

Report 161

Treaties tabled on 1 December 2015, 3 December 2015 and 2 February 2016

Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (Honiara, 2 November 2012)

International Code for Ships Operating in Polar Waters (London, 21 November 2014)

Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (London, 21 November 2014)

International Code for Ships Operating in Polar Waters (London, 15 May 2015)

Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973: Amendments to MARPOL Annexes I, II, IV and V (London, 15 May 2015)

International Code of Safety for Ships Using Gases or other Low-flashpoint Fuels (London, 11 June 2015)

Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (London, 11 June 2015)

Amendments to the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea (London, 11 June 2015)

Amendments to the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (London, 11 June 2015)

Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978, as amended (London, 11 June 2015)

Amendments to Part A of the Seafarers' Training, Certification and Watchkeeping (STCW) Code (London, 11 June 2015)

Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance, and Protocol (Berlin, 12 November 2015)

Amendment to Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

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Membership of the Committee

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Terms of reference

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

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

List of abbreviations

AFMA	Australian Fisheries Management Authority
AMSA	Australian Marine Safety Authority
ATO	Australian Taxation Office
BEPS	Base Erosion and Profit Shifting
CNG	Compressed natural gas
DAWR	Department of Agriculture and Water Resources
DIRD	Department of Infrastructure and Regional Development
FFA	Pacific Islands Forum Fisheries Agency
G20	Group of Twenty
IGF Code	<i>International Code of Safety for Ships Using Gases or other Low-flashpoint Fuels</i>
IMO	International Maritime Organization
IUU	Illegal, unreported and unregulated fishing
LNG	Liquefied natural gas
MARPOL	<i>International Convention for the Prevention of Pollution from Ships</i>
MEPC	Marine Environment Protection Committee
MSC	Maritime Safety Committee

NIA	National Interest Analysis
Niue Treaty	<i>Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific</i>
OECD	Organisation for Economic Co-operation and Development
Polar Code	<i>International Code for Ships Operating in Polar Waters</i>
POPS Act	<i>Protection of the Sea (Prevention of Pollution from Ships) Act</i>
PWOM	Polar Water Operational Manual
RIS	Regulation Impact Statement
Rotterdam Convention	<i>Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade</i>
SOLAS	<i>International Convention for the Safety of Life at Sea</i>
STCW	<i>International Convention on Standards of Training, Certification and Watchkeeping for Seafarers</i>
UN	United Nations

List of recommendations

2 Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region

Recommendation 1

The Committee supports the *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* and recommends that binding treaty action be taken.

3 Amendments to SOLAS and MARPOL

Recommendation 2

The Committee supports the *International Code for Ships Operating in Polar Waters* (Polar Code) and the concomitant amendments to the *International Convention for the Safety of Life at Sea, 1974, as amended* (SOLAS) and to the *International Convention for the Prevention of Pollution from Ships, 1973* as modified by the Protocol of 1978 and recommends that binding treaty action be taken.

Recommendation 3

The Committee supports the *International Code of Safety for Ships using Gases or other Low-flashpoint fuels* (IGF Code) and the concomitant amendments to the *International Convention for the Safety of Life at Sea, 1974, as amended* (SOLAS), the *International Convention for the Prevention of Pollution from Ships, 1973*, the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* (STCW), 1978, as amended, and the *Seafarers' Training, Certification and Watchkeeping (STCW) Code* and recommends that binding treaty action be taken.

4 Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance

Recommendation 4

The Committee supports the *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance* and recommends that binding treaty action be taken.

Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty actions:
- *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* (Honiara, 2 November 2012);
 - *International Code for Ships Operating in Polar Waters* (Polar Code) Resolution MSC.385(94) (London, 21 November 2014);
 - *Amendments to the International Convention for the Safety of Life At Sea, 1974, as amended* Resolution MSC.386(94) (London, 21 November 2014)
 - *International Code for Ships Operating in Polar Waters* (Polar Code) Resolution MEPC.264(68) (London, 15 May 2015);
 - *Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973: Amendments to MARPOL Annexes I, II, IV and V* Resolution MEPC.265(68) (London, 15 May 2015);
 - *International Code of Safety for Ships Using Gases or other Low-flashpoint Fuels* (IGF Code) Resolution MSC.391(95) (London, 11 June 2015);
 - *Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended* Resolution MSC.392(95) (London, 11 June 2015);
 - *Amendments to the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974* Resolution MSC.394(95) (London, 11 June 2015);

- *Amendments to the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 Resolution MSC.395(95) (London, 11 June 2015);*
 - *Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978, as amended Resolution MSC.396(95), (London, 11 June 2015);*
 - *Amendments to Part A of the Seafarers' Training, Certification and Watchkeeping (STCW) Code Resolution MSC.397(95) (London, 11 June 2015); and*
 - *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance, and Protocol (Berlin, 12 November 2015).*
- 1.2 In addition, the Report contains the Committee's views on one Minor Treaty Action:
- Amendment to Annex III of the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (the Rotterdam Convention).
- 1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.
- 1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.
- 1.5 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.6 A *Regulation Impact Statement* (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaties examined in this report did not require a RIS.
- 1.7 The Committee takes account of these documents in its examination of the treaty texts, in addition to other evidence taken during the inquiry program.

- 1.8 Copies of the treaties considered in this report and associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
- http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/1_December_2015/Treaties_being_considered
 - http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/3_December_2015/Treaty_being_considered
 - http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/2_February_2016/Treaties_being_considered

Conduct of the Committee's review

- 1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties were requested by 18 December 2015 and 2 February 2016 respectively.
- 1.10 Invitations were made to all State Premiers, Territory Chief Ministers and Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the treaties reviewed.
- 1.11 The Committee held a public hearing into the treaties in Canberra on 29 February 2016.
- 1.12 The transcripts of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaties tabling dates: 1 December 2015, 3 December 2015 and 2 February 2016.
- 1.13 A list of witnesses who appeared at the public hearing is at Appendix A.
- 1.14 A list of submissions is at Appendix B.

Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region

Introduction

- 2.1 This chapter examines the proposed *Agreement on Strengthening Implementation of the Niue Treaty on cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* which was tabled in the Parliament on 1 December 2015.
- 2.2 The Agreement is a subsidiary Agreement beneath the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific* (Niue Treaty) to which Australia is a Party. The National Interest Analysis (NIA) states that the Agreement is intended to strengthen the operation of the Niue Treaty. The Agreement does not replace or affect the obligations in the Niue Treaty.¹

¹ National Interest Analysis [2015] ATNIA 20 with attachment on consultation, *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* done at Honiara on 2 November 2012 [2014] ATNIF 25 (hereafter referred to as NIA), para 3.

