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Report 41

Six Treaties Tabled on 23 May 2001

Joint Standing Committee on Treaties

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Membership of the Committee

Chair The Hon Andrew Thomson MP

Deputy Chair Senator Barney Cooney

Members	The Hon Dick Adams MP	Senator Andrew Bartlett
	The Hon Bruce Baird MP	Senator Helen Coonan
	Kerry Bartlett MP	Senator Joe Ludwig
	Anthony Byrne MP	Senator Brett Mason
	Gary Hardgrave MP	Senator the Hon Chris Schacht
	Barry Haase MP	Senator Tsebin Tchen
	De-Anne Kelly MP	
	Kim Wilkie MP	

Committee Secretariat

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Recommendations

Films Co-Production Agreement with Germany

The Committee supports the proposed *Films Co-Production Agreement with Germany* and recommends that binding treaty action be taken. (paragraph 2.13)

Agreement with New Zealand on Social Security

The Committee supports the proposed *Agreement with New Zealand on Social Security* and recommends that binding treaty action be taken. (paragraph 3.13)

Agreement on the Conservation of Albatrosses and Petrels

The Committee supports the proposed *Agreement on the Conservation of Albatrosses and Petrels* and recommends that binding treaty action be taken. (paragraph 4.18)

Protocol to the Convention on Limitation of Liability for Maritime Claims

The Committee supports the proposed *Protocol to the Limitation of Liability for Maritime Claims Convention* and recommends that binding treaty action be taken. (paragraph 5.18)

Withdrawal of ratification and denunciation of ILO Conventions

The Committee supports Australia's withdrawal from the following International Labour Organisation Conventions:

- Hours of work and Manning (Sea) 1936;
- Wages, Hours of Work and Manning (Sea) 1946;
- Wages, Hours of Work and Manning (Sea) 1949; and
- Wages, Hours of Work and Manning (Sea) 1958. (paragraph 6.16)

The Committee supports Australia's denunciation of the following International Labour Organisation Conventions:

- Minimum Age (Trimmers and Stokers) (Convention 15); and,
- Inspection of Emigrants (Convention 21). (paragraph 6.17)

Introduction

Purpose of the report

- 1.1 This Report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of the following proposed treaty actions, which were tabled on 23 May 2001:
- Agreement with Germany on Films Co-Production, which is discussed in Chapter 2;
 - Agreement on Social Security with New Zealand, which is discussed in Chapter 3;
 - Agreement on the Conservation of Albatrosses and Petrels, which is discussed in Chapter 4;
 - Protocol to amend the Convention on Limitation of Liability for Maritime Claims, which is discussed in Chapter 5; and
 - a series of withdrawals from and denunciations of International Labour Organisation Conventions, including the
 - Hours of work and Manning (Sea) 1936;
 - Wages, Hours of Work and Manning (Sea) 1946;
 - Wages, Hours of Work and Manning (Sea) 1949;
 - Wages, Hours of Work and Manning (Sea) 1958;
 - Minimum Age (Trimmers and Stokers); and
 - Inspection of Emigrants Convention, which are discussed in Chapter 6.¹

¹ See *Senate Journal*, 23 May 2001, No. 188, p. 4249 and *House of Representatives Votes and Proceedings*, 23 May 2001, No. 184 8, p. 2277

Availability of documents

- 1.2 The advice in this Report refers to, and should be read in conjunction with, the National Interest Analyses (NIAs) prepared for these proposed treaty actions. Copies of the NIAs are at Appendix B. A copy of a Regulation Impact Statement prepared for the Agreement on Films Co-production with Germany is located at Appendix E. These documents were prepared by the Government agency responsible for the administration of Australia's responsibilities under each treaty.
- 1.3 Copies of each of the treaty actions and NIAs can also be obtained from the Australian Treaties Library maintained on the Internet by the Department of Foreign Affairs and Trade (DFAT). The Australian Treaties Library is accessible through the Committee's website at www.aph.gov.au/house/committee/jsct.

