-General's in case something of relevance to the Defence knowledge lies in one of those departments.

Senator ROBERT RAY—Thank you.

Senator BROWN—The review, as I understand it, is of the incidents involving Australians where prisoners of war have been taken in Iraq rather than of the arrangement made between Australia and the US regarding the handling and custody of those prisoners. Is that the case?

Senator Hill—Yes. As of yesterday afternoon that was the task. But the team is now also looking at the questions that were asked by the Senate committee last night that we were not able to fully answer.

Senator BROWN—You might remember that on Monday night this issue was strongly canvassed and you said at that time regarding the policy on this matter:

... it is not being reviewed. If it were to be reviewed, then we would need send military police and set up a whole apparatus of our own for detention of prisoners. We do not think that is a very sensible thing to do.

Is that still the position?

Senator Hill—That is still our position. We do not have special forces in Iraq and we do not have infantry in Iraq. If we were to take prisoners it would be most likely to be in relation to the maritime surveillance work we are doing in the gulf, and we are doing that in conjunction with coalition allies. I do not think sending over a team of military police and everything else that is necessary for the detention of prisoners would be warranted in those circumstances.

Senator BROWN—On Monday night General Cosgrove referred to the instruction regarding the treatment of prisoners and the monitoring of the treatment, and he also made a commitment to get a legal opinion about this matter. In your review of this process, would you look at Monday night's evidence and take that into account in ensuring that the answers that were sought on Monday night are, either separately or as part of your response to this committee, brought back to the Senate?

Senator Hill—I will look at that, but I do not recall him undertaking to get new legal advices. I thought the international lawyer from Foreign Affairs yesterday covered the law pretty well.

Senator BROWN—General Cosgrove said on page 113 of the *Hansard*:

If you want that taken on notice—

I was asking about Warrant Officer Day at the time—

to see whether we can establish the legal position—people brought into detention by Warrant Officer Day's unit vis-a-vis him as a person—we could do that. It would take some time, but ...

I ask you to review that situation and the legal position generally of Australians—whether a review is to be undertaken of the legal position generally of prisoners taken into custody by or with the assistance of Australians.

Senator Hill—I will go back to the *Hansard* and see what was undertaken. That is another issue—the issue of Australia’s obligations where Australian forces are serving under the rules of engagement of a third country. I will do whatever we undertook to do.

Senator FAULKNER—You indicated that you had a letter from General Tommy Franks—a confirmatory letter for the arrangement you have outlined. I gather from your comments that that is a classified letter, is it?

Senator Hill—That is so, yes.

Senator FAULKNER—If it is classified, I assume it would not be appropriate for it to be tabled at this estimates committee, but can I check that. Obviously, you have not indicated which particular classification it has.

Senator ROBERT RAY—Are you able to do that without any embarrassment—say what the classification is?

Senator Hill—‘Secret/RelAUS’. I assume it is ‘relations with Australia’.

Senator FAULKNER—What is the date of General Franks’s confirmatory letter?

Senator Hill—It is 11 March 2002.

Senator ROBERT RAY—Does that say that General Franks is writing in response to a letter written on so and so a date—just so we could have the date when our correspondence went to him?

Senator Hill—It refers to a letter from Admiral Barrie dated 27 February 2002.

Senator FAULKNER—Have you been able to turn up a copy of that letter?

Senator Hill—Not as yet.

Senator FAULKNER—We have not found that on the Defence files yet—the CDF’s letter to General Franks?

Senator Hill—In the short time available.

Senator FAULKNER—Send out the search party.

Senator Hill—What has been located has been given to me. This is what has been given to me.

Senator FAULKNER—You are saying that at this point you have not been able to locate the CDF’s letter—

Senator Hill—I am sure the CDF letter will be located.

Senator FAULKNER—I would have assumed they would be in fairly similar places and similar files. That is an assumption; I accept that. It sounds a reasonable one, but I suppose we should not make any assumptions at all. What concerns me about what you have said to the committee is that you have made clear that the confirmatory letter goes to an arrangement that related to the war against terror in Afghanistan—is that right?

Senator Hill—Yes.

Senator FAULKNER—Was that conducted under the auspices of the United Nations?

Senator Hill—I am not sure exactly what you mean by ‘auspices of the United Nations’. Reliance was placed upon UN Security Council resolutions. It was not a UN force.

Senator FAULKNER—What leads you to be able to assume that this particular letter in relation to our military involvement in Afghanistan automatically flows over to the military conflict in Iraq? I ask this question because I asked questions last night in this committee about the issue of Australia’s involvement in Afghanistan and the fact that it concluded, which was announced in November 2002. As you know, we discussed the issue of whether that was as a result of a cabinet decision and the like. Isn’t it true that Australia’s involvement in that conflict concluded in late 2002 by decision of the Australian government?

Senator Hill—I would need to check the dates. My recollection is that our in-air refuelling capability continued after the completion of the task of our special forces. I cannot recall offhand exactly when it concluded. My recollection is that that was the last of our direct military—

Senator FAULKNER—The point is that you are saying that the arrangement confirmed in this correspondence from General Franks dated 11 March 2002—well before, of course, hostilities in the war in Iraq commenced—is the basis on which Australia is not a detaining power under the Geneva conventions. I simply do not understand what appears to be an extraordinary leap of faith. Could you explain to me whether advices were sought as to whether the application of an arrangement entered into under a completely different legal construct—namely, the war against terror in Afghanistan—was to flow through to another, separate, different conflict, the war in Iraq?

Senator Hill—I have sought further information on that. I am advised that our forces operated under the same construct, and I am looking for what documentation there might be on that. But it was also subject to the development of the memorandum of understanding that has been referred to which dealt with the other circumstance, which was the taking of prisoners where—to use the words of the letter of 11 March—there was not a situation where it was ‘practicable for US forces operating with Australian forces to effect formal capture of detainees’. My recollection is that, because we were conscious of that possibility occurring, we believed that there needed to be an explicit understanding of the parties about a circumstance where Australians might capture Iraqis and later transfer them to another party.

Senator FAULKNER—But surely the point here is that the letter or the arrangement confirmed in the letter of General Franks of 11 March 2002 relates to a different war in a different country with very different United Nations involvement and a very different legal underpinning. I fail to understand how you can say to this committee that such an arrangement, confirmed in General Franks’s letter of 11 March 2002, could possibly provide the agreement and understanding that you believe exist in relation to Australia’s role—as a detaining power or not—in the war with Iraq.

Senator Hill—The understanding was clearly there, because it was in fact implemented on four occasions that we have referred to. In relation to the legal basis of each conflict, they were both coalitions of the willing and they may well have had a legal basis in different

Security Council resolutions. But I do not see that that is relevant to the issue of the detaining of prisoners and the obligations that flow therefrom. The obligations that flow from the detaining of prisoners do not relate to those Security Council resolutions; they relate to the Geneva convention and the other conventions that were referred to yesterday.

Senator FAULKNER—But it is a different war. Were the rules of engagement the same?

Senator Hill—We do not publicly disclose the rules of engagement, but in terms of Australian rules of engagement there would have been a great deal of similarity.

Senator FAULKNER—Do you seriously ask us to accept that the arrangements that were agreed to between the then CDF in Australia, Admiral Barrie, and General Franks for the war against terror in Afghanistan in March 2002 ought to apply in an identical way in a different war in a different country with different UN involvement—massively different UN involvement—and massively different legal underpinning for the conflict? How could that possibly be?

Senator Hill—I do not see that argument at all—that the legal underpinning of the conflict relates to the obligation to prisoners. But yes, what I am telling you is that I am advised that this understanding continued into the conflict in Iraq and in fact was implemented on four separate occasions.

Senator FAULKNER—Were advices sought on the applicability of the arrangements entered into in the war against terror in Afghanistan to the Iraq war? Was any legal advice sought on this issue or was it just assumed by government that this was the case?

Senator Hill—Every development of the rules of engagement and matters relating to the conduct of forces is to a background of legal advices. Obviously, the whole law in relation to military conflict is the starting point. In relation to whether, in relation to this specific arrangement, specific legal advice was sought, I do not have the answer to that at this time.

Senator FAULKNER—You have talked about four incidents and given the committee details of them. At least two of those involved HMAS *Kanimbla* in the war in Iraq. Was there any Royal Australian Navy involvement in the war against terror in Afghanistan?

Senator Hill—The Royal Australian Navy has been engaged in the war against terror from the outset.

Senator FAULKNER—Did these arrangements of 11 March 2002 relate to all services?

Senator Hill—The conflict in Afghanistan was part of the wider war against terror. I would like to check with the military but I assume that it would equally apply to the role of our Navy at that time. It certainly applied to the role of our Navy subsequently, so I suspect that from the time of this arrangement it has continuously applied.

Senator FAULKNER—The war in Iraq is not part of the war on terror though, is it? It is a different war.

Senator Hill—Some people speak of it as part of the wider war on terror. I have not generally done that. There are aspects of it in relation to defeating the wider global terrorist threat, but I have spoken of it in terms of the Security Council resolutions that related to the

failure of Saddam Hussein's regime to comply with requirements in relation to weapons of mass destruction.

Senator FAULKNER—Although I am pleased that you have found General Franks's confirming letter of 11 March 2002, I am a little surprised you have not been able to track down CDF's letter of 27 February 2002. I assume you have tracked down CDF's directive putting this arrangement into practice that followed from the confirmation received from General Franks. Do you have that available?

Senator Hill—I do not have it available. I am told that there was a directive. I was given these documents just before I came into this hearing. I am sure that I will be able—subject to any classification issues—to provide details of that directive in due course.

Senator FAULKNER—There should be no classification difficulties with the CDF directive, should there?

Senator Hill—Directives to our forces would not normally be public documents but, in the effort to complement what I have put before the committee today with further information, I will obviously peruse that directive and see what can be put on the record.

Senator FAULKNER—Did this CDF directive apply to the war against terror in Afghanistan? I assume it did not apply to other wars.

Senator Hill—I am assuming that it related to the conflict in which Australia was engaged at the time, which was the war against terror.

Senator FAULKNER—Yes, it applied to the conflict Australia was engaged in at the time—exactly. So was there a new CDF directive in relation to the war in Iraq?

Senator Hill—I have asked that question but I do not have an answer to that at the moment.

Senator FAULKNER—It is pretty important.

Senator Hill—I do not know that it—

Senator FAULKNER—No wonder you need a fact-finding team.

Senator CONROY—He needs the SAS.

Senator Hill—That is your spin. I do not necessarily see that there needs to be a new directive if that is the directive that is in place, the directive that has been operating and the directive with which the forces are familiar—and the directive under which the forces actually operated at the relevant time in the war in Iraq. We know what the forces did; we know the basis for it. What we are now seeking for the committee's benefit is to establish the paper trail. That is what I am doing.

Senator FAULKNER—We are actually doing it for the public's benefit as well as the committee's benefit.

Senator Hill—I would like to think that we do everything for the public benefit.

Senator FAULKNER—I think there may be a public interest in this as well.

Senator Hill—I hope there is public interest in parliamentary processes.

Senator FAULKNER—Given that you have been able to turn up only a confirmatory letter from General Tommy Franks of March 2002, you have not been able to turn up the CDF's letter that led to the confirmatory letter from General Franks, you have not been able to turn up the CDF directive, you have not been able to tell us—you have told the committee in evidence that that applied only to the war against terror in Afghanistan—

Senator Hill—I think I said, 'I believe so.'

Senator FAULKNER—You did not qualify it then. You may be qualifying it now. You have not been able to tell us whether there is a new CDF directive in relation to the war against Iraq. Are we expected to believe that this CDF directive of 2002 for the war against terror in Afghanistan will remain in place in perpetuity even though Australia ended its involvement in that particular war in November 2002?

Senator Hill—No.

Senator FAULKNER—What you are putting is absurd.

Senator Hill—It is not at all. The conflict about which we are speaking in Iraq followed shortly on from this conflict. An arrangement had been established in relation to the war on terror in relation to prisoners in the capture of which Australia might be associated. That had been agreed with the United States and, I am told, had been included in a directive to the forces. I am told that the forces continued to operate in that way in the subsequent conflict and that in fact, on four separate occasions, that understanding was implemented.

Senator KIRK—You mentioned that the CDF directive was issued in 2002. Do you know the date of that CDF directive? I know you say you do not have a copy of it.

Senator Hill—No, I do not have the date.

Senator KIRK—Is it reasonable to assume that it was issued shortly after 11 March 2002 when the confirmatory letter was received?

Senator Hill—That is what I would assume, but I am wanting to check that. My hesitancy is only that this is an exchange of correspondence confirming an arrangement. It might well be that the arrangement had been put into effect before the correspondence.

Senator KIRK—You are saying that it did have almost a backdating effect?

Senator Hill—I do not know that. You asked whether you could assume that it was postdated, and that is the most likely outcome, but I do not know and I would prefer, for obvious reasons, to ensure that what I say is accurate.

Senator KIRK—If and when you do get hold of the CDF directive, can you advise the committee as to whether or not there was any time frame contemplated within the CDF directive? Is that usual when something comes into effect for a time to be specified in such a directive or are they always just ongoing directives that stand in place until revoked?

Senator Hill—I think that would depend on the terms of the directive. I suspect that it might differ from directive to directive.

Senator KIRK—Am I correct in understanding that there was a second CDF directive that related specifically to the war in Iraq?

Senator Hill—I am assuming that there were many CDF directives. What I do not know is whether a new directive was made on this particular issue or whether the forces relied on the then existing directive.

Senator KIRK—I am trying to understand the relationship between these CDF directives that you speak of and the arrangement that appears to have been ongoing from March 2002 through to the present, and the relationship between those matters and the arrangement for transfer of prisoners of war and civilian internees—that two-page document, which I think you would have, dated 23 March 2003. What is the interrelationship between the understanding or arrangement that we have been discussing and this document?

Senator Hill—Last night I said that you could argue that that memorandum may not be necessary because, as I understand it, it really reiterates what the obligations are under the convention in any event. Nevertheless, to avoid any uncertainty in that regard, the parties decided to set out in writing their understanding in relation to transfer of prisoners. That is designed to be applied in a case where one of the parties captures prisoners and later transfers them to another party.