Background

- 2.3 The Niue Treaty and the new subsidiary Agreement are administered by the Pacific Islands Forum Fisheries Agency (FFA) based in Honiara in the Solomon Islands. The FFA was established in 1979 by the South Pacific Forum Fisheries Agency Convention and has 17 members.² Its aim is to help countries sustainably manage their tuna resources now and into the future.³ The Committee asked for clarification on the FFA's management and decision-making processes. The Department of Agriculture and Water Resources (DAWR) explained that FFA officials meet regularly and senior officials and ministers meet annually:

It is through that process that they develop an annual work plan and allocation of the resources that they receive from a range of sources – from Australian and New Zealand governments, from European governments, and from various fees and charges that make up a small part of their business. But it is an agreement by the forum fishing ministerial council on an annual basis which sets the work plan in place, which sets their priorities. Illegal fishing and improved fisheries management have always sat as a very high priority for the forum fisheries agency.⁴

- 2.4 Decisions are made both collectively and on a country-by-country basis depending on the circumstances:

In the forum fisheries agency it is collective for some of the fisheries, because they have an arrangement with the United States. They make country-by-country decisions with Taiwan, Korea, China or the EU. But where they are covered by the West and Central Pacific Fisheries Commission, which is a regional fisheries management organisation covering the migratory stocks across that part of the Pacific, it is a collective decision which gets made at that annual meeting.⁵

- 2.5 Australia has been pursuing a policy through the West and Central Pacific Fisheries Commission to ensure an equitable sharing of risk and benefit
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2 Member states are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

3 Pacific Islands Forum Fisheries Agency, <<http://wwwffa.int/about>>, accessed 30 March 2016.

4 Mr Ian Thompson, First Assistant Secretary, Sustainable Agriculture, Fisheries and Forestry Division, Department of Agriculture and Water Resources (DAWR), *Committee Hansard*, Canberra, 29 February 2016, p. 3.

5 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 3.

through fisheries management across the region. Australia has been advocating for:

... fisheries management based on getting a really good handle on stocks, catch rates and catches, and then trying to maintain the share of either growth in stocks or the pain of a drop in catches, if stocks look like being under threat, equitably between the countries, based roughly on their catch history.⁶

- 2.6 DAWR emphasised the importance of tuna fishing to the region which supplies up to 50 per cent of income for some countries.⁷ Overfishing and illegal, unreported and unregulated fishing (IUU fishing) are of major concern. Most tuna fishing is undertaken using purse sein methods which involve relatively large vessels and FFA has implemented a range of measures to manage the fisheries:

In recent years they have moved to what they call a vessel-day scheme, which take into account the size and catch capacity of the vessels. They allocate so many days based on the rough calculation of how many fish they might catch. Under the Western and Central Pacific Fisheries Commission, which covers most [of] that area, they have recently moved to a vessel management scheme and a fisheries management plan, which is taking them a long way down the track towards quota management of those fisheries.⁸

- 2.7 Losses from IUU fishing in 2009 amounted to between \$US750 million to \$US1.5 billion in the region, posing a serious risk to fish stocks.⁹ Overall, countries are strongly supportive of any efforts to combat IUU fishing, including the Niue Treaty and the Agreement.¹⁰

Overview and national interest summary

- 2.8 According to the NIA the purpose of the proposed Agreement is to support the continuous improvement of the management and development of the fishery resources in the region, ensuring sustainability and maximising the social and economic benefits.¹¹ The Agreement is intended to establish a legal framework for conducting a broad range of
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6 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 3.

7 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 2.

8 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 3.

9 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 1.

10 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 2.

11 NIA, para 5.

cooperative regional fisheries surveillance and law enforcement activities, including sea patrols and aerial surveillance, port inspections and investigations. It includes a mechanism for one Party to request another to exercise surveillance and enforcement functions on its behalf as well as a framework for the regional exchange of fisheries data and intelligence.¹²

- 2.9 The Department of Agriculture and Water Resources (DAWR) explained that although the Niue Treaty established a framework for conducting fishery surveillance and law enforcement activities in the Pacific, it did not provide a mechanism for the arrangement. This Agreement will fill that gap:

What it does is take the Niue treaty and say, 'Let's organise in advance some of the protocols and put the framework in so that countries can do the protocols.' At the present time, some of those things are done annually, but some of them are done exercise by exercise or incident by incident, which is quite time-consuming. This means they are delayed, and it also takes resources, so this is the framework for it.¹³

- 2.10 The NIA states that the proposed Agreement aims to enhance active participation in cooperative surveillance and enforcement activities in the Pacific by providing a means for Parties to share resources and exchange information in order to:

- maximise the operational reach and effectiveness of fisheries monitoring, control and surveillance tools;
- to prevent, deter and eliminate IUU fishing; and
- to contribute to broader regional law enforcement efforts.¹⁴

- 2.11 The NIA considers that the proposed Agreement will:

- strengthen Australia's ability to combat IUU fishing in the region;
- benefit Australia's broader security and development aims in the Pacific; and
- demonstrate Australia's commitment to work with Pacific Island countries to maximise benefit to the region.¹⁵

- 2.12 DAWR explained that the Agreement, by providing stronger legal certainty, would enable Australia to play a more supportive role:

Currently, [the Australian Fisheries Management Authority] assists all the regional operations led by the foreign fisheries

12 NIA, para 4.

13 Mr Thompson, DAWR, *Committee Hansard*, Canberra, 29 February 2016, p. 5.

14 NIA, para 5.

15 NIA, para 6.

agency. There are four dedicated operations a year. We have dedicated officers in the command centre—the coordination centre—and we also have officers that participate on board some of the Pacific Island patrols. Currently ... the officers participate as assistants only. They have no standing on the vessel other than as an assistant. Under this arrangement, there is the potential for us to work alongside some of the Pacific Island officers on an equal footing, supporting them with their enforcement in their own zones.¹⁶

Reasons for Australia to take the proposed treaty action

- 2.13 The NIA suggests that the Niue Treaty has been under-utilised, prompting the need for the proposed Agreement.¹⁷
- 2.14 The NIA stresses Australia's role as a key maritime surveillance partner for Pacific Island countries and its ongoing commitment to supporting regional cooperation on maritime security. The NIA also emphasises the dangers of IUU fishing as it:
 - depletes fish stocks through overfishing, seriously threatening food security in the region;
 - causes large financial losses for coastal States; and
 - can seriously damage marine environments and fish habitats.¹⁸
- 2.15 The NIA suggests that the proposed Agreement will maximise the benefits of Australia's surveillance and enforcement assets in the region by:
 - improving Australia's awareness of security risks;¹⁹
 - assisting in law enforcement activities beyond fisheries matters, such as transnational crime investigation and enforcement activities;²⁰
 - facilitating more effective and responsive regional approaches to maritime surveillance and enforcement, improving broader regional security;²¹ and

16 Ms Kerry Smith, Senior Manager, Foreign Compliance, Australian Fisheries Management Authority (AFMA), *Committee Hansard*, Canberra, 29 February 2016, p. 5.