Conduct of the Committee's review

- 1.4 Our review of each of the treaty actions tabled on 23 May 2001 was advertised in the national press and on our web site.² A total of 19 submissions were received in response to the invitation to comment in the advertisement. A list of submissions is at Appendix C.
- 1.5 For the proposed treaty actions reviewed in this report, we gathered evidence at public hearings held in Canberra on 4 June 2001 and 25 June 2001. A list of the witnesses who gave evidence at the hearings is at Appendix D.
- 1.6 A transcript of the evidence taken at both hearings can be obtained from the database maintained on the Internet by the Department of the Parliamentary Reporting Staff (at www.aph.gov.au/hansard/joint/committee/comjoint.htm) or from the Committee Secretariat.
- 1.7 We always seek to consider and report on each proposed treaty action within 15 sitting days of it being tabled in Parliament. In this instance it was not possible to complete our review within the 15 sitting day period, which expired on 7 August 2001.

2 Our review of these proposed treaty actions was advertised in *The Weekend Australian* on 26 and 27 May 2001, p. 4

Films Co-Production Agreement with Germany

Proposed Treaty Action

- 2.1 The purpose of the proposed *Films Co-Production Agreement with Germany* is to foster cultural and technical cooperation and exchange by facilitating international film co-productions with film producers in Germany. It is envisaged that the Agreement will open up new markets for Australian film and will increase the quality of productions through sharing of equity investment.¹
- 2.2 The Agreement obliges each country to provide official co-productions with all the benefits which may be accorded to national films. Specifically, it will facilitate the co-production of films by allowing co-productions to qualify:
- in Australia, for funding from the Australian Film Commission, and the Australian Film Finance Corporation and for tax concessions on private investment through Divisions 10B and 10BA of the Income Tax Assessment Act 1936; and
 - in Germany, for the comparable official financial support.
- 2.3 The Agreement also allows for film equipment imported for the purposes of a co-production to be exempt from customs duties and sales taxes and for entry into and temporary residence in Australia for German nationals

¹ The material in this section is drawn principally from *the National Interest Analysis for the Films Co-Production Agreement with Germany* (NIA for Films).

involved in co-productions. Reciprocal provisions apply for Australians exporting into and working in Germany.

- 2.4 The Agreement will be administered by the Australian Film Corporation, as part of the Films Co-production Program.
- 2.5 The Agreement also establishes the 'Mixed Commission', comprised of equal numbers of Australian and German officials. The Mixed Commission will meet every two years or sooner, if requested, to supervise and review the working of the Agreement.

Evidence presented

- 2.6 At our hearing we noted that Article 5 of the Agreement allows the Australian Film Commission (AFC) to approve a co-production involving a third-party and sought clarification on how this arrangement may work. Representatives of the Department of Communications, Information - Technology and the Arts (DCITA) responded by indicating that:

Any country that wishes to participate in a three-way co-production with Australia must already have an agreement with either party. Further, proposed co-productions are subject to AFC approval in accordance with requirements under its International Co-Production Guidelines.²

- 2.7 We also sought clarification regarding any application of Article 5 and were informed that there are several examples where co-productions involving more than two-parties have occurred. One example cited was a 1993 production of a feature film involving Canada, Italy and Australia entitled *Deepwater Haven*. Two other co-productions were recently approved involving France, Belgium and Switzerland and another with France and Belgium.
- 2.8 In all cases where more than two parties are involved the Department recommends that producers seek the advice of the AFC prior to making a formal application to undertake a co-production. This process insures that any problems with an application will be revealed very early to avoid refusal of an application.³

2 DCITA, *Submission No. 2*, p. 2

3 DCITA, *Submission No. 2*, p. 2

- 2.9 We also sought further information on how this treaty affects German - Australian film-makers with regard to Australian censorship laws and were told that:

Within our own funding arrangements in Australia we do not explicitly apply censorship laws, rulings or whatever to anything, but any product invested in by the Film Finance Corporation must have what we describe as market attachment: there must be a distributor who is prepared to take on the production and sell it somewhere. That in a way acts as industry self-censorship of what is invested in.⁴

- 2.10 The Department noted also that the Australian Film Commission administers co-production requests in a way that seeks to protect Australian interests:

The Australian Film Commission has an industry advisory panel that it consults on all productions. If the third country or the third partner meant that it was leaving Australia exposed in some way—leaving the deal exposed financially, culturally or was compromising the creative integrity of the project or whatever—then the AFC would not approve.⁵

Conclusions and recommendation

- 2.11 Australia already has film co-production agreements of treaty status with the UK, Canada, Italy, Israel, Ireland and memoranda of understanding with France and New Zealand. We reviewed and reported on the Agreements with Israel, Italy and Ireland.⁶ In each case we recommended binding treaty action be taken.
- 2.12 Although there are not a large number of films produced under the co-production regime, the agreements do offer a significant level of practical and financial assistance for film-makers from all participating nations. They provide opportunities not just for cultural exchange but also for industry support and development.