Senator FAULKNER—But aren't we left now with very serious questions and concerns about the whole legal underpinning of our involvement in Iraq? As well as that, we have a situation where, after nearly 24 hours, there are now serious question marks about the document retrieval capacity in Defence. I find it extraordinary that some of this material—CDF's letter, CDF's directive and any other directives that might have been issued on something of such importance as this—is not available. Again, Minister, you have to take some responsibility for some of these issues.

Senator Hill—I think there were three different assertions there. One puts in question the whole legal basis of the conflict. I think it has nothing to do with that at all. You and others have argued about the legal basis of the conflict. In relation to document retrieval, it is a very short period of time.

Senator FAULKNER—Nearly 24 hours.

Senator Hill—You will not accept that, because it does not suit you, but the usual practice is that matters are not dealt with under these sorts of time pressures. The committee asks questions which, if they cannot immediately be answered, are taken on notice. Sometimes a response to that takes days, weeks and even, on occasion, months. I have sought at very short notice to provide information further to what I said last night, and I have done so. I acknowledged at the outset that I do not regard it as complete, and I have said that when I am more fully briefed I am prepared to share that with the committee.

Senator FAULKNER—What you are saying to the committee is that this issue of whether Australia is a detaining power in Iraq under the third Geneva convention now all swings on an arrangement entered into for another war—a different war, in which Australia concluded its involvement in late 2002—in a different country, under a different UN mandate and with a completely different legal underpinning. Surely these matters are of such significance and seriousness that they require a little more urgent attention than they have been given.

Senator Hill—I think you misunderstand the issue. It has nothing to do with the legal underpinning of the conflict. Whether or not there was an understanding and the

understanding reflects a practical arrangement, the obligations are as set out in the convention. The obligations are as the law provides. In each case, the facts have got to be applied to the law to determine what party is under what obligation.

Senator BROWN—That is the central question, though, isn't it—the obligation as laid out under the Geneva convention? It is for the apprehending power—the soldiers of the apprehending power—to take that obligation. That is written very clearly, for example, in this authoritative handbook, *The handbook of humanitarian law in armed conflicts*, by Dieter Fleck. The question relates, for example, to the 60 Iraqi prisoners of war taken west of Baghdad on 11 April. Did you say that there was an American present into whose custody those prisoners went? Could you give further detail about that incident?

Senator Hill—In relation to the first matter you raised, I agree: this practical understanding between the forces does not change the law. The facts will still be tested against the law in each circumstance. I do not know that I have any more on that incident than what I read to the Senate. What I am advised is that Australian special forces provided security so that a member of the US forces could formally effect capture of those prisoners of war and that the prisoners thereafter remained in US custody. The fuller detail of that requires going back to the special forces. We have people following up these questions to provide greater detail. I have already acknowledged that. That is the information that I have today.

Senator BROWN—On the fact of it, though, the concern we must be left with is that there was an Australian force here with some 60 Iraqi prisoners of war and, by an arrangement—whether it came from General Franks or elsewhere—these prisoners were put into the custody of an American who did not take custody of the prisoners. In those circumstances, the SAS forces and Australia, under the Geneva convention, are responsible for the wellbeing of those prisoners right down the line. I ask you to explain how that could not be. On a plain reading of the Geneva convention, Australia retained responsibility for those prisoners. Also, in the House on 13 May, the minister said that there were five incidents of contact with Australian—

Senator Hill—Which minister?

Senator BROWN—The Minister for Foreign Affairs, Mr Downer. He said that there were five incidents. You have given us four. I wonder if you could investigate that inconsistency and come back to us. Finally, I wonder if you would look at the letter from General Franks and see if that can be provided to the committee without whatever sensitive component it is that ought not be released publicly.

Senator Hill—There are three questions there. The first I think I have already agreed with to some extent, and that is that the law stands. It is law that we obviously support, as I think I said last night, not only to the letter but also to the spirit.

Senator BROWN—Could I just make that clear?

Senator Hill—I am trying to answer your three questions.

Senator BROWN—Just on the first one, though, when you say that the law stands you are agreeing with me that, if the SAS forces took prisoner 60 Iraqis, the law is that Australia retains responsibility.

Senator Hill—No, I am not agreeing—

Senator BROWN—No, I am clarifying this—

Senator Hill—But that is not the advice that I have. That is the point. You want to interpret that to change the obligation of Australia.

Senator BROWN—No, I suggest that is what you are doing.

Senator Hill—You can assert that, but there was a practical arrangement, for very sensible, practical reasons, in relation to the capturing of individuals. In many ways the difference between the government and you, Senator Brown, is that when we are working with a coalition in which we have confidence we believe we can share practical responsibilities. We are here dealing with the United States—

Senator BROWN—But not at the expense of the Geneva convention and the strict application of it.

Senator Hill—But our view is that the United States respects the Geneva convention. You may not believe that, but that was the presumption under which we operated and continue to operate. It is what we believe.

Senator BROWN—That is not the question here; it is that taking custody of prisoners then obligates the state—that is, Australia—to be responsible for those prisoners right down the line.

Senator Hill—You also asked whether I can table at least parts of this letter. That is a question I am seeking advice on. The second question you asked—

Senator BROWN—That was about the inconsistency between the minister's five incidents.

Senator Hill—I did actually refer to a fifth incident today which I think is qualitatively different, but I believe he may well have been including that as the fifth incident.

Senator BROWN—Can you just check on that please?

Senator Hill—Yes, I can ask him that.

CHAIR—Senator Brown, we are going to close at three. Senator Kirk has a couple more questions, so you can work it out amongst yourselves.

Senator KIRK—I wish to clarify something, Minister. It is correct, isn't it, that any practical arrangement—

Senator Hill—I have been offered good legal assistance, so bring the lawyer to the table.

Senator KIRK—That could be of assistance. Thanks, Minister.

Senator Hill—Or bring a good lawyer to the table, it is better for me to modestly say. I am not arguing there is not a good lawyer at your table. I am talking about my table.

Senator FAULKNER—On another matter, could you take on notice, Senator Hill—I do not expect you to have the detail here—what has happened to the 120 POWs that you enumerated for the committee. Obviously that is a question on notice. Thank you.

Senator KIRK—I just wish to clarify that it is your understanding that any arrangement or practical arrangement—however you wish to describe it—cannot conflict with or derogate away from Australia’s responsibilities under the Geneva convention.

Senator Hill—That is my understanding. Am I right or wrong?

Dr French—Indeed, as I mentioned yesterday, the overarching legal norm that is relevant with respect to the taking of prisoners of war in a period of hostilities is the third Geneva convention of 1949. In addition to that, with regard to Australia and the UK, the first additional protocol to the Geneva conventions, the additional protocol of 1977, is applicable and those are clearly the norms that do apply. In order to make quite clear the practical application of those norms where two of the parties—that is, Australia and the UK—had a slightly broader set of obligations than the third party—that is, the US—in relation to the definition and categorisation of prisoners of war, it was appropriate to enter into a memorandum of understanding of less than treaty status to simply clarify the processes. But I must make it clear from the outset that the underpinning legal norms that define the obligations of the relevant countries are indeed the third Geneva convention of 1949 and the first additional protocol. The memorandum of understanding of 23 March 2003 per se did not create any new international legal obligations. It merely created a mechanism whereby those obligations could be implemented in a smooth manner.

Senator FAULKNER—And it cannot override those obligations, can it?

Dr French—Certainly not.

Senator FAULKNER—And they cannot modify those obligations?

Dr French—No, and the express wording of it does not intend that.

Senator BROWN—You said yesterday, Dr French, that the custodial power is the power that actually takes the details of the prisoners who have been taken, whereas I was maintaining that it is actually the power that takes the prisoners. I have had the opportunity of looking at the Geneva conventions overnight, and I cannot find reference to the opinion that it is the documenting power. Can you point to that provision under the Geneva convention?

Senator FERGUSON—I raise a point of order, Chair. Senator Kirk had the call. She has hardly had the chance to ask any questions and you, Senator Brown, totally butted in again, which you have done continually. I think Senator Kirk should be given the call.

CHAIR—In fact Senator Kirk has got the call until three o’clock, until we stop.

Senator KIRK—What you have said to us is that what is embodied in the Geneva convention is, quite rightly, also embodied in this document. It really is just a reflection of the principles under the Geneva convention and the other principles of international law that you spoke of earlier.

Dr French—Yes, to enable the implementation of those obligations in this specific circumstance.

Senator KIRK—Now what I need to understand from you is: how does this other practical arrangement that the minister has been describing to us sit alongside both this document and

the obligations of international law under the Geneva convention and other international law norms?

Dr French—My understanding of it, as it has been described, is that it is a purely practical arrangement. Like the MOU, it does not in any way amend or change the underlying international legal obligations of the parties. Indeed, the question as to which country or which power is a detaining power in any given fact or situation with regard to detaining of prisoners will remain an issue of fact in a given circumstance. The arrangement to which the minister has referred clearly was an arrangement to enable practical matters to be dealt with in a situation where there were, effectively, combined forces. It does not derogate, obviously, from the fact or the obligation that the convention must be complied with. That is, the detaining power, through personnel of the forces of the relevant power, engages in the act of detention consistently with the third Geneva convention.

Senator KIRK—So this practical arrangement really has no legal effect whatsoever in this context? It is going to be the Geneva convention.

Dr French—No, it does not in any way affect the international legal obligations, nor could it.

Senator KIRK—So, as you say, it is really a case-by-case analysis as to what occurred in the circumstances, whether or not it was an Australian who captured the individual concerned who was then possibly transferred to the United States. From what I understand of this practical arrangement, that is attempting to put into place a situation where even where an Australian is seen to capture a person they immediately go into US custody—so it is going to be a legal fiction, a bit of a fudge. That is how I understand the effect of the practical arrangement. Am I correct in saying that that really would not have any legal basis, that really you do need to refer back to what is contained in both this document and the rules of international law?

Dr French—The advice that we have received from ADF is that at all times the prisoners were taken into custody by the United States and that the detaining power was the United States. To that extent, then, under the Geneva convention the relevant obligations of a detaining power pertained and accrued to the United States.

Senator KIRK—And Australia has no further responsibilities once that occurs—is that your understanding?

Dr French—That is the clear wording of the Geneva convention.

Senator Hill—No further legal responsibilities, but some have suggested in this committee that that could be expressed in terms of washing our hands of responsibility. My answer to that has been that we were working with a coalition ally that supports the Geneva convention and respects the standards of humanity we think are important.

Dr French—I could just expand on that a little. One of the very points of the MOU was to express clearly the obligation contained in the third Geneva convention that prisoners may only be transferred between powers that are parties to and respect the norms of the convention. In the fact circumstances in Iraq, there was no requirement to activate that MOU by virtue of the fact that Australia did not become a detaining power.

Senator BROWN—You heard my question earlier, Dr French. Can you point to the clause or the provision in the third Geneva convention which says it is not the arresting power but the power that documents—takes name, rank and so on of prisoners—that is responsible under the convention for the wellbeing of the prisoners? Failing that, if you cannot point to it in the convention, can you point to the authority for that opinion which you gave yesterday?

Dr French—It is clear that a detaining power needs to be defined when prisoners of war are taken. Who the detaining power is in situations where you have mixed forces will be a question of fact at any given time. In the fact situations that we were given, the act of taking custody and of detaining was by US forces, as evidenced by the fact that the processing of those individual prisoners of war—for example, by taking the relevant details: name, rank, serial number—

Senator BROWN—Where does it say that in the convention?

Dr French—When taken in its entirety. One of the obligations in the third Geneva convention is that the maximum information that a prisoner of war is required to provide is name, rank and serial number. In addition to that, there is an obligation upon the detaining power to put that information into an identity card, for example, which is used for a number of purposes, including to ensure that information may be provided to interested parties, including the ICRC, to ensure the welfare of the prisoner of war. These are all indices of which power is assuming the responsibility as detaining power. In circumstances where you have mixed forces, where particular personnel from one of the nation states within a mixed force undertake this role of documenting and taking the details that clearly indicates that that nation state is assuming the obligations foreseen in particular under article 12, article 13 and following of the third Geneva convention.

Senator BROWN—It is a fraught opinion.

CHAIR—Thank you, Dr French. After the break we will be commencing with Austrade.

Proceedings suspended from 3.04 p.m. to 3.18 p.m.

CHAIR—We welcome Austrade to the table and look forward to your answers.

Senator CONROY—Austrade seemed to do quite well in this year's budget, with an extra \$19.6 million over four years for a new exporters program. What is the purpose of that?

Ms Lyons—Senator Conroy, I should clarify that. Of that \$19.6 million, \$6.1 million was new money and \$13.5 million was to be found from within Austrade's existing resources.

Senator CONROY—So you did not do quite as well as it looked.

Ms Lyons—It depends which way you look at it, I guess. It is for a program called New Opportunities—New Exporters. That has a number of components. There are two or three in part that are overarching. It is a program that relates to increased market access for industries that are undergoing some sort of restructure and for industries in regional and rural Australia, and to the increased market access that will inevitably arise with the negotiation of bilateral free trade agreements between the Australian government and other governments.

Senator CONROY—You said that you had to take \$13 million to put into this. Where did we take it from?

Ms Lyons—It is probably not so much where we took it from but, as with any business or organisation, from time to time—generally annually or biannually—we look at what the priorities are. In our case, because our business is trade facilitation for Australian businesses internationally, we look at where we are going to be able to get the best access for exporters. In this instance we look at what we are doing in relation to the components of this program to see where we can redirect and refocus some of our resources into the program.

Senator CONROY—Where did we refocus our resources from?

Mr Field—The existing resources that have been redeployed will be coming from the regions where they already exist. As Ms Lyons said, it is our job to get the best effect from those resources.

Senator CONROY—What do we mean by ‘the regions’?

Mr Field—I mean the overseas locations where we do business.