17 NIA, para 7.

18 NIA, para 8.

19 NIA, para 9.

20 NIA, para 10.

21 NIA, para 11.

- enhancing regional access to information by clarifying the assistance required by and available to parties in the region.²²
- 2.16 The legal framework established by the Agreement will enable better use of existing assets. The sharing of data will allow more effective analysis and better targeting of resources:
- The Niue Treaty subsidiary agreement gives effect in the first annex to a range of data and information that is to be shared. It is anticipated that that range of information will be able to be analysed and trend- and intelligence-driven risk based operations will be able to be derived from the information. Obviously, that is something that will build over time, as information comes in under that particular centralised database. That information will be used to inform future operations and to guide surveillance and activities in the Pacific.²³
- 2.17 Overall, the NIA maintains that becoming a Party to the proposed Agreement will demonstrate Australia's commitment to its ongoing work with Pacific Island countries.²⁴
- 2.18 The proposed Agreement encourages cooperation with non-Party surveillance and enforcement partners. France and the United States are two of Australia's key surveillance partners in the Pacific and the NIA proposes that there is potential for the Agreement to be used as a framework through which to cooperate with these partners, including with respect to information sharing.²⁵
- 2.19 The NIA explains that Australia has been heavily involved in the development of the proposed Agreement and suggests that early ratification could demonstrate Australia's continued leadership role in the Pacific region.²⁶

Obligations

- 2.20 The proposed Agreement imposes two obligations on Australia:
- To provide certain notifications to the Administrator (defined in **Article 1** as the Forum Fisheries Agency):
⇒ notification of Australia's 'National Authority' (**Article 5**);
-

22 NIA, para 12.

23 Ms Smith, AFMA, *Committee Hansard*, Canberra, 29 February 2016, p. 5.

24 NIA, para 13.

25 NIA, para 14.

26 NIA, para 15.

- ⇒ notification of applicable laws, policies and procedures for the conduct of cooperative surveillance and enforcement activities (**Article 8(2)(a)**);
 - ⇒ notification of assistance that may be made available for cooperative surveillance and enforcement activities (**Article 8(2)(b)**);
 - ⇒ notification as to whether Australia consents to hot pursuits being continued into its territorial sea, to which parties this consent applies and any conditions attached (**Article 13(2)**);
 - ⇒ notification of national laws, policies and procedures relating to the collection, management and use of evidence (**Article 15(2)**);
 - ⇒ notification of relevant baseline operating costs, terms of cost recovery and any costs over which Australia would wish to waive recovery for involvement of Australia's resources in cooperative surveillance and enforcement activity pursuant to the Agreement (**Article 17(1)**); and
 - ⇒ notification of national laws, policies and procedures with respect to the distribution of fines and monies recovered from operation under the Agreement (**Article 18(1)**).
- To provide to the Administrator the fisheries data and intelligence specified in **Article 19(1)** and **Annex A** of the Agreement. This includes:
 - ⇒ historic, current and ongoing fishing vessel licence lists;
 - ⇒ real time and historic observer data;
 - ⇒ boarding and port inspection reports;
 - ⇒ fishing vessel sightings data;
 - ⇒ catch and effort data;
 - ⇒ vessels and persons of interest for fisheries purposes; and
 - ⇒ public information on prosecutions, violations and settlements relating to fisheries.²⁷
- 2.21 The NIA notes that Australia already collects and provides much of this data in support of decisions of the Western and Central Pacific Fisheries Commission.²⁸
- 2.22 Additionally, the Agreement provides the operational framework for voluntary bilateral and multilateral cooperative operations, but does not commit Parties to undertaking operations. The NIA states that Australia will assess, on a case by case basis, whether to participate in any such

27 NIA, para 16.

28 NIA, para 16.

voluntary operations. If Australia does decide to participate in these activities, it will do so in compliance with the requirements in **Part II (Articles 8–18)** of the Agreement.²⁹

Implementation

- 2.23 According to the NIA legislative amendments are not required in order to comply with the mandatory obligations in the proposed Agreement. The Australian Fisheries Management Authority (AFMA) has the power to provide the information required under the proposed Agreement to the Director-General of the Forum Fisheries Agency (as the Administrator of the Agreement) under the *Fisheries Administration Act 1991* (Cth).³⁰
- 2.24 However, the NIA notes that if Australia decides to engage in voluntary cooperative surveillance and enforcement activities with other parties (see para 2.22 above), it will need to ensure such activities are consistent with domestic laws, policies and practices.³¹

Costs

- 2.25 The NIA notes that Australia already contributes to the costs of the Forum Fisheries Agency through both membership dues and aid funding therefore implementation of the proposed Agreement will have no cost implications for Australia. However, the NIA cautions that the cost of any voluntary surveillance or enforcement operation will need to be assessed on a case-by-case basis.³²
- 2.26 DAWR provided detailed information regarding Australia's aid funding and membership costs:
- Australia's core funding agreement with the FFA is for \$AUD22.7 million, over the period January 2013 to June 2018, with funding of \$5 million per year from 2015–16. Australia's core funding Agreement is inclusive of Australia's membership contributions (estimated at \$USD 634 782 for 2015–16).³³
- 2.27 Australia supplies additional support in a number of ways:
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29 NIA, para 17.