4 Megan Morris, *Transcript of Evidence*, 4 June 2001, p. 17

5 Megan Morris, *Transcript of Evidences*, 4 June 2001, p. TR21

6 See Joint Standing Committee on Treaties, *Treaties Tabled on 15 & 29 October 1996* (November 1996) on the Agreement with Italy; *Eleventh Report* (November 1997) on the Agreement with Israel; and *Fifteenth Report* (June 1998) on the Agreement with Ireland.

Recommendation 1

- 2.13 **The Committee supports the proposed *Films Co-Production Agreement with Germany* and recommends that binding treaty action be taken.**

Agreement with New Zealand on Social Security

Proposed treaty action

- 3.1 The proposed *Agreement with New Zealand on Social Security* replaces an earlier agreement set in place in the 1940's. The Agreement is based on a model social security treaty and is similar to ten other social security agreements entered into by Australia.¹
- 3.2 The Agreement provides for access to Australian and New Zealand social retirement and disability pensions and changes the method of calculating how much each country will contribute to the payments covered. The Agreement covers access to age pensions, disability support pensions for the severely disabled and carer payments in respect of partners of persons who receive disability support pensions.
- 3.3 The new Agreement coordinates the social security schemes of both countries allowing Australians and New Zealanders flexibility to live and work in either country. The main benefits of the proposed Agreement include:
- application to persons who reside or have resided in Australia using trans-Tasman travel arrangements;
 - sharing of financial responsibility for the provision of relevant social security benefits based on the proportion of working life residence spent by a person in each country Australia or New Zealand

1 The other countries covered by similar agreements include Italy, Canada, Spain, Malta, Portugal, the Netherlands, Ireland, Austria, Cyprus and Denmark. New agreements with the USA and Germany are currently being negotiated. See Roger Barson (DFACS), *Transcript of Evidence*, 4 June 2001, p. 9

- continuation of benefits under the existing agreement; and
 - allowing people to move freely between the two Countries and enhancing the single Australia-New Zealand labour market under the Closer Economic Relations Agreement between Australia and New Zealand.²
- 3.4 To implement the Agreement, a Schedule will be added to the *Social Security (International Agreements) Act 1999* with the addition of consequential regulations. The Government hopes to implement the Agreement from July 2002.
- 3.5 Savings in Government outlays of around A\$93.9 million are expected as a result of implementation of the Agreement while implementation costs of A\$14.5 million will be required due to changes in administrative processes.

Evidence presented

- 3.6 Representatives of the Department of Family and Community Services advised us that this Agreement with New Zealand is the only one of our reciprocal agreements where temporary residents of a country are eligible for some social security benefits. The Department also pointed out that the agreement enables the period of working life residence in either country to be added together to form an eligibility for the pension in one of those countries.³
- 3.7 We were advised also the proposed Agreement provides an effective dispute resolution mechanism in both countries
- If [recipients] are residing in Australia, if it was a question about the Australian component of their pension, they would use the Australian dispute resolution mechanisms; if it is the New Zealand part, they would access it through the New Zealand social security system facilitated by us in Australia.⁴
- 3.8 In developing the text of the Agreement, representatives of the Department indicated that they:

2 Roger Barson (FaCS), *Transcript of Evidence*, 4 June 2001, TR9

3 Roger Barson (FaCS), *Transcript of Evidence*, 4 June 2001, TR10

4 Roger Barson (FaCS), *Transcript of Evidence*, 4 June 2001, TR12

... had consulted with all major welfare organisations in Australia and that Centrelink wrote to every New Zealand born customer to explain the changes⁵.

Conclusions and recommendation

- 3.9 As we have noted in previous reports, we support the principle of establishing a network of bilateral agreements to give better welfare protection to people who move between countries. Such agreements are to the benefit of the individuals and the governments involved in these schemes.⁶
- 3.10 The Agreement with New Zealand is of particular value given the close social and economic ties between our two nations.
- 3.11 While the current arrangements have successfully provided for reciprocal recognition of social security entitlements, it has been on the basis of the 'host country principle' - which means that the country in which the person resides takes responsibility for their entitlements. We note that although New Zealand has been partly reimbursing Australia for payments made to former New Zealand residents, the long-term trends in immigration have resulted in Australia bearing a disproportionate share of the costs.
- 3.12 The new agreement, which is based on the 'shared responsibility' principle, will address this disparity by ensuring that each country contributes to the pension income of individuals based on their period of residence in the respective country. It will overcome the fundamental financial imbalance in the existing arrangements and avoid the need for the administratively complex and increasingly unworkable reimbursement arrangements.