Senator CONROY—Does this mean we are closing any offices or bringing any staff home? What was the money used for last year?

Mr Field—The money was used for trade facilitation in those regions.

Senator CONROY—Which regions are we redeploying the money from?

Mr Field—The money will remain in the regions where it is currently being spent. As Ms Lyons said, we are refocusing and reallocating resources within those regions to take full advantage of these opportunities.

Ms Lyons—Can I clarify it for you, Senator? Clearly this program relates to opportunities for Australian companies and businesses out of increased market access. Those countries that thus far have negotiated bilateral trade agreements with Australia are Singapore, Thailand and the US. This is a four-year program and in the first couple of years of the program there will be a focus in those particular countries—so that will be the regions of the Americas, South-East Asia and the South Pacific.

Senator CONROY—I want to make sure I have this right. You have created a new program and money has been redeployed from some existing programs. Either you have a slush fund with \$13 million in it that is not designated—and I do not think you do—or you have redeployed \$13 million from some program, into this new program. Is that a fair description?

Ms Lyons—It is not entirely fair in the sense that within Austrade there are a number of programs, but in this instance—the New Opportunities—New Exporters Program—I do not think it would be fair to say that we have taken money from one and put it into another. I think it is just a refocusing of some of the funding that is out in the regions and within Australia that is—

Senator CONROY—Unfortunately, the government cannot have it both ways. If they had said, ‘There’s \$6 million of new money,’ you may have decided ‘Okay, we’re going to allocate and redeploy.’ But when they want to announce it as a \$20 million program, there is no ‘magic pudding’—to borrow one of Mr Costello’s favourite phrases at the moment—and money must be redeployed from somewhere. So I am assuming it was in some program. Mr

Field described it as ‘trade facilitation’. I am asking you to list the programs from which the money has been redeployed or refocused—whatever euphemism you would like. Which programs was there money in that has been redeployed, rephased or refocused into this one?

Ms Lyons—If you are putting it like that—

Senator CONROY—It is a matter of maths. It is not me putting it like anything. It is the maths of the situation.

Ms Lyons—It is money that is already existing in Austrade.

Senator CONROY—Last year it was allocated for some purpose.

Ms Lyons—It will have been—

Senator CONROY—You did spend it last year. You spent that \$13 million.

Ms Lyons—Yes, and it will have been allocated to enable Australian businesses and companies to access markets throughout the world.

Senator CONROY—What program would that be? Some \$13 million has been taken from a program to be put into this program. I am just asking you to identify what the program is—or if it is two or three programs.

Mr Field—The point is that Austrade’s underlying business is not organised by program. We are organised—

Senator CONROY—When money is allocated—

Mr Field—We are organised by—

Senator CONROY—It is organised with a title on it.

Mr Field—We are organised by title and location within region.

Senator CONROY—What title did it have last year?

Mr Field—We are organised by location within region and we have an onshore operation as well. This program essentially brings together all of our efforts, as Ms Lyons described, in order to capitalise on the emerging trade opportunities arising from the free trade agreement. That is why we are using the word ‘refocusing’.

Senator CONROY—We are going to be here for a little while until you start explaining to me where the \$13 million was allocated—which program. It was allocated in the budget. Each dollar has to have a title attached to it. It must be listed in the PBS under a title. Which one has it been taken from? It may not be how you have structured your organisation, but in a parliamentary accountability sense we open the portfolio budget statements and we say, ‘Okay, money is there. There is a title.’ Where was that \$13 million titled in last year’s PBS?

Mr Field—Under outcome 1, and that is where it stays.

Senator CONROY—Output accounting is very entertaining because of these very reasons where you are able to just say that it stayed within outcome 1. But outcome 1 is more than just the title ‘outcome 1’. Do you want me to really drill down and ask you every single question about where all the money in outcome 1 went last year and then drill down and ask where all the money is going in outcome 1 this year? If you want me to do that right now, we can do it.

Mr Field—I am not trying to be difficult.

Senator CONROY—I am not saying you are. I am asking you if you would like me to do that. Or you can just tell me which programs within outcome 1 the money was moved from. There must have been a title. And do not give the ‘Outcome 1 stays the same’ line.

Ms Lyons—Perhaps I can help. I do not know if this is going to help. One of our roles in Austrade is to identify opportunities for businesses. From time to time, as you would appreciate, those opportunities change. This is about having a look at some different opportunities that have emerged.

Senator CONROY—Yes. That means there are some opportunities that you are no longer looking at. That is what I want you to identify.

Ms Lyons—It may be that we are increasing the number of opportunities that we are looking at.

Senator CONROY—Where was the money spent last year? I will just go back to square one. In the PBS, under outcome 1 last year—we are obviously going to have to go through this ridiculous charade so let us do it. Give me a list of your programs under outcome 1 last year and how much money is in them. I will do the maths myself.

Mr Field—It is certainly not meant to be a charade. What we are doing is collecting all of the activities that we propose to do under the heading of the New Opportunities—New Exporters Program. That includes the \$6.1 million of fresh money. And we reallocated \$13.5 million from what we were previously doing. Within each region—

Senator CONROY—Are you closing any regional offices, cutting any posts or cutting numbers of staff?

Ms Lyons—No.

Senator CONROY—They are moving from one responsibility to another.

Mr Field—Redeploying them.

Senator CONROY—Where were they redeployed from?

Mr Field—Redeploying the activities.

Senator CONROY—What were their previous activities? That is what I am trying to establish. What opportunities are they no longer focused on because we have found new opportunities? I am not being critical of the fact that they are doing it; I am just trying to identify the activities. These people were sitting there doing something—or weren’t they?

Mr Field—Yes, they were.

Senator CONROY—What were they doing?

Mr Field—They were undertaking trade facilitation which was not specifically focused on the free trade agreements.

Senator CONROY—You can tell me what they were not doing but you cannot tell me what they were doing. Is that your proposition to me?

Mr Field—No. They were undertaking trade facilitation but their activity was not focused on the free trade agreements.

Mr Crawford—In any one year the expenditure incurred by Austrade's business units are outlined in their operational and business plans. The resourcing of those regions in the domestic network is designed to be flexible to take advantage of whatever emerging opportunities or emerging challenges occur. In the last couple of years, for example, we have had SARS and we have had to address that challenge and apply resources to it. Similarly, in the upcoming 12 to 18 months we will be in the regions in Australia refocusing the existing resources to take advantage of the opportunities of the FTAs. If you look at where the money is allocated in this financial year, Austrade takes very seriously its outcomes and outputs budgeting and you will notice that under outcome 1 there are a number of outputs which range from community awareness to specifically the identification of opportunities and the delivery of those opportunities to Australian companies.

Senator CONROY—What it sounds like at the moment is \$13 million of resources just sloshing around in Austrade doing nothing. Frankly, that is what it sounds like at the moment. I am sure that is not the case, but if I were a suspicious person that is where I would be led. Is it easier if I name a name: what was the name of the officer, in which region, what was he doing, and which opportunities was he working on?

Mr Field—Pursuing trade facilitation activities—

Senator CONROY—What were the opportunities? We have described new opportunities through the FTA that have come up. What were the old opportunities that he or she was working on?

Ms Lyons—Are you asking us to provide you with that sort of level of detail for everybody in the overseas organisation?

Senator CONROY—I am being forced to at the moment, yes.

Ms Lyons—I would have to take that on notice, Senator. There are 600-odd Austrade people offshore, all of whom are involved in identifying opportunities.

Senator CONROY—Can you name the people who are now taking up the new opportunities under the new program? What are their names and who has been refocused? When you tell me who the people are who are working on this new program I will then be able to say: where were they before and what were they doing? If we want to get to that level, I am prepared to do it. One way or the other you are going to have to explain what these people were doing before.

Mr Crawford—Perhaps we could provide you on notice with a comparison of business plans for this financial year compared to next financial year for the affected regions.

Senator CONROY—If they are specific enough that will possibly give me the answer. Thank you for being the first person at the table who is trying to help me. That will possibly do, depending on the level of detail. At the moment I hope you understand I am a bit suss that in six months time I will get a generic answer that really tells me nothing. But I do appreciate that you have actually made the first concrete suggestion.

Senator PAYNE—That is not fair. The officers are trying to assist you and you know it.

Senator CONROY—Senator Payne, either you were asleep or, please, don't interrupt.

Senator PAYNE—That does not even merit your sort of behaviour, Senator Conroy, and you know it.

Senator CONROY—What we are trying to do is establish which staff have been moved into the new program called the New Exporter Development Program and what they were doing before, and it is a mystery to the Austrade officials at the table—either that or they do not want to say.

Mr Crawford—With all due respect, it is not a mystery. We have already said we would give you a comparison. A concrete example would be in the Americas there has been a focus over the last couple of years on the wine sector. As opportunities emerge through the FTA, we may apply fewer resources to the wine sector and more to other sectors. There has been maturation in that market.

Senator CONROY—That is the sort of information I am interested in.

Ms Lyons—Could I please add that, as this is a new program that will not commence until 1 July, the detail of who will be doing what under that program is still being finalised. The detail is yet to be worked out.

Senator CONROY—I can appreciate that you might not quite know all that they are currently going to be working on. But my question has always been about what they were previously working on. You must know, or be reasonably close to knowing, where the resources are being allocated, re-profiled or reallocated from. Is it still too early to tell, at this stage?

Ms Lyons—My view would be that it is still too early to say right at this minute. I would suggest that in the course of the next six to eight weeks that will become a lot clearer.

Senator CONROY—So when you prepared the budget submission and you put in for extra money—I understand what Finance is like and the ERC process; they always like you to come up with a few savings yourself to help move it along the way—did you put up any reallocations yourselves or did you ask for the full \$19 million and they only gave you \$6 million and said, 'If you want the \$19 million, you have to come up with \$13 million yourselves'? That process usually does identify where savings will come from. That is my understanding of the budget process. Does that sound familiar to you? You have to point the finger somewhere yourselves. If you did not and you just went into the process and said, 'We're after \$19 million,' or 'We're after \$50 million,' and they cut you back to \$6 million, that would be one thing. But at some point, either you put forward where the \$13 million worth of resources was coming from—which would tend to suggest to me that, if that was the case, you already know—or the government said to you, 'We're going to give you \$6 million and if you want \$20 million, you have to come up with \$13 million.' Please tell me how it worked for you.

Mr Field—In terms of the budget process we certainly do know how we intend to apply the fresh money. We also do have a plan which my colleague has alluded to. It is not a fully costed implementation plan yet. As to the full program, I cannot add to what she said.

Senator CONROY—I was asking about whether or not you put forward any savings reallocations in your budget submission towards the make-up of the \$19 million. How did the \$13 million you were allocated come forward?

Mr Field—In terms of the budget process—I am new to this, you probably realise—I am advised that that is budget-in-confidence.

Senator CONROY—So the reality is that, despite the government's announcement, there is a grand total of \$6 million for the new program—the New Exporter Development Program?

Ms Lyons—Yes, that is right.

Senator CONROY—Will there be any new export advisers out of the extra \$6 million? What will the extra \$6 million be spent on? Will there be extra staffing deployed?

Mr Crawford—It is proposed that there will be a number of new export advisers, specifically with expertise in the countries where the FTAs are being negotiated. We are currently finalising the number of those that will operate within Australia and in the market.

Senator CONROY—Do we know yet what the allocation will be? Is it three in the US, two in Thailand et cetera?

Mr Crawford—The intention is to have the bulk of them based in Australia to directly assist Australian companies. At this stage, I am not able to give you the specific number—I believe it is about five.

Senator CONROY—Did you say that you are 'not allowed' to give me the specific number?

Mr Crawford—I believe it is about five but I would have to clarify.

Senator CONROY—Is that what you said—that you are not allowed to give me the specific number?

Mr Crawford—No, I did not say 'not allowed'.

Mr Field—No, he said that he was not able to give you the specific number.

Senator CONROY—So how many was it?

Mr Crawford—Five, subject to clarification.

Ms Lyons—There is the capacity for there to be some business development managers in the overseas network who would also be able to take advantage of this.

Senator CONROY—Any idea roughly of the number?

Ms Lyons—No, not of the number. At this stage we would be looking at the US and possibly at Thailand.

Senator CONROY—Is that one for each or are you not sure yet?

Ms Lyons—We have not reached that level of detail yet.

Senator CONROY—Was it a surprise when you got this money? Were you pitching for it?

Ms Lyons—If I were to say it is always a surprise when you get funding, I am sure you would appreciate that. I guess in the sense that we believe this is an important program—and clearly the government thought that it was an important program—no, we were not surprised.

Senator CONROY—What do the export advisers actually do? What is their role?

Ms Lyons—There are two types of export advisers. As you probably appreciate, the Australian operations of Austrade have two separate structures: one for sourcing clients and one for servicing them. Export advisers, in the broad, either fall into the category of those advisers who are out sourcing clients or those who are servicing the clients who have already been found.

Senator CONROY—Austrade's web site says that a widespread education campaign will be rolled out over the next four years to ensure companies, particularly in rural and regional areas, have information about exporting. How much money is going to be spent on that?

Mr Crawford—At this stage, we anticipate the figure will be about \$200,000 in the next financial year with funding for further years to be determined. The word 'advertising' is probably a misnomer in the sense that we are not talking about a major single advertising campaign but rather targeted support for seminars and events.

Senator CONROY—What will the education campaign entail?

Mr Crawford—A couple of things: ongoing promotion of the importance to the Australian economy of international trade, making potential exporters aware of the services provided by Austrade, and supporting seminars and events that we will run throughout the country to raise awareness of opportunities and also deliver specific opportunities for Australian companies.

Senator CONROY—Do you know where these seminars will be held yet?

Mr Crawford—No, I cannot give you specific details. They will be held throughout the country—in metropolitan, regional and rural areas.

Senator CONROY—When do you envisage these seminars will begin?

Mr Crawford—I would not expect the seminars on the US to begin until after final confirmation of the agreement, so we would be looking at later this calendar year—the last quarter—although I note that some seminars on the opportunities have been held already with DFAT colleagues. But at the moment we are at the stage of mapping out the seminars and events program for Austrade for next financial year.