30 NIA, para 18.

31 NIA, para 19.

32 NIA, para 20.

33 Department of Agriculture and Water Resources (DAWR), *Submission 1*.

- Australian government agencies also collaborate with FFA in delivering enhanced support for combatting IUU fishing in collaboration, including through the new Defence led Pacific Maritime Security Program and a DAWR led partnership (\$2.4 million over 3 years ending June 2017) supporting the implementation of the Niue Treaty Subsidiary Agreement, development of catch documentation scheme options and monitoring, control and surveillance training.³⁴
- 2.28 The NIA maintains that the additional responsibilities placed on Commonwealth government agencies by the proposed Agreement will be absorbed or offset by efficiencies or managed by shifting priorities within relevant agencies.³⁵
- 2.29 The NIA also expects no regulatory costs to result from the implementation of the proposed Agreement, as Australia already collects much of the information required.³⁶
- 2.30 The NIA doesn't foresee any added cost to the Australian fishing industry nor to State or Territory governments as a result of the implementation of the proposed Agreement.³⁷

Conclusion

- 2.31 The Committee supports the ratification of the Agreement.

Recommendation 1

The Committee supports the *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* and recommends that binding treaty action be taken.

34 DAWR, *Submission1*.

35 NIA, para 20.

36 NIA, para 21.

37 NIA, para 22.

3

Amendments to SOLAS and MARPOL

Introduction

- 3.1 This chapter examines two treaty actions:
- *International Code for Ships Operating in Polar Waters* (Polar Code); and
 - *International Code for Safety of Ships using Gases or other Low-flashpoint Fuels* (IGF Code).
- 3.2 To bring the Polar Code into effect the following treaty actions, tabled in the Parliament on 3 December 2015, are required:
- *International Code for Ships Operating in Polar Waters* (Polar Code) Resolution MSC.385(94)
 - Amendments to the *International Convention for the Safety of Life at Sea, 1974, as amended* Resolution MSC.386(94);
 - *International Code for Ships Operating in Polar Waters* (Polar Code) Resolution MEPC.264(68); and
 - Amendments to the Annex of the Protocol of 1978 relating to the *International Convention for the Prevention of Pollution from Ships, 1973.* Amendments to MARPOL, Annexes I, II, IV and V Resolution MEPC.265(68).
- 3.3 To bring the IGF Code into effect the following treaty actions, tabled in the Parliament on 2 February 2016, are required:
- *International Code of Safety for Ships using Gases or other Low-flashpoint Fuels* (IGF Code) Resolution MSC.391(95);
 - Amendments to the *International Convention for the Safety of Life at Sea, 1974, as amended* Resolution MSC.392(95);
 - Amendments to the Protocol of 1978 relating to the *International Convention for the Safety of Life at Sea, 1974* Resolution MSC.394(95);

- Amendments to the Protocol of 1988 relating to the *International Convention for the Safety of Life at Sea*, 1974 Resolution MSC.395(95);
- Amendments to the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)*, 1978, as amended Resolution MSC.396(95); and
- Amendments to Part A of the *Seafarers' Training, Certification and Watchkeeping (STWC) Code* Resolution MSC.397(95).

Background

- 3.4 The International Maritime Organization (IMO) is the specialised agency of the United Nations (UN) responsible for setting and maintaining a comprehensive regulatory framework for international shipping addressing safety, environmental, legal, technical, security and efficiency of shipping.¹ The IMO has 171 Member States and Australia has been a member since 1952.
- 3.5 The IMO administers the *International Convention for the Safety of Life at Sea, 1974, as amended* (SOLAS) and the *International Convention for the Prevention of Pollution from Ships, 1973* (MARPOL). Australia has been a Party to SOLAS since 1983 and to MARPOL since 1988.
- 3.6 SOLAS and MARPOL address ship safety and security, and pollution from ships, respectively. SOLAS contains the safety requirements for different types of ships including in respect of construction standards, life-saving appliances, navigation, the carriage of cargoes and dangerous goods, radio-communications, and maritime security measures. MARPOL regulates ship-generated pollution by way of six technical annexes dealing with: oil, noxious liquid substances in bulk, harmful substances in packaged form; sewage, garbage, and air pollution.²

1 National Interest Analysis [2016] ATNIA 1 with attachment on consultation, *International Code of Safety for Ships using Gases or other Low-flashpoint Fuels* and related amendments, done at London on 11 June 2015[2015] ATNIF 38 (hereafter referred to as NIA IGF Code), para 1.

2 National Interest Analysis [2015] ATNIA 22 with attachment on consultation, *International Code for Ships Operating in Polar Waters* and related amendments, done at London on 21 November 2014 and 15 May 2015 [2015] ATNIF 30 (hereafter referred to as NIA Polar Code), para 2.

Overview

Polar Code

- 3.7 The Polar Code will be mandatory, replacing the existing non-mandatory 2009 *IMO Guidelines for Ships Operating in Polar Waters*. It will apply to ships operating in polar waters in both the Antarctic and Arctic.³
- 3.8 The Department of Infrastructure and Regional Development (DIRD) explained that the main impact will be on the Arctic rather than the Antarctic, as the Antarctic Treaty system already imposes high environmental standards. However, increased shipping in the Arctic has seen a need for the implementation of a mandatory code.⁴
- 3.9 The Code addresses the specific risks of operating in polar waters, such as: poor weather conditions; the relative lack of both good navigational charts and aids, and communications systems and aids; the potential for ice to impose additional loads on the hull and propellers; reduced effectiveness of machinery components of the ship while in low air temperatures, high latitudes or ice covered waters; and environmental protection challenges.⁵
- 3.10 The Code addresses these risks by specifying a range of operational and structural measures for ships to improve their safety and promote protection of the polar environments. The measures cover design, construction, equipment and operational matters, as well as training, search and rescue, and environmental discharges.⁶
- 3.11 The Code is divided into two parts, the first covering safety and the second pollution prevention:
- **Part I** of the Polar Code requires ships to be constructed to a structural strength appropriate for polar conditions and for necessary equipment to be carried on board.⁷
 - **Part I** also specifies the ship must have a Polar Water Operational Manual (PWOM) that details ship-specific capability and limitation information, procedures to be followed in normal operating conditions, and procedures to be followed in the event of incidents or emergencies.⁸
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3 NIA Polar Code, para 12.

4 Ms Stephanie Johanna Werner, General Manager, Maritime and Shipping Branch, Surface Transport Policy Division, Department of Infrastructure and Regional Development (DIRD), *Committee Hansard*, Canberra, 29 February 2016, p. 7.