5 Roger Barson (FaCS), *Transcript of Evidence*, 4 June 2001, TR10. See also D. Knoch, *Submission No. 2*, p. 1, who questions who was contacted in the development of the proposed agreement.

6 See *Report 32, Six Treaties Tabled on 7 March 2000* (May 2000) in relation to the Social Security Agreement with Denmark and *Report 33, Social Security Agreement with Italy and New Zealand Committee Exchange* (June 2000). We also commented on social security agreements in *Report 27: Termination of Social Security Agreement with the United Kingdom and International Plant Protection Convention* (December 1999)

Recommendation 2

- 3.13 **The Committee supports the proposed *Agreement with New Zealand on Social Security* and recommends that binding treaty action be taken.**

Agreement on the Conservation of Albatrosses and Petrels

Proposed treaty action

- 4.1 The proposed *Agreement on the Conservation of Albatrosses and Petrels* seeks to coordinate and harmonise conservation actions undertaken in both terrestrial and marine environments internationally to conserve albatrosses and petrels and their habitats in the Southern Hemisphere. The Agreement was developed under the umbrella of the *Convention on the Conservation of Migratory Species of Wild Animals* (known as the Bonn Convention).
- 4.2 The Agreement brings international conservation standards and actions in relation to albatrosses and petrels in line with those currently in place domestically in Australia. It does this by sharing information and contributing to greater knowledge of the species through additional networks.
- 4.3 Albatrosses and petrels are highly migratory and twenty-one species visit Australia or Australian waters. These birds are amongst the most threatened groups of birds in the world. The Bonn Convention recognises all albatross species as threatened or endangered. The primary threat is oceanic long line fishing activities. Other threats include ingestion of plastics and other marine debris, predators, changes to breeding habitats, pollution and disease.
- 4.4 In 1997 Australia proposed the listing of these birds in the Appendix to the Bonn Convention because of their declining populations. Parties to the Convention are obliged to promote conservation and management action

on listed species and to promote, cooperate in, and support research relating to those species¹.

- 4.5 In 1999, at a conference of parties to the Bonn Convention, a resolution was passed calling upon Range States (states that birds interact with) to develop an Agreement to achieve and maintain favourable conservation status for albatrosses and petrels. The resolution also requested Australia to initiate discussions with Range States to develop the Agreement.
- 4.6 A favourable conservation status is achieved when all the following conditions are met:
- the species is maintaining its population on a long term basis;
 - the range of albatrosses and petrels is neither being reduced or is likely to be reduced;
 - there is sufficient habitat to maintain populations on a long term basis; and
 - the distribution and abundance of the birds approaches historic coverage and levels to the extent that potentially suitable ecosystems exist.
- 4.7 The Agreement hopes to achieve this by sharing and consolidating data on the birds so that a comprehensive understanding of their status can be developed. This will allow Range States to create an internationally agreed plan of action that will detail specific and immediate actions and result in long term solutions.
- 4.8 Australia has recently enacted regulations for the Australian long line fishing industry operating in areas known to have high levels of sea bird interaction. These regulations provide for certain bird distracting measures to be undertaken in certain areas as well as requiring fishing expeditions to limit or change actions that attract birds to their boats².
- 4.9 Australia has a comprehensive framework in place for conservation of these birds in respect of by-catch mitigation measures. This Agreement is intended to encourage other nations to follow our lead in implementing the same measures. The Australian fishing industry supports this Agreement.³
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1 Unless otherwise specified material in this section was drawn from the National Interest Analysis (NIA) for the Agreement on the Conservation of Albatrosses and Petrels.

2 Andrew McNee, *Transcript of Evidence*, 25 April 2001, TR75

3 Andrew McNee, *Transcript of Evidence*, 25 April 2001, TR75

- 4.10 The Agreement poses no additional costs on Australian industry as all actions are currently being undertaken. The Agreement was signed at an official ceremony in Canberra by seven countries, including Australia, on 19 June 2001⁴.