Senator CONROY—As in after 30 June?

Mr Crawford—Yes—not just on FTAs but the general program.

Senator CONROY—What is the general program?

Mr Crawford—We run an ongoing program of seminars and events throughout the country, focusing on opportunities that are either sector specific or country specific. That is part of Austrade's normal business. For example, we will be running a seminar later this calendar year on fine food opportunities in a number of markets, such as the UK and Singapore, targeting niche food producers. We have done that for the last two years. There will be seminars on Australian innovation and opportunities in the services sector. There are a

range of them. We could provide you with a list of seminars and events this year and proposed ones for next year.

Senator CONROY—I would be interested in the list of seminars and where they are being held for the rest of this calendar year. Off the top of your head, how many seminars are there?

Mr Crawford—You will embarrass me—I am the person who probably should know this. I cannot tell you off the top of my head how many there are this year. They are numerous. We can get you the details.

Senator CONROY—How much is this program costing?

Mr Crawford—I would not classify it as a program because, once again, that would imply that there is a specific funding bucket for seminars, and there is not. Funding to support seminars, whether they be about opportunities in particular countries or about opportunities in particular sectors, is spread throughout the organisation. My own area, marketing, supports other business units if they wish to run a seminar or an event which is designed to—

Senator CONROY—But you are suggesting that for 12 months there is an organised set of seminars.

Mr Crawford—That is correct—taking into account, of course, that sometimes you have to respond to particular opportunities or challenges that may arise.

Senator CONROY—Has there been an increase in the number of seminars from last calendar year to this calendar year?

Mr Crawford—On a calendar year basis, I would expect not. You would have to go back and look at the particular—

Senator CONROY—I will take your word for it. Will there be ads in the newspapers and on television for these seminars? I am going back to the education campaign on your web site which I mentioned at the beginning of this part of the conversation. I think you said that that was a bit overblown. I appreciate the point you have made about the one that is on your web site—it is not a TV and newspaper thing—but what about this other program that you are describing?

Mr Crawford—For the seminars and events we do not generally do any television advertising, because it is expensive and in our view it is not necessarily the most effective thing. To advertise whatever event we are running we tend to do a mix of media placements—placing stories—purchasing, in some cases, advertising space on a relevant local or metropolitan paper; and, depending on the nature of the event, purchasing lists for email campaigns, such as lists of companies interested in doing business in the UK who have capability in the ICT sector. So it is an integrated approach. We avoid what I call the broadcast approach, because it is very expensive and it does not give us the results we need.

Senator CONROY—How would you assess the effectiveness of the seminars?

Mr Crawford—The effectiveness of the seminars and the measurement therein vary, depending on what their objective is. If the seminar is about general awareness raising, for example, in the education sector we run seminars for teachers where we provide them with information and curriculum material about international trade. The measure of success there is

the number of attendees and feedback on the seminar and the quality of the material. If the seminar is about opportunities in a specific country, a number of companies to attend, and in some cases where it is possible we track whether those companies actually achieve deals, particularly where we have a seminar or an event where we have in-market specialists attending who have direct knowledge of the opportunities available—so a direct matching of capable Australian companies with interested potential international purchasers.

Senator CONROY—With regard to the seminars that we have been talking about, your web site says ‘information about exporting in a general sense’. We were talking about the extra \$6 million, and you mentioned there may be some export advisers and business development managers. I presume they will not take up the full \$6 million?

Ms Lyons—No.

Senator CONROY—There is a campaign. Is there any advertising in support of the FTA to come out of that campaign?

Mr Crawford—There will be no campaign advertising the FTAs. If there is any advertising in relation to the FTAs, it will be to attract Australian companies to attend a seminar or an event which is about the opportunities that may arise.

Senator CONROY—I do not know how many personnel you are planning on hiring, but you have at least \$3 million or \$4 million left there to run a pretty meaty sort of campaign advertising some seminars.

Mr Crawford—No, in this coming financial year there is \$200,000 available.

Senator CONROY—But there is money unallocated that could become available.

Ms Lyons—Can I just reiterate that this is a four-year program, so we have to divvy up that money over four years.

Senator CONROY—I appreciate that. I appreciate what your priorities would be, but ultimately you do not make the decision on how the money gets spent. There are no proposals at this stage for any enhanced advertising program other than what you currently have in train for the \$200,000?

Mr Crawford—No. You mentioned enhancements. We will be doing this sort of advertising I just mentioned as part of our activities to draw people to seminars and events.

Senator CONROY—I am just keen not to turn up somewhere and find an ad for an FTA benefits seminar on national television—or, more importantly, in all the local newspapers in regional seats. No suggestion that there will be anything like that?

Mr Crawford—You will not be seeing an ad on the television from Austrade. You will see in local papers throughout the country as the year rolls on, as appropriate and as necessary, small advertisements perhaps and media placements to attract people to seminars and events. But as I said, they will be throughout the country.

Senator CONROY—I will hold you to that and hopefully I will not have to raise it again. What impact has the Singapore FTA had on Australian exporters?

Ms Wilkes-Bowes—I cannot give you any data on the numbers of companies that have successfully entered the Singapore market directly as a result of the FTA, except to say that

there have been activities conducted by Austrade and there have been companies involved. The most obvious example is the University of New South Wales, which now has a campus in Singapore which was a direct result, I understand, of the FTA, so there are some of those headline companies. There are others, but I could not give you an exact number.

Senator CONROY—How many inquiries?

Ms Wilkes-Bowes—I would have to take that on notice. I could certainly get that.

Senator CONROY—Have there been a lot of inquiries about the possibility of exporting to Thailand under the new Australia-Thailand FTA?

Ms Wilkes-Bowes—I could not tell you the level of inquiry yet, but I can say that Austrade and DFAT have developed an FTA strategy to promote that FTA once it is signed.

Senator CONROY—That is within the programs that we have been talking about?

Ms Wilkes-Bowes—It would have been done to some degree already but it is certainly covered under the programs that we have and, as has been outlined already, there will be new activities, extra activities, that we would not have been able to fund otherwise. So, yes, there will be some funds allocated to the Thai FTA strategy.

Senator CONROY—The minister's press release says:

The initiative would target those industry sectors where there is greatest Australian capability to match new opportunities.

What are the sectors that the program will target?

Ms Wilkes-Bowes—For the Thai FTA, manufactured goods generally but processed food, automotive parts and aftermarket parts, and electronic machinery are the three key specific sectors that we would look at. But, for example, the seminar series that we would run under that strategy will be both general and specific, so there will be seminars which talk about the general opportunities.

Senator CONROY—You would have all these companies that would be relevant on file already?

Ms Wilkes-Bowes—Certainly we would have some, and I will defer to Mr Crawford on this, but in marketing I think we would go to those companies we know have an interest in Thailand. We would definitely hope to generate interest from other companies which do not yet export to that market but could take up these new opportunities. So there would be a combination of companies that we would target and part of that would be getting new companies, even perhaps new to exporting.

Senator CONROY—I am thinking about it logically. There would be a limited number of companies that would fall into that category.

Ms Wilkes-Bowes—Yes, for any market there is a limitation but I would also add that, under the work that we are doing to attract new exporters, with companies that may not have considered export we are trying to enlarge that pool for all markets and for the ones we are targeting—and here we are talking about Thailand.

Senator CONROY—Do the sectors that you have identified have the capacity to supply more of their goods or services to the US?

Ms Wilkes-Bowes—The way in which Austrade works is to target companies and raise awareness of exporting. In talking to companies we target those that we think do have capability. That is part of the process of qualifying companies that we talk to. Those that did not have the capacity we would perhaps refer to others to get themselves up to speed. We would not send a company into a market that we did not think they had the capacity to supply.

Senator CONROY—As an example, there is the beef industry. Would it have the capacity to send more beef to the US in the near future?

Ms Wilkes-Bowes—I would not want to comment on that because I am not an expert. I could not give a clear answer.

Senator CONROY—I am happy for you to take that on notice. My understanding is that it is at maximum capacity at the moment, given the drought and a whole range of factors. I am just questioning whether you would target the beef industry right now for an export drive when, for a variety of reasons, the deal does not kick in if it were passed for X period and they are at maximum capacity. They are at about their maximum capacity now. I am wondering if you would take those factors into account before you target an advertising campaign on it.

Ms Wilkes-Bowes—In general terms, again, we consider the capacity of the Australian industry before we target.

Senator CONROY—I just wanted to briefly chat about the EMDG. How are things going with the EMDG?

Ms Ward—To clarify, do you mean how are we going this year with the processing of applications?

Senator CONROY—Yes.

Ms Ward—I have got some figures here which are to the end of April. They have not been updated to May, as we have only just finalised that May outcome. I think we have now processed over 90 per cent of the applications for the grant year 2002-03, which are the applications we are processing this current financial year. The minister has determined that 16 June will be what is referred to as the balance distribution date, which means that is the date we will finalise processing for this financial year in order to finalise grant payments during the course of the financial year.

Senator CONROY—So that is when you distribute the balance?

Ms Ward—That is the date at which we stop processing and stop payment of grants, which means that is the date at which we can do a strict audit of grant payments made, any outstanding administration costs, provisional entitlements outstanding and the balance, to be able to determine the payout factor, which takes, usually, approximately one week.

Senator CONROY—How many companies got a full payment of their claim for a 2002-03?

Ms Ward—Do you mean during the financial year 2002-03?

Senator CONROY—Yes.

Ms Ward—Therefore applying to the previous grant year, 2001-02? I am just clarifying that that is your question.

Senator CONROY—Yes, a full payment of what they asked for.

Ms Ward—Seventy-five per cent of recipients for the grant year 2001-02 received their full payment. That was 2,854 recipients. I should clarify: when you say ‘what they asked for’, which I think were your words, it is 100 per cent of what we have determined as their provisional entitlement. I think this was explained last Senate estimates. There are adjustments made to some claims. It may not necessarily be 100 per cent of what was originally claimed.

Senator CONROY—Did you say that was 2001-02?

Ms Ward—That was for the grant year 2001-02. We are processing in the financial year following a grant year, so that was for last financial year, 2002-03.

Senator CONROY—It goes back a year.

Ms Ward—That is correct. Because it is a partial reimbursement program, we are processing in a financial year for the previous year, what we refer to as the grant year.

Senator CONROY—How does that compare with previous years?

Ms Ward—In the previous year, which was the grant year 2000-01—that is, we processed during 2001-02—72 per cent of recipients were paid 100 per cent of their provisional entitlement. The following year it was 75 per cent.

Senator CONROY—So it has hovered around 70 to 75 per cent in the last few years.

Ms Ward—That is correct. Before that it was, for most years, 100 per cent who received in full, except for one year when there was a small number who did not.

Senator CONROY—Can I clarify so I understand the processing. When you said you stopped processing on 16 June and that would be for last financial year, does that mean you have been paying them ongoingly or that you have all the money still sitting there and on 16 June you will work it out to give them their base entitlements and then the extra?

Ms Ward—In June of each financial year the minister determines what is referred to as the initial payment ceiling. For this current year that we are now processing in, and which we will finish processing on 16 June, that initial payment ceiling is \$50,000. We assess grants continually through the course of the year, from the time the lodgments first start.

Senator CONROY—When you say ‘assess’, does that include sending them a cheque?

Ms Ward—That includes payment of amounts, up to the initial payment ceiling, which is \$50,000 this year.

Senator CONROY—So as soon as they send in their invoices and you process them, they get that, providing it is under \$50,000.

Ms Ward—Correct, to the extent that, having assessed an application of claim and assessed an entitlement under that claim, we will pay up to the initial payment ceiling of \$50,000. That means that somebody, for example, whose full entitlement was \$40,000 gets all their entitlement immediately paid to them. Somebody, for example, whose provisional entitlement was \$60,000 would get \$50,000 immediately we have determined the entitlement, and the second payment will be calculated after we have closed off on 16 June.

Senator CONROY—So in effect they get two cheques. Presumably they are not sending you half a dozen sets of invoices. They would collect them all and send you one set.

Ms Ward—We do one assessment of the application, yes. We do not assess it twice. When we have assessed it, we send out a notice of determination of what the provisional entitlement will be. That sets out on it what the figure has been calculated on from the assessment and, where that is over \$50,000, it will make clear that they are being paid \$50,000 now with the second payment subject to calculation at the end of the financial year.

Senator CONROY—Is there a pattern where you get a late rush on 15 June?

Ms Ward—The applications have all closed—last year it was on 1 December—so there is not a late rush of applications. We are heavily still auditing, however, because some of the more difficult assessments, where we have asked for more substantiation of claims, are still being worked through.

Senator CONROY—I know it is pre 16 June, but have you got a rough idea of what the remaining payout is likely to be for companies?

Ms Ward—We cannot accurately, as you have alluded to, calculate that until after 16 June. However, because we are now getting close to that date, we are estimating that it will be at least 60c in the dollar.

Senator CONROY—What was it last year?

Ms Ward—It was almost 33c. It was 32.84c.

Senator CONROY—So it is a \$50,000 cap, plus they will probably get around 60c this year?

Ms Ward—Yes, at least 60c.

Senator CONROY—How many companies are there this year? You said there were 2,854 last year but I think you said that was the number that got the full entitlement.

Ms Ward—That is correct. We had claims received of 4,022 this year. Firstly, it would be, of those, how many are assessed as being entitled to a payment, because some on assessment are not entitled to anything at all—they were not eligible for some reason or another. Of the ones that we determine to be eligible for payment, which are processed during the year, we would expect this year again it will be something of the order of 70 to 75 per cent that will get full payment. The numbers will be of the same order as last year.

Senator CONROY—So it was almost 33c last year. What was the base payment last year?

Ms Ward—\$60,000.

Senator CONROY—You may not be able to tell yet because this is for 2002-03: what was the proportion of SMEs as opposed to large companies in claims for 2002-03?

Ms Ward—The whole program is aimed at SMEs. We do break it up. As you will see from our annual report we will do a distribution by size of company within the categories, but a huge proportion are very small companies. I think I have probably got the figure with me but it will take a moment to get that.