5 NIA Polar Code, para 13.

6 NIA Polar Code, para 14.

7 NIA Polar Code, para 15.

8 NIA Polar Code, para 16.

- **Part II** of the Polar Code contains provisions for both existing and new ships. For existing ships operating in polar waters, the Polar Code imposes discharge restrictions for oil, noxious liquid substances, sewage, and garbage. For new ships it specifies structural provisions, such as the protective location of cargo, fuel, sludge and bilge tanks.⁹
- 3.12 The amendments are *deemed* amendments and will be accepted on 1 July 2016 unless, prior to that date, more than one third of the Parties to the Convention, or Parties the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet, have communicated to the IMO their objection to the amendments.¹⁰
- 3.13 DIRD advised that, as the decisions reflected in the IMO resolutions are reached by consensus, 'it is unusual for objections to be lodged once a resolution has been adopted'.¹¹
- 3.14 The Code applies to all ships that come under SOLAS and MARPOL regulations, that is ships that are over 500 tonnes, are not government operated research vessels, are not pleasure craft and are not fishing vessels.¹² Currently there are no privately-owned Australian-flagged vessels operating in Antarctic waters to which the Code will apply.¹³
- 3.15 DIRD told the Committee that currently all countries operating in the Antarctic are subject to the Code as all parties are members of the Antarctic Treaty System and, with the possible exception of Belarus, parties to both MARPOL and SOLAS.¹⁴
- 3.16 The Australian Marine Safety Authority (AMSA) is responsible for enforcing the Code with regard to Australian- flagged vessels and may also use Port State Control inspections to enforce it where applicable:
... were a ship to call into Tasmania ... on the way out of a visit to the Antarctic we could conduct a Port State Control inspection there and check that they are complying with the Polar Code.¹⁵
- 3.17 Penalties will be in place for non-compliance when the Code comes into effect. Penalties for foreign flagged vessels are primarily the responsibility of the country in which the vessel is flagged, in accordance with the

9 NIA Polar Code, para 17.

10 NIA Polar Code, para 9.

11 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 7.

12 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 8.

13 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 8.

14 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 8.

15 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 8.

United Nations Convention on the Law of the Sea.¹⁶ For Australian-flagged vessels penalties exist under the *Protection of the Sea (Prevention of Pollution from Ships) Act* (POPS Act):

The penalties that could be imposed reach up to the millions of dollars for breaches such as deliberate discharge of oil in contravention of our legislation.¹⁷

IGF Code

- 3.18 The purpose of the IGF Code is to provide an international standard for ships using low-flashpoint fuels.¹⁸ The Code establishes mandatory provisions for the arrangement, installation, control and monitoring of machinery, equipment and systems using low-flashpoint fuels, focusing initially on methane [ie liquefied natural gas (LNG) or compressed natural gas (CNG)], to minimise the risk to the ship, its crew and the environment, having regard to the nature of the fuels involved.¹⁹
- 3.19 The Code addresses all areas that need special consideration for the usage of low-flashpoint fuels, taking a goal-based approach, with goals and functional requirements specified for each section forming the basis for the design, construction and operation of ships using this type of fuel.²⁰
- 3.20 The amendments are *deemed* amendments and will be accepted on 1 July 2016 unless, prior to that date, more than one third of the Parties to the respective Conventions or Parties the combined merchant fleet of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet, have communicated to the IMO their objection to the amendments.²¹

Reasons for Australia to take the proposed treaty action

Polar Code

- 3.21 Australia has a strong national interest in Antarctica, including in the safety of shipping and the environmental protection of Antarctic waters and Antarctic operations. This also includes sea areas outside of these
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16 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, pp. 7–8.

17 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, pp. 7–8.

18 NIA IGF Code, para 3.

19 NIA IGF Code, para 4.

20 NIA IGF Code, para 10.

21 NIA IGF Code, para 7.

- waters for which Australia has search and rescue coordination responsibility.²²
- 3.22 Australia is one of the twelve original signatories to the Antarctic Treaty. The Australian Antarctic Territory covers 42 per cent of Antarctica, the largest territorial claim of any State.²³
- 3.23 According to the NIA, acceptance of the amendments to SOLAS and MARPOL making the Polar Code mandatory is consistent with Australia's interests and will demonstrate the Australian Government's ongoing commitment to effective regulation of shipping and environmental protection in Antarctica.²⁴
- 3.24 Australia has a direct interest in increasing the safety of vessels in polar waters as it is responsible for search and rescue coordination over a vast area including the East Indian, South-west Pacific and Southern Oceans, as well as Antarctic waters.²⁵

IGF Code

- 3.25 Australia has been an actively-engaged, long standing supporter of the IGF Code both at the maritime administration and industry level. Acceptance of the Code is in accordance with Australia's interests as the requirements provide clarity to the Australian shipping industry on regulatory standards, outline best practice in the use of gases or other low-flashpoint fuels and also ensure international regulatory consistency in ship building and seafarer training standards. The NIA maintains that the resultant outcome will increase maritime safety and security, enhance measures to protect the marine environment and promote smooth, effective and efficient international trade.²⁶
- 3.26 DIRD noted that the use of LNG has increased in recent years due to the lower cost of this type of fuel and tighter environment regulations:
- The IMO has imposed stricter requirements for diesel emissions ... that limit the emission of sulphur oxides, nitrogen oxides and particulate matters in ships' fuels, and LNG emits nearly no sulphur oxide or particulate matter, 90 per cent less nitrogen oxide and 20 to 25 per cent less carbon dioxide than existing fuels that are being used.²⁷
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22 NIA Polar Code, para 20.

23 NIA Polar Code, para 22.

24 NIA Polar Code, para 23.

25 NIA Polar Code, para 26.

26 NIA IGF Code, para 17.

27 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 9.

3.27 A dramatic increase in the use of low-flashpoint fuels is expected in the future due to growing emission control areas world-wide:

... the IMO has established some sulphur emission control areas which seek to reduce emissions from ships around ports and within 200 miles of protected coastlines. They have been introduced in the Baltic Sea, the North Sea, the English Channel area, the North American area and the United States Caribbean Sea area meaning that, in effect, all of North America, Canada and the European seas are covered by these tighter restrictions on diesel emissions. Because of that ... there is a need for ships to look at lower emission fuel options. So, we do anticipate that in the future there will be a dramatic increase in the number of ships using LNG.²⁸

Obligations

Polar Code

3.28 **Part I** of the Polar Code contains safety measures and requires the Parties to:

- ensure that all new ships intended for operation in polar waters are of a structural strength appropriate for polar conditions;
- ensure that necessary equipment is carried on board ships, such as personal survival, communication and navigational equipment;
- issue a Polar Ship Certificate that certifies that the ship meets the requirements of the Polar Code, following a survey of the ship in accordance with the applicable safety-related provisions of the Polar Code; and
- ensure that ships carry a Polar Water Operational Manual, which includes information on ship-specific capabilities and limitations.²⁹