Evidence presented

- 4.11 A number of issues were canvassed during our review:

- the non-participation of Japan, China and some other Asian countries who are involved in long-line fishing and whose ships may not apply the mitigation procedures adopted in the Australian fleet;
- the lack of awareness in many countries of the seabird bycatch issue;⁵
- Australia's comprehensive framework for the conservation of albatross and the fact the Australian fishers have taken significant steps to mitigate seabird bycatch;⁶ and
- the work being done in Queensland to develop bait bags made from agricultural crops which quickly decompose when they are wet and will eventually replace the current plastic bait bags;⁷ In this context, Environment Australia indicated that fatality caused by ingestion and entanglement of marine life in marine debris is one of the 'Key Threatening Processes' under Australia's *Environment Protection and Biodiversity Conservation Act 1999*. A threat abatement plan is currently under consideration.⁸

- 4.12 At our first hearing on this matter we were concerned at the lack detail underpinning the submission presented to us by Environment Australia. However, at a second hearing a detailed presentation was provided on the species covered by the Agreement, the states they range through, the level

4 Howard Bamsey, *Transcript of Evidence*, 25 April 2001, TR40

5 A lot of countries are not really aware of what level of seabird by-catch is occurring within their fisheries, so one of the actions of the agreement will be to try to elucidate that information. See Narelle Montgomery (Environment Australia), *Transcript of Evidence*, 25 June 2001, p. 73

6 See comments by Andrew McNee (AFMA); *Transcript of Evidence*, 25 June 2001, p. 75

7 Geoffrey Baker from Wildlife Australia noted that the ingestion of plastics and other waste products was currently far worse in the Northern Hemisphere than in the Southern Hemisphere largely due to the feeding habits of the different species inhabiting those regions.

8 Environment Australia, *Submission No. 8*, p. 1. Environment Australia noted also that apart from this type of debris, abandoned fishing nets which are not biodegradable are also a major problem in Australia's northern waters.

of their populations and the types of threats that were endangering their populations.

- 4.13 Environment Australia also advised that various albatross and petrel conservation projects are being funded through the National Heritage Trust. A total of \$407 125 is being made available, including \$231 000 for an observer program, and monitoring and profiling programs amounting to \$60 000.⁹
- 4.14 Support for the proposed Agreement was expressed by the Queensland Government which considers the Convention a 'significant Australian-led initiative that demonstrates Australia's world leadership in seabird conservation.'¹⁰ The Western Australian Government also supported the initiative indicating that without international action to greatly reduce the incidental by-catch some will become extinct in the near future. The Western Australian submission indicated that its Department of Land Management and Conservation was playing an active part in the process.¹¹
- 4.15 Humane Society International (HSI) noted the key role played by Australia in developing the proposed Agreement and emphasised the need for Australia to continue to set best practice standards.¹²
- 4.16 The Minister for the Environment and Heritage provided a written submission which noted, in part, the strong international support for the proposed Agreement:

It is clear from the rapid consensus reached [at the Cape Town meeting where the agreement was finalised] that there is a high level of international concern about the conservation status and vulnerability of Albatrosses and petrels, and commitment to implement an international instrument to help return them to a favourable conservation status. All Range States present at the Cape Town negotiation undertook to give early consideration to becoming a party to the Agreement.¹³

9 Environment Australia, *Submission No. 8*, p. 2

10 Queensland Government, *Submission No. 7*, p. 1

11 Ministry of Premier and Cabinet (WA), *Submission No. 6*, p. 2

12 HSI, *Submission No.3*, pp. 1-2. See also Barry Hebbard, *Submission No. 4*, p. 1, who supports any effort to protect the albatross.

13 Senator the Hon Robert Hill, Minister for the Environment and Heritage, *Submission No. 1*, p. 1

Conclusions and recommendations

4.17 We have reported on issues to do with fishing and by-catch mitigation in a number of our reports:

- in our *3rd Report* (November 1996) we referred to the bycatch issue in respect to Japanese long line fishing of southern bluefin tuna in the Australian Economic Zone. Many of the bycatch mitigation measures raised in that report have since been implemented through AFMA;¹⁴
- in our *9th Report: Amendments to the Bonn Convention* (August 1997) we reviewed in some detail the impact of long line fishing on Albatross populations and recommended the listing of 10 species of albatross in Appendix II of the Bonn Convention. Among other matters we recommended a review of the observer program and the application of techniques like night setting on the high seas to mitigate sea-bird by-catch. Importantly, we encouraged the Government to continue its efforts in a number of international fora to optimise membership of relevant international agreements by countries involved in long line fishing; and
- in *Report 28, Fourteen Treaties Tabled on 12 October 1999* (December 1999) we reported on the ‘conservation and management of straddling fish stocks and highly migratory fish stocks.’ In particular, we noted that ‘the ecological implications of fisheries, and the decline in the albatross population over the last two decades because of declining food stocks and by-catch issues associated with unregulated long-line fishing’.¹⁵

4.18 The Australian Government and its agencies continue to play a leading role in developing and encouraging the adoption of best practice in sustainable fishing management. These efforts have been directed in large part towards the protection of species such as albatrosses and petrels.