Senator CONROY—How does that compare to the previous year? They are my last two questions, if you want to take a moment. Then we are finished.

Ms Ward—There is a table in the annual report for last year which shows EMDG recipients by annual income. From that report, up to and including \$500,000 was 20 per cent.

Ms Wilkes-Bowes—The next category—\$0.5 million to \$2 million—is 28 per cent.

Ms Ward—That is consistent with what I am saying. The large numbers are very small companies.

Senator CONROY—How is that in comparison to this year? I know you were saying you were not sure you absolutely had it.

Ms Ward—You mean our processing for this year? We have not attempted to do that yet. We will do that when we are doing annual reporting but I would expect it to be similar. The evidence is that it is small companies that are particularly attracted to using the EMDG scheme. Certainly we can provide it very soon. Within a few weeks we will have to do these sorts of calculations.

Senator CONROY—Thank you very much.

CHAIR—Thank you Margaret and your colleagues. I know that some of you have come to Canberra.

[4.12 p.m.]

CHAIR—We welcome back Mr Chester and his colleagues.

Senator CONROY—I was asking about article 1 of CER. Under CER—and this is not just about article 1—doesn't Australia have an obligation to not treat domestically produced products more favourably than imported products?

Mr Maclean—That is correct.

Senator CONROY—That seems a fairly straightforward principle.

Mr Maclean—Yes.

Senator CONROY—Is that an obligation? Is that a requirement under CER? Is that what the agreement means? Is it binding?

Mr Maclean—My understanding is that it would be a binding obligation upon Australia.

Senator CONROY—Does the rebate undermine that obligation?

Mr Maclean—That is something we are still assessing in responding to the New Zealand concerns.

Senator CONROY—Perhaps you can help me out. I am not an expert in WET. I am sure you are by now.

Mr Maclean—I was not a few weeks ago.

Senator CONROY—I am sure you were not. Could you explain to me how the WET rebate applies?

Mr Maclean—We held a meeting with Treasury on 19 May and they sent over subsequent briefings. The rebate was announced in the budget a few days before that meeting. I can go into some detail on this if you would like me to.

Senator CONROY—Just so I understand the argument.

Mr Maclean—The wine equalisation tax was introduced with the new tax system legislation in 1999. It partly replaced the former 41 per cent wholesale tax on wine. With the introduction of the GST of 10 per cent, an additional 29 per cent WET—wine equalisation tax—was introduced in order to provide for equivalence with the previous regime. In concert with that was a cellar door rebate scheme combined with state government wine production subsidies for cellar door sales, which had been previously in place since 1997. Those two schemes—the Commonwealth rebate and the state subsidy schemes—combined to fully offset the wine equalisation tax for cellar door, Internet and mail order sales of up to \$300,000.

The new rebate announced in the budget, as we understand it and as briefed by Treasury, provides each wine producer with tax relief of up to \$290,000 per annum—in other words, with the 29 per cent WET. The effect of that is to exempt WET on the first million dollars of wholesales of wine for each wine producer in Australia. That is our current understanding of what the WET is and what the rebate scheme does.

Senator CONROY—Why didn't New Zealand complain about the old scheme? Why have they only complained about this change?

Mr Maclean—I cannot answer that question. I do not know why they have not addressed the old scheme before.

Senator CONROY—From what you have learned, other than where it is targeted, the scheme still has the same basic structure—they have just expanded it. Is that a fair way of describing it?

Mr Maclean—There is clearly an expansion in the funds available, and since the new announcement in the budget on 11 May, the New Zealanders have expressed concerns about the new scheme.

Senator CONROY—Which article did you mention the New Zealand government was quoted from—article 7.2?

Mr Maclean—New Zealand has raised concerns about the WET rebate scheme in relation to CER article 7.2 and GATT article 3, both of which relate to nondiscrimination in the levying of internal taxes.

Senator CONROY—So article 7.2 says:

2. A Member State shall not levy on goods, ingredients or components contained in those goods, originating in and imported from the territory of the other Member State, any internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic goods, ingredients or components.

Mr Maclean—That is correct.

Senator CONROY—Do you believe the rebate is consistent with that?

Mr Maclean—Again, New Zealand has raised these concerns. I can set out some of the time line for you if you so desire. The budget measure was announced on 11 May. The next day New Zealand indicated its—

Senator CONROY—I can construct my own time line. It is okay, thanks.

Mr Maclean—Mr Vaile or Mr Downer have undertaken to respond to the New Zealand concerns expressed about the relationship of the measure to the—

Senator CONROY—When have they indicated they will do that by?

Mr Maclean—No time line was put on it.

Senator CONROY—Have you finished your deliberations and advised the minister of the department's view yet?

Mr Maclean—No. We are still in the process of formulating advice for the minister. A preliminary brief setting out the facts of the issue has been conveyed, and that foreshadows—

Senator CONROY—So you have forwarded a preliminary brief?

Mr Maclean—That foreshadows the formulation of further advice. That simply set out the facts of the issue.

Senator CONROY—No opinion was expressed in that?

Mr Maclean—No.

Senator CONROY—Did it contain any legal advice?

Mr Maclean—It canvassed the concerns that the New Zealanders have raised.

Senator CONROY—Have you sought legal advice? Is it a legal issue that you would normally take legal advice on?

Mr Maclean—Yes.

Senator CONROY—So you have sought legal advice?

Mr Maclean—Internally within the department, we are discussing the issue with our trade law branch.

Senator CONROY—Would you normally get external advice or in these circumstances would you normally just go with internal?

Mr Maclean—I will defer to Mr Gosper on that question.

Senator CONROY—What normally happens in these situations?

Mr Gosper—In this case, legal obligations relevant to the CER agreement and to the WTO agreements have been cited, so there are various parts of the department that are involved in formulating the advice that Mr Maclean has referred to, including his own branch, of course, which has expertise on the CER agreement, and the trade law branch, which has specific expertise on the WTO agreements. That process is under way now.

Mr Maclean—Just to clarify that further, there is also the international legal division, which examines legal issues relating to bilateral agreements.

Senator CONROY—Mr Downer was in New Zealand recently.

Mr Maclean—Yes.

Senator CONROY—After the budget.

Mr Maclean—Mr Downer was in New Zealand on the weekend of 15 and 16 May.

Senator CONROY—And the budget was?

Mr Maclean—It was 11 May.

Senator CONROY—Was a brief prepared for the minister before he went to New Zealand?

Mr Maclean—Yes.

Senator CONROY—Is that the preliminary brief you are referring to or a separate brief?

Mr Maclean—It was a separate brief just explaining that the New Zealanders were likely to raise this with him and setting out—very initially at that stage, because we had only been aware of it ourselves for two days—what the issue appeared to be.

Senator CONROY—You did not let him fly in blind? You gave him as much as you could?

Mr Maclean—Yes.

Senator CONROY—If, ultimately, the legal advice suggests that we may be in breach, have you canvassed options to overcome the problem? Are there options that have been considered yet?

Mr Maclean—I would not like to prejudge the outcome of the legal advice. We have not fully canvassed options for what may or may not be undertaken in relation to theoretical outcomes of whether or not the New Zealanders—

Senator CONROY—I probably know the answer to this, but I will ask it anyway. Consistent with the spirit of CER, was the New Zealand government consulted before the introduction of the rebate?

Mr Maclean—I am not aware that they were consulted before.

Senator CONROY—You were not. I would be shocked if Treasury phoned the New Zealanders before they phoned you.

Mr Maclean—I should clarify that. The rebate has not been introduced yet.

Senator CONROY—Well, announced.

Mr Maclean—It is due to come into effect on 5 October.

Senator CONROY—Do we have an obligation to consult with New Zealand before introducing these types of measures?

Mr Maclean—I am happy to take that on notice but there is, for example, an agreed minute under the auspices of the CER which provides for consultation on industry measures. Whether or not that means that somehow our actions have not been in accordance with it is another issue.

Senator CONROY—So you may have breached the CER even with the announced introduction of it?

Mr Maclean—Not CER.

Senator CONROY—What is it? You said a minute.

Mr Maclean—I would have to get back to you on the detail but I understand that there is an agreed minute which is not part of the formal CER agreement itself.

Senator CONROY—Is that something like a side letter, equivalent to what the FTAs have?

Mr Maclean—Again, I would have to get back to you on that.

Senator CONROY—Who is the agreed minute between—the two governments?

Mr Maclean—Australia and New Zealand.

Senator CONROY—The two governments. You do not know what status that minute has other than being a piece of paper with some writing on it and some signatures?

Mr Maclean—Again, I would like to take that on notice.

Senator CONROY—Mr Gosper, has this ever happened before as far as you are aware?

Mr Gosper—What?

Senator CONROY—A unilateral decision by Treasury to wander around—

Mr Gosper—I am not aware of a particular issue of this sort before.

Senator CONROY—I would have thought it was fairly rare. I am hoping it is fairly rare, for all of your sakes. Doesn't the Agreed Minute on Industry Assistance 1988 require, among other things, that parties try to avoid the adoption of 'industry specific measures—bounties, subsidies and other financial support—which have adverse effects on competition'? Does that ring a bell?

Mr Maclean—Yes, it does. I do not have it with me, but it does.

Senator CONROY—What is the status of this? It has been around for a long time; it is not new. Mr Gosper, are you more familiar with it?

Mr Gosper—No, I am not familiar with this agreement.

Senator CONROY—Mr Chester, what is the status of an agreed minute?

Mr Chester—I am not aware of the agreed minute or its status.

Senator CONROY—Mr Deady, do you have any idea?

Mr Chester—I think we said we would take it on notice.

Senator CONROY—I thought perhaps Mr Deady, who continues to lurk at the back of the room, might have known; but please come back to us on that. Do Treasury define the rebate as a subsidy? What is the economic term for it? I know it is called a rebate, but is it categorised in trade jargon? I am looking for the trade jargon term. Is the rebate a subsidy in trade jargon?

Mr Maclean—Treasury have not referred to it as a subsidy; they have simply referred to it as a rebate.

Senator CONROY—But Treasury live in their own world. This is the hard-nosed world of international trade. I am sure that if you turned up at the WTO and said, ‘We’ve just put these rebates in; they’re not really subsidies,’ there would be a few chuckles—wouldn’t there, Mr Gosper?

Mr Gosper—This is part of the analysis we are undertaking now to look at the design, the incidence and the intent of the measure and whether it does in fact raise issues relating to WTO rights and obligations, including article 3 or the subsidies agreement—these are the issues we are examining.

Senator CONROY—I will not ask you about the WET. I will ask you about a rebate on something else—a rebate on local cars. Would you credibly be able to go before the WTO and argue that a rebate on cars is not a subsidy for car makers?

Mr Gosper—It may raise issues depending on the design, incidence and intent of the measure, but that would need to be examined.

Senator CONROY—What could be an alternative intent other than giving money to the producer?

Mr Gosper—I am not aware because we are talking about a hypothetical situation.

Senator CONROY—Don’t be bashful, Mr Gosper.

Senator FERGUSON—You should not ask hypothetical questions, Senator Conroy.

Senator CONROY—What is the expected impact of the rebate on the price of Australian wine vis-a-vis New Zealand wine?

Mr Gosper—This is the sort of issue that we would also include in our analysis—in other words, looking at what the potential economic impact of the measure might be. So we are also undertaking some further investigation on those aspects—but we are not convinced that there would be any substantial impact of that sort.

Senator CONROY—So are you doing some estimates on the price impact on bottles of Australian and New Zealand wine or have you discussed that with Treasury?

Mr Gosper—We have not yet discussed explicitly how we would undertake this, but this will be part of our analysis.

Senator CONROY—Any idea of the timing of this?

Mr Gosper—There are a group of people within the department who are working on this issue and we will be working with a Treasury colleagues over the coming weeks.

Senator CONROY—Are you anticipating that New Zealand will raise it with the minister in the APEC forum? Have you prepared a brief for the minister on where it is up to?

Mr Gosper—I am not sure if they have a bilateral meeting scheduled in the margins of APEC, but there may well be other opportunities for New Zealand ministers to raise it with their Australian counterparts.

Senator CONROY—Have you given Mr Downer a brief before he goes overseas and possibly bumps into Mr Sutton?

Mr Gosper—Yes—which would of course talk about the facts of the case and the fact that it is not designed to favour domestic over imported product but that the economic impact is unclear and we are examining the issues that New Zealand has raised. That would be the form of the response.

Senator CONROY—Have the export subsidy schemes employed by the US or the EU had an effect on, say, sugar prices?

Mr Gosper—The export subsidy scheme operated by the EU on sugar clearly does have an influence on the international price of sugar, yes.

Senator CONROY—Do you know of any other subsidies that have been given to a product that do not have an impact on a price of the good?

Mr Gosper—There are subsidies that, in the jargon, are less trade distorting than others.

Senator CONROY—What is a less trade distorting subsidy?

Mr Gosper—A subsidy, for instance, which is decoupled.

Senator CONROY—Could you explain that? As you know, I am still new to this. What is a decoupled subsidy?

Mr Gosper—A subsidy decoupled from a particular production level. Part of the architecture of the agriculture agreement is about various levels of disciplines on various subsidies according to their trade-distorting impact. If you are talking about subsidies, I think is quite clear that their effect on production and, hence, on trade and on prices will vary according to the nature of the subsidy itself.

Senator CONROY—The way you have described it, it is a least-distorting subsidy but there is a distortion.

Mr Gosper—There are more trade distorting forms of subsidy than others.

Senator CONROY—But all of them are trade distorting.

Mr Gosper—We ourselves would say that inevitably and eventually most subsidies would have some level of impact on trade, but in many cases the subsidy might have a very small or minimal impact.

Senator CONROY—We might talk about apples now. Where are things at with New Zealand's request to export apples to Australia? I understand there were a few pink ladies being tossed around in the chamber the other day.

Mr Gosper—That is probably a question for Biosecurity Australia, given that it relates to the import risk assessment that is being undertaken for apples. We can—

Senator CONROY—Do you know the closing date for comment on the draft IRA?