3.29 **Part II** of the Polar Code requires the Parties to:

- implement discharge restrictions for oil, noxious liquid substances, sewage, and garbage, on ships operating in polar waters; and
- for certain new ships, ensure additional structural provisions, for the protective location of fuel, oil and cargo tanks, when operating in polar waters.³⁰

28 Ms Werner, DIRD, *Committee Hansard*, Canberra, 29 February 2016, p. 9.

29 NIA Polar Code, para 31.

30 NIA Polar Code, para 32.

IGF Code

- 3.30 The IGF Code applies to new ships and to existing ships converting from the use of conventional oil fuel to the use of gases or other low-flashpoint fuels of more than 500 gross tonnage, on or after the date of entry into force of the Code. **Part A-1** contains specific requirements for ships using natural gas as fuel.³¹
- 3.31 The IGF Code covers:
- ship design and on-board arrangements (**Part A-1, Regulation 5**);
 - fuel containment systems (**Part A-1, Regulation 6**);
 - material and general pipe design (**Part A-1, Regulation 7**);
 - bunkering matters (**Part A-1, Regulation 8**);
 - fire safety and explosion prevention (**Part A-1, Regulation 12**);
 - ventilation and electrical installations (**Part A-1, Regulation 13** and **14**);
 - control, monitoring and safety systems (**Part A-1, Regulation 15**);
 - drills and emergency exercises (**Part C-1, Regulation 17**); and
 - operational procedures for the loading, storage, operation, maintenance and inspection of systems (**Part C-1, Regulation 18**).³²

Implementation

- 3.32 Amendments to some Marine Orders made under the *Navigation Act 2012* will be required to implement both Codes.³³
- 3.33 Additionally, for the Polar Code, minor amendments will be required to the POTS Act as well as amendments to Marine Orders under that Act.³⁴

Costs

Polar Code

- 3.34 The NIA states that the Agreement is not likely to impact on any existing

31 NIA IGF Code, para 22.

32 NIA IGF Code, para 23.

33 NIA Polar Code, para 35; NIA IGF Code, paragraphs 27–28.

34 NIA Polar Code, para 35.

private Australian flagged vessels, and any impact on other operators will be as a result of other countries' regulation.³⁵

IGF Code

- 3.35 The adoption of the IGF Code will come into effect after 1 January 2017 and the costs for new ship builds after that date will be included in the ship's construction budget.³⁶
- 3.36 The NIA points out that conversion costs for existing ships choosing to move from conventional fuels, to gases or other low-flashpoint fuels would be subject to commercial business considerations addressing the fuel containment system, the fuel process technology and the suitability of the engines for modifications and/or adaption.³⁷
- 3.37 The NIA suggests that the financial impact of the Agreement on the Australian ship building and shipping industries is not likely to be significant. Currently in Australia only one vessel has been constructed to use gas or low-flashpoint fuel with one other vessel under construction.³⁸
- 3.38 According to the NIA, implementation of the IGF Code is expected to have negligible administrative impact for business with compliance costs remaining low.³⁹
- 3.39 Likewise, training costs associated with the requirements under STCW and the STCW Code are expected to be minimal. Training experience already gained on liquefied gas carriers will fulfil the training qualification requirements, thus reducing any costs that may eventuate.⁴⁰

Conclusion

- 3.40 The Committee supports the ratification of both the Polar Code and the IGF Code and the two packages of resolutions for SOLAS and MARPOL required to ensure their implementation.
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35 NIA Polar Code, para 38.

36 NIA IGF Code, para 32.

37 NIA IGF Code, para 33.

38 NIA IGF Code, para 34.

39 NIA IGF Code, para 35.

40 NIA IGF Code, para 36.

Recommendation 2

The Committee supports the International Code for Ships Operating in Polar Waters (Polar Code) and the concomitant amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS) and to the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 and recommends that binding treaty action be taken.

Recommendation 3

The Committee supports the International Code of Safety for Ships using Gases or other Low-flashpoint fuels (IGF Code) and the concomitant amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS), the International Convention for the Prevention of Pollution from Ships, 1973, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978, as amended, and the Seafarers' Training, Certification and Watchkeeping (STCW) Code and recommends that binding treaty action be taken.

Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance

Introduction

- 4.1 This chapter examines the *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance*, tabled in the Parliament on 3 December 2015.

Overview and national interest summary

- 4.2 The Agreement aims to update the existing bilateral tax arrangements in the 1975 Agreement between Australia and Germany, and align them with current Australian and international tax policy settings.¹ The Agreement includes new integrity provisions to minimise tax avoidance opportunities. It enables exchange of information and mutual assistance in the collection of outstanding debts.²

1 National Interest Analysis [2016] ATNIA 2 with attachment on consultation *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance*, done at Berlin on 12 November 2015 [2015] ATNIF 31 (hereafter the NIA) para 4.

2 NIA, para 5.

- 4.3 The Treasury explained that the existing treaty with Germany which was signed in 1972 (and came into force in 1975) is Australia's 'oldest unamended tax treaty'.³ The new treaty updates and modernises the arrangements between the two countries:

[The existing treaty] is well out of date. We needed to not only include the base erosion and profit-shifting measure ... but also generally bring it up to date. It is actually a real refresh for the treaty. It takes it into the modern economy and the modern times.

We are confident that it will have a really positive effect.⁴

- 4.4 The Australian Taxation Office (ATO) and the Treasury saw the need to negotiate a new Agreement with Germany as an opportunity to incorporate the OECD/G20 recommendations to prevent base erosion and profit shifting:

There is a current process going on in the OECD to try and make sure there is a process for incorporating those sorts of provisions into all of the current treaties to which member states are involved. That, obviously, is ... an expedited process to put those provisions in a range of treaties between various partners. We took the opportunity, given we were negotiating with Germany at this time, to really be ahead of the pack. This was an opportunity to put those provisions in now, in a way which is really unprecedented. Both Germany and, obviously, ourselves are very excited to be at the leading edge of making those new provisions a reality.⁵

- 4.5 By incorporating the OECD/G20 recommendations, the new Agreement will provide a precedent for future such treaties:

... it is good to have a precedent now in this treaty with Germany, which will help us progress the OECD work. Part of the ongoing work in the OECD is getting a lot of these changes in a multilateral instrument and also part of that, moving forward, is to do it bilaterally to make sure not just Germany but the countries that we do want to have these sorts of provisions in a treaty with, also come on board.⁶

3 Mr Greg Wood, Senior Adviser, Corporate and International Tax Division, The Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 12.