Mr Gosper—No, I cannot give you that specific information, but we could take it on notice if you like. There are hearings under way at the moment, I understand, on the draft IRA.

Senator CONROY—The Productivity Commission released their interim report in December 2003 on CER rules. When are you expecting the final report to be released?

Mr Maclean—We publicly release the final report on 11 June, next week. The Productivity Commission presented the findings of the report to stakeholders in Canberra this morning.

Senator CONROY—Is it publicly available?

Mr Maclean—No.

Senator CONROY—Not yet? I am a stakeholder! That is all. Thanks.

ACTING CHAIR (Senator Payne)—We will go on to the US FTA.

Senator CONROY—Welcome back, Mr Deady. You have made another flying visit to Washington for the signing. I saw you standing there in the TV coverage.

Mr Deady—Thank you, yes.

Senator CONROY—We signed a real deal this time. It was not a piece of cardboard.

Mr Deady—Certainly.

Senator FERGUSON—All we need is for you to sign off on it now, Senator Conroy.

Senator CONROY—We are working on it. The government claims the FTA does not include investor-state dispute settlement and the text tends to make that clear. However, there has been concern expressed about article 11(16), which says that the parties may consider establishing such a procedure to hear a claim by an investor if there is a change in circumstance regarding the parties' economic and legal environments. What could be a changed circumstance for a party?

Mr Deady—The agreement does not include an investor-state dispute mechanism. As you know, this was an issue that was discussed at some length through the negotiations. I think it is fair to say on both sides there was a question right through as to whether an agreement between Australia and the United States should have such a provision. In the end, the Americans did press for it. We, in the end, did not believe it was necessary. You are right: there is nothing in the agreement—there is no investor-state dispute settlement mechanism in the agreement. There is an article that provides, as you said, for consultations or discussion in the event that circumstances in the two countries change.

Very clearly that means the legal circumstances—the rule of law—that applies in both the United States and Australia. There is a recognition of the strength and the quality of that, and that is why we do not need it. It would only be in the absolute extreme circumstances of those legal processes in either country being somehow altered that you would trigger that particular clause. Then, of course, all it does trigger is a consultative mechanism.

Senator CONROY—I was asking about the changed circumstances. Would that be a change in law?

Mr Deady—Certainly not a change in law but certainly a change in the legal situation in both countries—that is, that the rule of law in one country would be considered to have deteriorated to such an extent that the investors of the other country believed that this was an issue that needed to be revisited.

Senator CONROY—So you think it requires something that dramatic?

Mr Deady—Absolutely.

Senator CONROY—Is there anything that identifies that? A side letter?

Mr Deady—There is no side letter attached to that particular clause. I would say, though, that this is an area where the negotiating history is something that would be taken into account. As I said, this was an issue right through the process. Both countries had an open mind, if you like, about whether there was ever a need for it. You know the circumstances: the Americans finally took the view that largely for precedential reasons they wanted to maintain it as part of their broad template. We argued very strongly then that it was not necessary, and that was the outcome. All of that is recognised between the two parties and reflected in that broad language that is there in that article.

Senator CONROY—You have enormous experience in these matters. You look at those words and they have a particular meaning that is consistent with what you have known all your working life. I do not think you create it along the way but you know exactly what it means. A lot of ordinary Australians look at this and think, ‘What does that mean?’

Mr Deady—I hear what you are saying and we have certainly heard some of that and read some of that.

Senator CONROY—You have met with these people—

Mr Deady—We have.

Senator CONROY—far more often than I have.

Mr Deady—This is something that, in the end, the Americans wanted in the agreement. It is part of their normal FTAs. It is not in this agreement. That in itself is very significant. There is, though, a marker there—and this is there because the Americans wanted at least some reference to this to reflect back to their stakeholders—so that if there were such a change in circumstances in the legal situation in both countries there could be a vehicle or process whereby they could sit down with us and consult on whether or not such a mechanism should be established. But that is all it is. There is no obligation other than to sit down and consult on both sides. I think this was pointed out a week or so back; even if that clause were not there because there are two countries involved these are things that could always be brought up as part of the ongoing consultation process that is built into the agreement.

Senator CONROY—What is the existing investor dispute settlement? I do not mean the investor state. If either of the parties have a disagreement, what is the mechanism for resolving the dispute?

Mr Deady—There is a chapter that deals with disputes that arise under the agreement. It is very clearly articulated what the processes would be if such a dispute arose. It is not dissimilar to the WTO dispute settlement mechanisms. It is based on that but it is not identical.

Senator CONROY—Is there a significant or material difference between the two?

Mr Deady—The simplest answer I can give to that is that the biggest difference is that there is no appellate body. There is no appeal mechanism under the bilateral dispute

settlement mechanism, as you spoke about with Mr Gosper this morning. But the panel processes are very similar. A panel would be established.

Senator CONROY—Where would the panel be drawn from? Would it be drawn from people outside the two parties—from trade experts? Would you borrow some from the WTO? How would it work?

Mr Deady—Under the bilateral agreement, Australia would nominate a panellist and the United States would nominate a panellist, and that could be an Australian or an US citizen. Then the two parties would agree on the chair—the third person. There will be a small panel or group established which could be drawn on to make up these panels. But it would depend on which area the dispute was taken under. Again, it is very similar to the WTO. You would involve people in the dispute who had an expertise in that particular area. If there were a dispute on agriculture, you would tend to have trade policy experts or an ag expert. If it were IP, again, you would have that sort of expertise brought to the table.

Senator CONROY—I have not had any experience on the subject of any of the dispute panels previously. Did you say that there would be a small group that would be nominated here in Australia as our nominees and then there would be a random selection of who was available at the time and those sorts of things?

Mr Deady—The agreement provides for Australia and the United States to identify a small group who could be drawn on to participate in these panels, but that is not an exclusive list. You could also draw on others to make up a panel. There is a standing group of individuals that would also be established.

Senator CONROY—I am looking for an indication of the sort of people who we are talking about.

Mr Deady—I think the language is actually again pretty similar to what is in the WTO. It talks about—

Senator CONROY—Do we have a small panel that we submit people for to the WTO?

Mr Deady—For example, we do have a list of Australian nominees to the WTO to be drawn on.

Senator CONROY—Could I get a copy of that?

Mr Deady—We could provide that.

Senator CONROY—Off the top of your head are there any names that you can remember?

Mr Deady—As an indication of the sorts of people that are involved, I am sure Mr Chester was on the list at some stage; I do not know whether Mr Gosper is.

Senator CONROY—So they are trade department officials?

Mr Deady—They are from the trade department. There are some officials from Customs that have been nominated in the past. There are people with either trade policy experience, legal expertise—

Senator CONROY—Is it private sector or is it only departmental?

Mr Deady—There is no limitation in that. Academics could be listed, I think. They have been in the past.

Senator CONROY—They are a bit dangerous. You have to be careful of them. You never know what they are going to come up with.

Mr Chester—There have been some listed in the past.

Senator CONROY—But it is mainly members of the Public Service?

Mr Chester—Mainly it is, but it is experts in their particular fields. As you would imagine, it was essentially members of the Public Service who negotiated the particular agreements and who will have the large bulk of expertise.

Senator CONROY—What is the norm in the WTO when selecting a chair? Is it someone who is completely from outside the two parties? Is it some eminent person that everyone acknowledges within the existing two nominated groups or is it someone completely from the outside?

Mr Deady—In the WTO context, the panellist would be someone who was not from either of the parties involved. The way the panel process works—again this is articulated in the WTO agreements—is that the secretariat would put forward a number of names to the two parties. There could be some ready acceptance of those names; there could be some discussion and debate about them. In the end, if the two parties cannot agree to the participants on the panel, then one party could ask the director-general to establish the panel and appoint three people to be involved.

Senator CONROY—This is within the WTO process?

Mr Deady—Yes.

Senator CONROY—What would happen if we could not agree?

Mr Deady—Again, within the FTA, there will be a panel of three members, one from Australia, one from the United States and the parties would endeavour to agree on the third panellist who would serve as the chair, and it goes on to say:

If the Parties are unable to agree on the chair within 30 days after the date on which the second panellist has been appointed, the chair shall be selected by lot from the contingent list established under paragraph 4.

Which is this list. It says:

... the Parties shall establish a contingent list of ten individuals who are willing and able to serve as panellists. Individuals on the contingent list shall be appointed by agreement of the Parties for a minimum term of three years, and shall remain on the list until the Parties constitute a new contingent list.

It closes the circle.

Senator CONROY—I am really just trying to get this on the record. It may be possible for the government to help to clarify this for the public record. It is something that you might want to take up, because there is concern. I was at a public meeting in New South Wales where I was attacked extensively about there being an investor state dispute resolution in this. Sometimes, no matter how hard you try, it does not make any difference to what some people

believe. If a US company is not satisfied with the outcome of a dispute settlement—and, as you said, there is no appellate body, so that is it—could they push for an investor state hearing under article 11.16? Could they mount the argument: ‘We didn’t win; therefore we want to push for this change in circumstances.’?

Mr Deady—No. It would be the US government that would take the action against Australia in alleging some breach of some particular measure that the Australian government introduced which was a breach of the agreement. If the panel found in Australia’s favour in those circumstances—that there was no breach of the agreement—there is no way that that would constitute a change in the circumstances of our legal system.

Senator CONROY—It is just that it is ambiguous at the moment.

Mr Deady—I do not think it is. I can understand some of the discussions you may have had. It is not ambiguous.

Senator CONROY—You have a clear understanding.

Mr Deady—There is no way that the outcome of a panel process established under the FTA dispute settlement chapter could in any way, shape or form be constituted as some indicator of the legal system of Australia. As we have said, the way this panel is established is that there is a US nominee on it, an Australian nominee and a chairman agreed. The panel looks in good faith at the agreement and the measures and arguments that are brought forward. It does not in any way, shape or form get to Australia’s domestic legal system.

Senator CONROY—As I said at the beginning, you see those words and, even if you had not negotiated them, with your background and experience you know what they mean. It is within your box and that is exactly what it means to you. What I am trying to achieve is to set people’s minds at rest on this issue. The circumstances that you have a clear understanding of are not clearly defined in the clause. You know exactly what they mean in that clause, but what about an ordinary Australian? When I first read it I thought, ‘Oh, what does that mean?’ I do not have a background in this area. I have no experience in these issues. To me that looked as though it might have been a backdoor way. I am trying to get something definitive—almost as simple as the way you have described it—that can be stated and have some sense—not force—of authority. I am not suggesting that your statement in *Hansard* publicly does not carry any authority, but what about out there in the broader community—something that the government could set down that said, ‘These are the circumstances that would envisage the activation of this clause.’ Do you follow what I mean? Hopefully, I am expressing myself clearly enough.

Mr Deady—Yes. It is hard to say. I would have to look at exactly what we said in some of our guides to the agreement, but the government has made this clear. I can say very clearly that this is not an issue that is in any question between us and the United States. As you say, I am very happy to be very much on the public record in *Hansard* in saying that the change in circumstances here that are talked about in article 11.16 are about the legal systems applying in both countries. If the same question was asked of Ralph Ives, I am absolutely certain as to the answer he would give.

Senator CONROY—I am seeing him next week, so I will be asking him. Unfortunately not everyone is going to accept my word or your word; we are not the government.

Governments change their minds sometimes. Would it cause great grief if there was some sort of communication where both governments agreed to that statement? They could borrow your words; you could write it for them. We could lift the *Hansard*, take Steve Deady's name off it and put on the names of Mark Vaile and Bob Zoellick.

Mr Deady—As you well know, there are a number of side letters attached to the agreement. This is one area where we—Australia—do not believe there is a need for such a side letter: in our view this article makes it very, very clear how investor-state dispute settlement would be handled—that it would require a change in these circumstances which we spoke about. And in any event, even in the extreme, all that establishes is a consultation mechanism. It would still be for a future government of Australia. There is certainly no obligation on a future government of Australia to establish such an investor-state dispute settlement mechanism.

Senator CONROY—Would a side letter hurt in this circumstance even though you are saying that it is so clearly understood that it was not necessary? The majority of Australians would not necessarily have that same understanding that you have and that Bob Ives has. They do not live in the world of trade negotiation and trade jargon. Would a side letter hurt in this circumstance?

Mr Deady—The Australian government did not believe a side letter was necessary in this area. This is very clear statement of what our obligations are. The agreement is concluded and the negotiations are concluded and we have signed the agreement including those side letters that are an integral part of the agreement. That would be reopening the negotiations to—

Senator CONROY—But I thought you made the point that at any time any party can raise any issue.

Mr Deady—When we get to the first round of the first ministerial committee meeting then, yes, that could be an issue that could be raised there.

Senator CONROY—Is that the only time you can raise it—at the agreed time?

Mr Deady—There would be nothing to stop the two governments talking about issues covered by the agreement at any time but there is a formal process whereby every year there would be ministerial-level consultations or meetings on the FTA. This is an area where a side letter is not required—

Senator CONROY—But would it hurt?

Mr Deady—There is no obligation here on a future Australian government even if these extreme circumstances were met where we would do anything other than be required to consult. So I think it is an area where it is not necessary.

Senator CONROY—Unfortunately, there are a whole lot of people who do not necessarily trust the government either. I know that is a terrible thing to say, Mr Deady.

Senator Hill—I don't understand it.

Senator CONROY—Senator Hill, I am sure you would be aghast at that thought.

Mr Deady—All I would say is that I think people have to look at the language there and identify what particular problem they have with it. I think it is very clear that the claims that

are made that we have included investor-state dispute settlements as part of this agreement are absolutely not the case. It does provide the consultative mechanism in a drastic change in circumstances and that provides for a commitment from Australia that we sit down and talk to United States in those circumstances. I really do not believe a side letter helps.

Senator CONROY—You have tried to make it as clear and definitive as you can. I guess, unfortunately, not everyone is going to trust you, me or the government on this one. I might take it up with Mr Vaile and see if he is interested in that sort of concept.

I want to move on to IP. I appreciate that you did not personally negotiate all of this, Mr Deady. It may be that I get to a level of technical detail that means we have to hold this over until we get to another meeting of the Senate select committee, but I thought I would chance my arm and see how far we can get. Will there need to be changes made to the Copyright Act 1968 to implement the provisions relating to limitations on liability for service providers? That is article 17. 11.29(b) that establishes safe harbour for Internet service providers.

Mr Deady—There some changes required to the copyright legislation as a result of some of the commitments we have entered into in this chapter. They are outlined, I believe, in the regulation impact statement that we put together for the JSCOT processes which can obviously be drawn on by the Senate select committee. I believe that there are aspects of the ISPs that do require some changes to the legislation.

Senator CONROY—Would you define these changes as significant?

Mr Deady—As I said, there have been a number of areas where we have made commitments to the United States which will require legislative changes. The experts in this area are Attorney-General's Department and our colleagues in the department of communications. They are working on the legislative changes that will be required. I am really not the expert. I could not say how elaborate the legislative changes are, that will be required. Under the terms of the agreement we have commitments, which, whilst they require some legislative changes, still provide Australia with sufficient flexibility in these areas to ensure the very high level of intellectual property protection that we already have and balance that against consumer interests and other things. That is what the text of the agreement provides us as we go through this process of putting together the legislative changes required.

Senator CONROY—Is it possible that Australia's Copyright Act already meets the obligations contained in article 17.11.29(b)?

Mr Deady—I should take these questions on notice.

Senator CONROY—I entirely understand.

Mr Deady—I am not across that level of detail.

Senator CONROY—I was wondering whether, instead of making legislative changes to the Copyright Act, it would be possible to meet the obligations contained in that article mentioned by the ISP industry code of practice that is currently being developed?

Mr Deady—There are many aspects of the agreement where we believe that our existing regime meets the obligations contained in the agreement but, as I said, there are also areas in this chapter where legislative changes are required. I would have to defer to the experts on which particular articles we need to give effect to through legislative change.

Senator CONROY—Are you aware of the debate inside the US on a lot of these issues to do with the Internet, IP and things like that, Mr Deady?

Mr Deady—Yes, I know there has been a debate within the United States. The Digital Millennium Copyright Act, as you know, is the legislation that the United States have put in place. I know in some of the consultation and discussions we have had with you, and others on the committee and elsewhere, that there is a question about how much of that US legislation we need to bring into our own system. We have tried to explain that the commitments we have entered into in this chapter do not require us to bring into our legislation the Digital Millennium Copyright Act.

Senator CONROY—It is a slightly interesting perspective. I know you would not want to do it but you might be required to pay attention to murmurings and burlblings on the FTA Senate select committee.

Mr Deady—As I understand it, in this ISP area there has been a lot of discussion between the rights holders and others about getting the balance of this right—the safe harbour—and I think both sides see some benefits in it.

Senator CONROY—There are two very credible sides having an argument here. I get a sense, though, that while you correctly say that we are not importing their laws holus bolus, we are being asked to adopt things that the industry in the US have been unsuccessful in achieving in their own legislature. If we introduce some of the changes that are being provided here, the US may not be compliant because they have been unsuccessful at achieving some of these objectives within the US. That is putting aside the debate to roll back the millennium bill. The argument has been put to us that what we have been asked to implement is tougher than the US legislation.

Mr Deady—I am not sure I understand that, in that these obligations apply as equally to the United States as they apply to Australia. We certainly have negotiated long and hard in this area to ensure that we have the flexibility in certain areas that are important to us to enable us to introduce legislation to meet the commitments under the agreement without changes to legislation to the maximum extent we could. Where we have changes, we will introduce them in a way which is consistent with the agreement but which still reflects the legal and regulatory framework that is important to Australians. That is certainly our objective in this. But, as I say, it is a two-way obligation. The United States are also required to meet the commitments under this chapter.

Senator CONROY—I am not expert enough. I am not sure it would be of any use even if I were able to engage you in this conversation, because I suspect it could be the blind leading the blind, and I am not sure that will actually be helpful for either of us.

Senator Hill—It may be the blind doing the leading.

Mr Deady—If I could just say one thing. I was away when the last hearings of the Senate select committee were held, and I know there were a number of questions asked of the officials at that meeting. Those questions are certainly being looked at and worked through by officers of DFAT, but also A-G's and DCITA, with a view to answering those questions as quickly as we can. I really do believe, like you, that that probably is the best way, at least as an initial response to these questions, and then following it up with the subsequent discussions

we will no doubt have with the experts there. It is an area where, in so much of this agreement, DFAT took the lead, but of course we drew on the whole of government and the expertise and officers from other agencies. That is the case as we now go through the various processes here—JSCOT and the Senate select committee.

Of course, the legislative changes here are being worked out between Attorney-General's and DCITA. Whilst we have very much a strong interest in that, as we also reflect on how they give effect to the commitments we have entered into in treaty language, that really is the DFAT role—this giving effect to the treaty language rather than to the legislative changes, which is, rightly, the role of those two agencies.

Senator CONROY—I am just wondering about the timetable for the introduction of legislation. Are you aware of when the legislation is likely to be introduced?

Mr Deady—I cannot be definitive on that. All agencies are working now, including with the Office of the Parliamentary Counsel. That process is under way, but, of course, the JSCOT process itself is under way—it is continuing—as is the Senate select committee. But, where the legislative changes are required, all agencies are certainly working hard to get that legislation done as quickly as possible so it can be introduced, because, as you know, the government is committed to the maximum extent it can to have the agreement up and running by 1 January next year.

Senator CONROY—I think you and Senator Cook had a lengthy discussion about whether we need to vote on it before the US. There is no requirement for us to vote on it before the US.

Mr Deady—There is no requirement under the agreement for that. The timing is not specified.

Senator CONROY—If it is to be in place from 1 January next year, there is a bit of an implication there that the vote will be taken before parliament rises in December, just by implication of that start-up date, but there is flexibility between now and the end of December in the parliamentary sittings this year.

Mr Deady—The only thing I would say is that the agreement has one clause which says that there needs to be an exchange of letters between the two parties 60 days in advance of it entering into force.

Senator CONROY—Thanks for that clarification. Are you aware whether separate legislation is required for each of the nine amendments or is it to be an omnibus approach? Do they wheel in one bill or nine separate bits?

Mr Deady—As I understand it, there certainly will be changes to individual pieces of legislation. But I think we are looking to see whether it will be an omnibus bill. I am not sure of the correct term. There is another term they use that collects the bills, if you like, and presents them as one. I do not think it is an omnibus bill as such in the US meaning of it, as I understand the US system.

Senator CONROY—Senator Hill, are you aware of any rough timetable for the introduction of the FTA enabling legislation?

Senator Hill—It is the government's hope that the legislation would be introduced before the end of this session.

Senator CONROY—That would mean, by definition, in the next couple of weeks?

Senator Hill—Yes.

Senator CONROY—Introduced in the House of Reps?

Senator Hill—I am not sure; it depends where is most appropriate. I am a few weeks out of date in terms of the preparation. Because there are a large number of agencies involved, there were some significant challenges in the drafting and I have not heard in the last fortnight or so how that process is going.

Senator CONROY—But the government's intent would be to try to put it at least into the Reps?

Senator Hill—That was our goal, yes.

Mr Deady—Yes, Minister, that is the goal, certainly as I understand it.

Senator CONROY—So it will be up for a vote in the Senate by the first couple of weeks in August?

Senator Hill—That was the idea, yes.

Senator CONROY—The good news is that I had 156 questions on IP, Mr Deady.

Mr Deady—How many, Senator?

Senator CONROY—One hundred and fifty-six. No, not quite that many, but I certainly had a lot—about 50-odd. The good news is I think they are probably a bit detailed to impose them upon you. I will hold them off until we have A-G's in front of us in the FTA committee.

Mr Deady—Thanks, Senator, because I think there are 30 which you have provided to us which we are working on. That is a good start, I hope.

Senator CONROY—I think I have 50-odd more. I might move on to audiovisual. There were some concerns expressed in the industry about whether the term 'interactive audio and/or video services' used in annex II is broad enough to capture future media. I know we have had a bit of a talk about this previously, but now we have the actual document in front of us. What is the true meaning of this term and what specific services does it capture? This is one that I know we have talked a little bit about before.

Mr Deady—Yes.

Senator CONROY—I am hoping we are going to get something a bit more definitive before the process ends overall, but you may not be able to do that just yet. Do you want to have a crack at it? I have a string of follow-up questions.

Mr Deady—We have talked about this before, Senator. I do think we are very comfortable with that sort of language, because it does very much get to the heart of it. If the concerns being expressed out there are about what do we mean by new media, this gives us that flexibility. It is not definitive, so I think we have the flexibility here about those things that we just do not know about at the moment. We think that language is very good. We have had some discussions with industry. You may have had more in recent times, but they raised that

with us at a session we had with them after we got back from Washington. They have not been back, at least to the DFAT team, since then expressing ongoing concerns about that.

Senator CONROY—Let me try a little example to encapsulate my dilemma with it and then I will come to the more detailed questioning. It is the interaction with e-commerce that I think is probably causing the most concern. Let me give you two examples. In America now—and in Australia as well—mobile phones have cameras and screens where you can see things. In America they have now reached a stage of technical sophistication such that you can run a minute-long ad on the screen of the mobile phone. Does that constitute e-commerce or does that constitute an interactive audiovisual service? The other example that I am grappling with—and we have not quite reached this stage in Australia, but I suspect it will not be too far away—is that Hollywood, if I can use that phrase, will be able to have a direct demand service via satellite into your own home of the latest blockbusters. It is sort of like movies on demand but direct from Hollywood, so they would be the latest blockbusters. Is that an interactive audiovisual service or is that e-commerce?

Mr Deady—I think it is an audiovisual service.

Senator CONROY—To me, it is interactive. You press a button to make something happen. You send a request. You have got one of the seven remote controls in front of you and you work out which one to dial-up so to speak. To me that is what it is but there are people prepared to say that is e-commerce and that is not intended to be captured.

Mr Deady—The key point here is that if the concern is about e-commerce then what we have made sure of in the agreement is that the commitments we have entered into on audiovisual services, the exceptions we have entered into there, override the national treatment and MFN commitments in the e-commerce chapter. What you have described to me—movies on demand and those sorts of things—are audiovisual services.

Senator CONROY—That was my first reaction. But that one would fall into interactive audiovisual.

Mr Deady—Yes.

Senator CONROY—The mobile phone with an ad running on it, is that e-commerce also?

Mr Deady—I do not see it as e-commerce. This is an audiovisual service. If it is an ad or a movie that they tell me I will be able to watch on videos on phones, then they are audiovisual.

Senator CONROY—I would possibly have thought that an ad beamed onto your phone might have been e-commerce. That was my immediate reaction. People said yes and no.

Mr Deady—It would be an audiovisual service for the purposes of the commitments we have entered into under the cross-border trade in services chapter, it seems to me.

Senator CONROY—We did a negative list agreement. I guess the simplest way to avoid the confusion about what is the future would have been to have had a positive list for e-commerce and to have said, 'This is e-commerce; everything else is outside it,' but I know we cannot change that now. It is just that technology is going to be fraught with these arguments. I will move on to more specific questions.

In the brief summary of the audiovisual aspects in DFAT's guide to the FTA, the government says that the government will be able to take measures to ensure that Australian content on new media platforms is not unreasonably denied to Australian consumers. Doesn't the use of the word 'interactive' in the actual agreement and the ambiguity associated with this term render this statement misleading? Some people believe that the term 'interactive' should not be there because it narrows the scope. To me it makes more clear but some lawyers have argued—and I am not a lawyer—that by putting the word 'interactive' in you have narrowed the scope of the area you are trying to protect. I am surprised by that. You might have heard that argument yourself. Because it has the word 'interactive' in, that counteracts new media platforms. It could be a new media platform that is not interactive; that is the thought. If you would like to take it on notice, that is okay.

Mr Deady—Perhaps I had better. That has not been raised with me, but if it is not interactive, if it is broadcast or if it is pay television, they are covered by other reservations under the agreement.

Senator CONROY—This is just 3G mobile phone technology—3G video stream. This is what lawyers are saying: how can you define a 3G video stream as interactive?

Mr Deady—It would be the consumer who was determining—

Senator CONROY—It is an ad, you see. People do not often request ads.

Mr Deady—I had better take this on notice. I am not sure.

Senator CONROY—These are the sorts of issues that are perplexing me. What does the word 'video' mean in the term 'interactive audio and/or video services'? Does it mean video, VHS or visual? We need a legal definition on this.

Mr Deady—I think that is the point, that the use of these terms 'video services' and 'audio visual services' is open-ended.

Senator CONROY—So you say it is broad enough; others would say it is ambiguous.

Mr Deady—Yes, I think it is broad. The difficulty with being too precise in these definitions is that, as I said before, you run the risk of in the future missing something out rather than capturing it. If we are talking about TV, films or advertisements that have moving pictures or pictures then that is video, and it is a video service if it is delivered. This is certainly what we have worked hard to capture here. It is about a future Australian government being able to look at these—whatever they are—in terms of programming on these sorts of services. If, for some reason, Australian local content is insufficient and is being unreasonably denied then future Australian governments can do something about it.

Senator CONROY—The Australian Film Commission identified 18 new content delivery mechanisms in a report last year entitled *Future audiovisual services: options for supporting Australian content*. Only two of these mechanisms, HD TV and FTA multichannelling, appear to be definitely captured by the audiovisual provisions of the FTA. Can the department—and I am more than happy for you to take this on notice, Mr Deady—provide an opinion, legal and/or otherwise, on what the remaining 16 audiovisual content delivery mechanisms identified in that report fall under, in terms of the category of interactive audio and/or video services? I will list those now for you. They are: broadband web sites, datacasting, digital film

distribution, digital film exhibition, digital television subscription, DVD/video hire and sale market, interactive television, electronic program guides, personal video recorders, Internet content narrowband, Internet TV and walled gardens—and if you can toss in a definition of what a walled garden is there, that would be good, Mr Deady—peer-to-peer networks, satellite delivery, T-commerce, interactive advertising, 3G cellular mobile services and video on demand. If you could take that one on notice, that would be great, Mr Deady.