4 Ms Caroline Edwards, Chief Adviser, Corporate and International Tax Division, The Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 12.

5 Ms Edwards, The Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 11.

6 Mr Stephen Knipper, Assistant Commissioner, Tax Counsel Network, Australian Taxation Office (ATO), *Committee Hansard*, Canberra, 29 February 2016, p. 11.

Reasons for Australia to take the proposed treaty action

Reducing barriers to bilateral trade and investment

- 4.6 The Agreement is expected to reduce taxation barriers to bilateral trade and investment between Australia and Germany, primarily by reducing source country taxes on cross-border payments of dividends, interest and royalties.⁷
- 4.7 The treaty will reduce taxation barriers in three ways:
- reducing the dividend withholding tax rate limit from 15 per cent to either zero per cent or five per cent, depending on the inter-corporate relationships. The NIA states that this will promote direct investment and allow Australian companies to repatriate profits made by certain German subsidiaries back to Australia without facing any further tax;⁸
 - reducing the interest withholding tax rate limit from 10 per cent to zero for interest paid to financial institutions that are unrelated to, and dealing wholly independently with, the payer. The NIA states that this will lower borrowing costs for Australian firms;⁹ and
 - reduce the royalty withholding tax rate limit from 10 per cent to five per cent. The NIA states that reduced source country taxation on royalties is expected to reduce the costs for Australian businesses of accessing German intellectual property, and is likely to encourage Australian businesses to source intellectual property from Germany and vice versa.¹⁰

Increased certainty and reduced compliance costs for taxpayers

- 4.8 The Agreement allocates taxing rights over income flowing between the two countries. It clarifies that treaty benefits will be available for income received by Australian managed investment trusts and certain German collective investment vehicles.
- 4.9 The NIA advises that the Agreement will help remove double taxation on the same profits of two associated enterprises. In cases where the revenue authority of one country adjusts the taxable income of a resident of the other country, to reflect the arm's-length price of goods or services provided to an associated enterprise, the Agreement will require the

7 NIA, para 6.

8 NIA, para 7.

9 NIA, para 8.

10 NIA, para 9.

- revenue authority of the other country to make an appropriate adjustment to the amount of tax charged in its jurisdiction in respect of the same profits (**Article 9**).¹¹
- 4.10 The Agreement will prevent the double taxation of fringe benefits, by allocating taxing rights over fringe benefits to the country that has the primary taxing right over the relevant employment income.¹²
- 4.11 The NIA advises that the Agreement will protect taxpayers from one country from tax discrimination in the other country (**Article 24**). Australian nationals and businesses will not be subject to more burdensome taxation and connected requirements in Germany than German nationals and businesses in the same circumstances, and vice versa.¹³
- 4.12 Taxpayers will have an avenue for resolving tax disputes arising from the application of the treaty. Taxpayers will be able to seek the revenue authorities' assistance by presenting their case to the competent authority in either country. Taxpayers will be able to seek independent and binding arbitration where a tax dispute remains unresolved after two years.¹⁴
- 4.13 Overall, although the benefits cannot be quantified, the Treasury expects the Agreement to have a positive impact on both countries:
- ... our experience with tax treaties is that they do enhance business relationships and they certainly are sought after by many businesses around the world. We certainly expect it to have a very positive effect on our relationship with German companies and with the German government and also be an opportunity for Australian companies to do business in Germany in a more efficient and effective way.¹⁵

Establishing a more effective framework to address international fiscal evasion

- 4.14 The Agreement includes OECD/G20 tax treaty recommendations from the *Base Erosion and Profit Shifting* (BEPS) Reports, including:
- a new Preamble clarifying the purpose of the treaty;¹⁶
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11 NIA, para 13.

12 NIA, para 14.

13 NIA, para 15.

14 NIA, para 16.

15 Ms Edwards, The Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 11.

16 NIA, para 17.

- ensuring the benefits of the proposed treaty will be denied if a principal purpose of a person is to take advantage of the treaty;¹⁷
- clarifying that treaty benefits will be available for income derived through fiscally transparent entities but only to the extent that the income is treated as the income of a resident of Australia or Germany under domestic law;¹⁸
- individuals who change their tax residence after at least 5 years will remain taxable in their former country of residence on certain capital gains from the alienation of property;¹⁹
- the source country is not obliged to provide treaty benefits for income derived by a temporary resident of the other country if that other country exempts that income because of the individual's status as a temporary resident;²⁰ and
- strengthening the definition of 'permanent establishment' in the proposed treaty to broaden the range of circumstances in which both countries can tax business profits.²¹

4.15 The Treasury provided practical examples of the way the OECD/G20 measures will strengthen tax evasion provisions in the Agreement:

A particular feature that the OECD recommended was a new preamble, which makes it very clear that the treaty is not intended to create instances of non-taxation – where income is not taxed in either jurisdiction – and it specifically refers to treaty shopping. The preamble with treaty interpretation laws sets the scene. It makes it very clear that this is not an intended purpose. Then there are a range of provisions throughout the treaty. There is a general rule in there, which we call the 'principal purpose test', that allows the tax administrations to deny treaty benefits if the main purpose was to take advantage of the treaty and the particular arrangement is contrary to the intended objective of the treaty.²²

4.16 To further strengthen tax avoidance, integrity rules throughout the Agreement have been improved. One example is with regard to the definition of 'permanent establishment':

17 NIA, para 17.

18 NIA, para 17.

19 NIA, para 18.

20 NIA, para 18.

21 NIA, para 19.

22 Ms Lyn Redman, Senior Adviser, Corporate and International Tax Division, The Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 11.