Mr Deady—I will take that on notice because I think that, to the extent that they are audiovisual services, there are certainly aspects of the reservation that would cover them. I also make the point that many of those sorts of services, it seems to me, we do not have any restrictions on now—and I am not sure how you would do it. We have the capacity under this agreement to introduce measures where Australian consumers, as you say, are being denied access to Australian content unreasonably. So we can look at all of those.

Senator CONROY—Why has the government ruled out ‘must carry local content’ provisions for pay television? Why will pay television have an expenditure quota instead of a ‘must carry local content’ provision?

Mr Deady—We have now, as you know, expenditure quotas on pay television on dramas. We believe that the flexibility we have built into the pay television area here is more than sufficient for future Australian governments. In fact expenditure quotas are what we have now. We have the capacity to increase those and broaden the coverage of those to additional stations and we believe that is preferable. It certainly gives enough flexibility to deal with local content in the future rather than ‘must carry’. I am not sure what that means. Much of this expenditure is on new TV production. One of the problems you could potentially see with a ‘must carry’ provision is that it could just involve repeats of existing Australian drama or Australian television local content. I am not sure that would be achieving the sort of outcome that a future government would be looking for. So I think there is sufficient flexibility in what we have agreed to. This is what we have at the moment for pay television. We have a capacity to increase those expenditure quotas.

Senator CONROY—What if pay TV becomes the dominant supplier, though? Foxtel would like to become the dominant supplier.

Mr Deady—If that is the situation, there is the capacity for expenditure requirements on drama to be spent. These things have been put to us, but they are speculation. If it does become the dominant supplier then there is flexibility here for the government to increase expenditure. It would seem to me that clearly if it was the dominant supplier there would be a higher level of expenditure on drama and other things going into those and there would be a subsequent increase in the amount of expenditure on these quotas. But free-to-air television is the dominant medium at the moment, and there are the local content arrangements we have there which are carried forward under the agreement.

Senator CONROY—Why did the government decide to put existing television services in annex I, and therefore subject to ratcheting provisions, and put existing radio services into annex II, not subject to ratcheting provisions? Why the distinction?

Mr Deady—This is part of the balance of the outcome. We gave commitments to the United States on annex I in relation to its analog television and the existing local content

requirements there. Once you moved to multichannelling, for example, then it would be the annex II reservation that would kick in. So we have a standstill commitment on free-to-air analog television and the straight shift to single channel digital, and that is subject to the ratchet mechanism, as you say. But beyond that the annex II reservations would apply. That is part of the overall outcome. The ratchet mechanism is there in the services area, but of course it would be a future government decision to decrease that share of local content, knowing that they could not subsequently increase it again.

Senator CONROY—With regard to the multichannelling arrangements under annex II, Australia 5(a), is it fair to say that a likely outcome under these provisions in a multichannelling environment is a greater amount of local content than is presently the case?

Mr Deady—Under multichannelling, there is certainly the capacity for future Australian governments to, at a minimum, double the amount of local content on free-to-air commercial television and then potentially triple it if there is a large number of channels in the future.

Senator CONROY—Is it also fair to say that a likely outcome under these provisions in a multichannelling environment will be for a lesser total percentage of Australian content given the increased number of channels?

Mr Deady—If we are looking at a multichannel environment then there is certainly the capacity for more hours to be available for television, but for the dominant service the 55 per cent local content could be maintained. If there were two channels then that could be doubled—as I said, 55 per cent local content on two channels. That is a large increase in the number of hours that we are talking about here, even if we simply look at a multichannel environment going from 24 hours of available time to 48 hours of available time through two channels. Then there could be, as I said, double the amount of local content. At a minimum there would still be the 55 per cent local content on the 24-hour service. I am not quite sure that is a good answer, but that is the situation. There is certainly the capacity under that reservation to significantly increase the number of hours of Australian content on free-to-air television.

Senator CONROY—Is it a correct reading of this section to say that you cannot have three multichannels subject to local content regulations until you have at least 15 multichannels, three being 20 per cent of 15?

Mr Deady—That is correct, yes.

Senator CONROY—Is it also true that once you reach 15 multichannels you cannot regulate for local content regulations on more than three channels regardless of how many more multichannels you have?

Mr Deady—That is correct.

Senator CONROY—Why did the government agree to cap the total number of multichannels able to be subject to local content requirements at three? Wouldn't this be too little in a far-off scenario where there might be dozens more multichannels?

Mr Deady—Again, this was the negotiated outcome. It does provide for a very large amount of local content on free-to-air television. We are talking about free-to-air television here. How many channels there may be in a multichannel system in the future we clearly do

not know; but what we have here is, in any event, a capacity for a future Australian government to more than double the amount of local content, at a minimum, through this reservation. So it is a large amount of local content. On the situation in the future of a very large number of channels in Australia, it is very difficult to envisage that you would have 55 per cent local content on 50 Australian television stations. That amount of content is, I think, well beyond any realistic assessment of the future capacity of the industry. This is a significant amount of time and a significant amount of local product that would be shown on these TV stations.

Senator CONROY—In addition to the price safeguards on beef and a range of horticultural products, there is a general transitional safeguard in the FTA. Can you give me an outline of that?

Mr Deady—The general transitional safeguard is not dissimilar to the broad safeguard available under the WTO, in the sense that it requires an injury test—it is not automatically triggered. As you say, the horticulture safeguard is a price trigger. The beef transitional safeguard is a quantity trigger—if we hit 110 per cent of the volume then the safeguard could be triggered. The general transitional safeguard is a mechanism whereby if there is a surge of imports and that causes injury, and that is subject to a test—an examination, a review or an investigation—an increase in the tariff could apply for a period of time. I think two years is the period of time for which the safeguard could apply, but I would have to check that for certainty. It is not dissimilar to the injury based tests of the WTO safeguards agreement.

Senator CONROY—I want to make it absolutely clear so that I understand the circumstances where this safeguard can be invoked by the US. Can you give me an absolutely tight outline?

Mr Deady—It would apply in circumstances where there was an increase in imports and that increase in imports was causing injury, subject to an investigation to that effect.

Senator CONROY—Is that it? That sounds general. Could you give us an explanation of it?

Mr Deady—As I say, it is very similar to the safeguards language contained in the WTO agreements. It applies during the transition period. If, as a result of the elimination or reduction of the tariffs—so as a result of a tariff concession—the imports from the party are increasing in such quantities as to constitute a substantial cause of serious injury or a threat thereof, then you can take safeguard action. That is very broadly the language that is contained in the WTO safeguards agreement. Very simply, the tests are that you have to demonstrate that as a result of the tariff concession there is an increase in imports and that that increase in imports is a substantial cause or threat of injury. Then you can revert to an increase in the tariff—a removal of the preference—back to the MFN tariff rate.

Senator CONROY—Is this the type of safeguard that the US imposed on Australian lamb some years back?

Mr Deady—It is very similar but, just to be clear, this is about preferential trade, not like the safeguard on lamb which was obviously taken under the WTO and which was an MFN safeguard action. Under these sorts of safeguards, you are no worse off than you are as we sit

here today without the FTA in place. You do not have a tariff like with lamb, where they put additional tariffs on above the MFN rate.

Senator CONROY—Will the FTA provide Australia with protection from any future US trade sanctions under section 201 of their trade act along the lines of the lamb tariffs imposed on Australia?

Mr Deady—Article 9.5 of the agreement deals with this question. It says that both countries reserve their rights and obligations under the safeguards article of the GATT and the safeguards agreement. What we have negotiated with the United States here is, though, that with the United States in the future—and let us use the lamb case as perhaps a good example—if there was a general safeguard action taken against lamb imports, then what the United States would do for Australia would be to conduct a separate investigation of those imports from Australia. This would be done by the International Trade Commission. The ITC would then make a finding on whether Australian imports were a substantial cause of the injury. If the finding was that Australia was not a substantial cause of the injury, then they would put that to the President, who would take a decision on whether or not to apply a safeguard action against Australia. So there is still, at the end of the day, discretion for the President as to whether to apply or not apply a section 201 safeguard action. But it is very significant here that we have got this additional—

Senator CONROY—You do not want to put your life in his hands, do you, Mr Deady?

Mr Deady—It really is a meaningful commitment to Australia. It is not something that the United States give in all of their trade agreements. It was not something that they gave to Chile under the Chile-US FTA. They did give it to Singapore, and we have got that as part of this.

Senator CONROY—Is this the same status as Canada and Mexico under NAFTA ?

Mr Deady—It is interesting that under NAFTA for Canada and Mexico it is a similar process in that there is a separate investigation done of imports from Canada and Mexico. If the finding of the ITC is that Canadian and Mexican imports are not a substantial cause of injury, then that report is given to the President. The difference here is that the President has no discretion. He could then carve out Canada and Mexico from the safeguard action. There is no discretion there. There is still the discretion that we have under our agreement. If I could say one more thing on that, you have to read though the whole of the commitment that the United States have made under NAFTA. There is an additional clause in this article, if you look at NAFTA, that says that if injury continues to occur to the US industry, then the President can look again at this issue—whether Canadian and Mexican imports are causing this injury—and can take action, so it is not an absolute exclusion for Canada and Mexico. It is not an absolute exclusion for us; it does depend on this process but the process itself is very valuable and we believe that is substantial.

Senator CONROY—Did we try to get exactly the same status as theirs?

Mr Deady—We argued through the negotiations—we were pushing very hard for this—to remove the discretion from a future President. We would have preferred something that said if there was a finding that Australia was not a substantial cause of the injury then we would be excluded from the agreement, rather than that we may be excluded from the agreement.

We were not able to get that. No countries have got that since NAFTA. There is discretion there now. I would still argue very strongly that the overall commitment that we have from the United States in this area is very close to what they gave Canada and Mexico. You have to read NAFTA in its entirety. There is still a clause there that says that, notwithstanding the requirement on the President to exclude them, he can revisit that question if there is still injury and complaints from the US industry and extend the safeguard action to Canada and Mexico.

Senator CONROY—Are you disappointed? We are supposed to have a special relationship.

Mr Deady—I believe that if the Americans could have given a general exclusion from general safeguard action in the future Australia would have been prepared to make that commitment also. In the end, this is an area where the Americans could go a certain distance but not to complete exclusion from future WTO safeguard actions. We believe, though, that this is a valuable outcome for Australian industry for the future. I know the steel industry were very interested in this provision. If you ask them, I am sure they would say that they were disappointed that it is not tougher than it is and that it is not ironclad, but it is still a very significant improvement on the situation we face now. The fact that the ITC has to do a separate investigation of Australia is a significant development and a significant outcome from the agreement.

At the moment we are just caught up with all other suppliers. We are not given any special treatment at all. The fact is, they have to look at Australia and make a decision. If that decision is that Australia is not a substantial cause of the injury, that then gets put to the President. The President has to say that, despite the fact that Australia is not a substantial cause of injury, he is still going to impose a safeguard action on Australia. The language allows him to do that but, nonetheless, we would certainly think a future Australian government would have a very strong case for resisting the application of that.

Senator CONROY—I appreciate that you mentioned you were away. I am not sure if you were present or watching or if you have had a chance to catch up by reading the *Hansard* but, during the inquiry on 18 May, I asked about the apparent contradiction concerning the FTA's alleged boost to US investment in Australia between the CIE's report and Mr Vaile's submission to the Senate inquiry. As was said at that hearing, in assessing the gains for Australia arising from the FTA, the CIE report says in its summary:

Investment liberalisation makes the biggest contribution to overall economic growth and welfare.

On page 11, Mr Vaile's submission to this inquiry says:

... Australia's commitments under the Agreement with regard to screening of foreign investment are unlikely to have a major impact on US investment in Australia given the very few rejections of investment applications outside residential real estate.

Mr Vaile's submission, which was finalised on 30 April, makes clear in a footnote that it was revised in light of the finalisation of a report commissioned by DFAT and conducted by CIE to report on the impacts of the FTA. Why does Mr Vaile's submission contradict the CIE report? Who are we supposed to believe? They are diametrically opposed positions. Mr Vaile clearly had read the CIE report.

Mr Deady—The initial draft of the regulatory impact assessment was prepared before the CIE report was produced, as you know. We did produce and incorporate some of the outcomes of the CIE report in a final regulation impact statement. I know there was a lot of discussion on this issue at the Senate select committee hearings you spoke about and I did read the transcripts of those. There was also discussion at the JSCOT hearings. I think Treasury appeared in front of the Senate inquiry and also in front of the JSCOT. I do not think there is a contradiction at all between what the CIE have done and what is contained in the RIS. The paragraph that is being quoted—the RIS—does go on to recognise that there are transaction costs associated with the foreign investment review mechanisms.

You are looking at two different things here. The CIE study, which was done by the modellers, looked at the outcome on the investment side, and they made these calculations on just what those changes to the Foreign Investment Review Board mechanisms will mean for the equity risk of investment in Australia. They made some assumptions about how the FTA might reduce those risk premiums, ran that through their model and came out with those numbers which do contribute to a very substantial increase in GDP as a result of the concessions on investment. But I do not think there is a contradiction between them. We have said all along that the government maintains—and I think it is demonstrated—that Australia does have an open foreign investment regime. We certainly said that to the Americans through the negotiations. We have made some concessions to the Americans on that investment regime whilst maintaining the capacity to screen for national interest on sensitive sectors and investments above \$800 million. That is the commitment that we made. As I say, you are looking at two different things here. The modellers then go on and look at what this might mean for risk premiums, and they come up with those calculations. But I do not believe there is a conflict between what we have said in the RIS and what the modellers have done in the separate work by the CIE.

Senator CONROY—Thanks very much.

ACTING CHAIR (Senator Payne)—Thank you very much, Mr Chester and Minister, and thank you to your officers who have been taxed over the last few days through the estimates process.

Committee adjourned at 5.46 p.m.