We have strengthened the definition of ‘permanent establishment’, which is the principle that is used to determine whether you have a taxable presence in a jurisdiction. It is much more difficult to avoid having a taxable presence now.²³

- 4.17 Nothing in the Agreement will prevent either country from applying their own domestic laws to prevent the evasion or avoidance of taxes.²⁴ The Agreement also establishes a framework to address international tax evasion through allowing the exchange of relevant information and enabling mutual assistance in the collection of outstanding tax debts. There are also strict rules governing the privacy of tax information exchanged between Australia and Germany in relation to individuals.²⁵

Obligations

- 4.18 Paragraphs 24 to 52 of the NIA set out the specific obligations contained in Articles 2 to 31 of the treaty. These obligations relate to:

Article	Subject matter
Article 2	Includes fringe benefits tax and resource rent tax within the treaty.
Article 4	How an individual’s State of residence shall be determined.
Article 5	Defines the term ‘permanent establishment’.
Article 6	Income from immovable property (e.g. mining rights).
Article 7	Clarifies taxing rights over profits derived through a permanent establishment in the source country.
Article 8	International shipping or air transport profits may be taxed where the transport is between places in the other country (e.g. Australian coastal shipping).
Article 9	Removes double taxation for transactions between related enterprises.
Articles 10, 11, 12	Allows for dividends interest and royalties, arising in one country and paid to a resident of the other country, to be taxed in the country of residence (noting the reduced rate of tax in the first country mentioned above).
Article 13	Allows for source country taxation of income or profits from the alienation of immovable property within that country, and for the taxing of former residents on moveable property.
Article 14	Prevents the double taxation of salaries, wages and fringe benefits subject to certain conditions.
Article 15	Allows for directors’ fees to be taxed by the resident state where the fees derive from a company of the other state.
Article 16	Allows for visiting sportspersons and entertainers to be exempt from tax in the country visited if funded by public funds from the home country.
Article 17	Allows for pensions and annuities to be taxed only in the recipient’s country of

23 Ms Redman, The Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 11.

24 NIA, para 20.

25 NIA, para 21.

	residence.
Article 18	Provides that government service income and pensions will be taxable only in the source country.
Article 19	Visiting teachers and professors will be exempt for up to two years if supported by public funds or a tax exempt charity.
Article 20	Income not expressly dealt with in the treaty may be taxed only in the country of residence, except for income arising from the other country.
Article 21	Covers the circumstances where Germany may apply its capital tax to capital owned by Australian residents.

Implementation

- 4.19 The implementation of the Agreement will take place in three stages:
- in respect of withholding tax, on income derived on or after 1 January next following the date of entry into force;
 - in respect of fringe benefits tax, in relation to fringe benefits provided on or after 1 April next following the date of entry into force; and
 - in respect of other Australian tax, on income, profits or gains of any year of income beginning on or after 1 July next following the date of entry into force.²⁶
- 4.20 Amendments to the *International Tax Agreements Act* (1953) will be made to implement the obligations contained in the treaty. These amendments will be made before the Agreement enters into force.²⁷

Costs

- 4.21 The NIA advises that the reciprocal nature of tax treaties means that both countries can expect direct costs and benefits to their revenue bases as a result of changes to their taxing rights and increased taxpayer compliance.²⁸

26 NIA, para 2.

27 NIA, para 53.

28 NIA, para 54.

First-round impact of the Agreement

- 4.22 The Treasury estimates that the first round impact will be a revenue loss of \$85 million, mainly attributable to reduced dividend, interest and royalty withholding tax collections.²⁹
- 4.23 Administration costs for the ATO will be managed within existing agency resources.³⁰
- 4.24 The NIA advises that the Agreement is expected to reduce compliance costs for those taxpayers with cross-border dealings between the two countries, because it brings the bi-lateral tax relationship within international norms.³¹

Second-round impact of the Agreement

- 4.25 The NIA does not provide any detail of the second round costs and benefits, only noting that 'the estimated revenue costs and benefits do not take account of any additional revenues that may flow from the second round impacts generated by the treaty'.³²
- 4.26 According to the NIA, it is possible that there will be revenue gains from changes in cross-border investment levels, improved access to technology, reduced capital costs, economic growth and job creation.³³
- 4.27 Asked to clarify the lack of detail regarding the second round costs, the Treasury acknowledged that, consistent with normal practice, no modelling had been done:

Consistent with normal rules, we can only look at the first-round effects but, with tax treaties, it is generally acknowledged that they are about removing or reducing tax impediments. It is about facilitating greater trade and investment and growing the pie. Beyond that, there is not very much that we can add.³⁴

Conclusion

- 4.28 The Committee acknowledges the significance of incorporating the OECD/G20 recommendations to combat base erosion and profit shifting into the new Agreement with Germany. The Committee commends the
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29 NIA, para 55.

30 NIA, para 56.

31 NIA, para 58.

32 NIA, para 59.

33 NIA, para 59.

34 Ms Redman, the Treasury, *Committee Hansard*, Canberra, 29 February 2016, p. 11.

Treasury and the ATO for taking advantage of the opportunity to set a precedent for future taxation treaties in this regard thus furthering worldwide efforts to minimise tax avoidance.

- 4.29 The Committee supports the ratification of the Agreement.

Recommendation 4

The Committee supports the Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance and recommends that binding treaty action be taken.

Minor Treaty Action

Introduction

- 5.1 Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest.
- 5.2 Minor treaty actions are presented to the Committee with a one-page explanatory statement and are listed on the Committee's website. The Committee has the discretion to formally inquire into these treaty actions or indicate its acceptance of them without a formal inquiry and report.

Amendment to Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

- 5.3 The proposed minor treaty action contains the Amendment to Annex III of the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (the Rotterdam Convention).
- 5.4 The Rotterdam Convention establishes a list of very dangerous pesticides and industrial chemicals and provides for an internationally binding mechanism to control the use and transport of these chemicals.
- 5.5 Annex III of the Rotterdam Convention contains the list of chemicals for which an importer requires the prior consent of the government of the country into which the chemical is being imported before the importation can take place.

- 5.6 The treaty action involves the addition of the chemical methamidophos to Annex III of the Rotterdam Convention.
- 5.7 Methamidophos is an organophosphate pesticide used in rice and potato cropping in China and South America. It is a nerve toxin that removes the ability of muscles to relax.
- 5.8 The Committee determined not to hold a formal inquiry into these amendments, and agreed that binding treaty action may be taken.

The Hon Luke Hartsuyker MP

Chair

2 May 2016

A

Appendix A—Submissions

1 Department of Agriculture and Water Resources

B

Appendix B—Witnesses

Monday, 29 February—Canberra

Department of Agriculture and Water Resources

Mr Ian Thompson, First Assistant Secretary, Sustainable Agriculture, Fisheries and Forestry Division

Ms Zoe Scanlon, Legal Adviser, Fisheries Branch, Sustainable Agriculture, Fisheries and Forestry Division

Australian Fisheries Management Authority

Ms Kerry Smith, Senior Manager, Foreign Compliance

Department of Infrastructure and Regional Development

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