4.19 Ratification of this Agreement is another positive step in this direction.

Recommendation 3

4.20 **The Committee supports the proposed *Agreement on the Conservation of Albatrosses and Petrels* and recommends that binding treaty action be taken.**

14 We also recommended that a review of the existing tuna fishing technology be undertaken to determine if modifications could be made to reduce the by-catch of non-target species.

15 Joint Standing Committee on Treaties, *Report 28 Treaties Tabled 14 October 2000*, December 1999, p 15

Protocol to the Convention on Limitation of Liability for Maritime Claims

Proposed treaty actions

- 5.1 The 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims amends the Convention (known as the LLMC Convention) providing for enhanced compensation to parties that suffer damages as a result of an incident involving ships, or salvage operations. It also establishes a simplified procedure for updating the limitation amounts applicable under the Convention. The amendment will increase the limits set out in the LLMC and recognises that the liability limits in the LLMC Convention have over time been eroded by inflation.
- 5.2 The LLMC Convention allows a shipowner or salvor to limit the total amount of damages they can be required to pay for damages caused by a ship, the shipowner or the salvor. It provides for reasonable compensation for a party that suffers damages resulting from an incident involving ships or salvage operations.
- 5.3 The LLMC convention does not establish liability, rather the LLMC convention places a limit on the amount of compensation a shipowner is required to pay if there is a successful claim against the shipowner in respect of loss of life or personal injury or damage to property.
- 5.4 The LLMC Convention provides for certain persons to be entitled to limit their liability:
 - Shipowners - meaning the owner, charterer, manager and operator of a seagoing ship;
 - Salvors – meaning any person rendering services in direct connection with salvage operations; and

- any person for whose act, neglect or default the ship owner is responsible.
- 5.5 The LLMC Convention does not apply to all claims relating to a spill of oil from an oil tanker or to workers compensation claims. These liabilities are covered under separate conventions.
- 5.6 The 1996 Protocol will be implemented in Australia by amendment of the *Limitation of Liability for Maritime Claims Act 1989* with the amendment coming into operation when the Protocol enters into force generally¹.
- 5.7 Accession will not impose any additional costs generally although insurance costs for some shipowners and salvors could rise. The amount of such increases cannot be quantified.

Evidence presented

- 5.8 We were advised by witnesses from the Department of Transport and Regional Services that the LLMC Convention does not cover all liability claims and should be viewed alongside several other international maritime agreements that also cover liability for environmental damage.²
- 5.9 The main issues raised in evidence were:
- in response to our question as to why the cap on liability was necessary the Department indicated that this was partly because without a cap, insurance may not be available to ship owners and more importantly perhaps, that this agreement recognises that the current liability limits are too low and by adopting the protocol they will be increased;³
 - concerns were also expressed about the impact of the proposed changes on insurance premiums paid by the myriad of Australian businesses that operate smaller commercial vessels up and down the coasts of Australia. In particular we sought clarification from the Department whether consultation had involved Queensland bareboat owners. In its submission the Department indicated that after our initial hearing it consulted with the Whitsunday Bareboat Owners Association who considered that the implementation of the Protocol will have no effect

1 National Interest Analysis for the *Protocols to amend the Convention on Limitation of Liability for Maritime Claims* p 5

2 Other conventions include the Convention on Hazardous and Noxious Substances (to which Australia is not yet a party) and the International Convention for Civil Liability for Bunker Oil Pollution Damage.

3 Robert Alchin (DTRS), *Transcript of Evidence*, 25 June 2001, TR38 and TR33

on them as they already have coverage higher than the liability limits in the Protocol; and⁴

- we noted that in accepting the Protocol Australia invokes a self-imposed limit on what penalty we can levy on ship-owners, however, we were advised that if Australia did not accept the Protocol ‘a lot of shipowners will decide they are not going to come to Australia’ – a situation that is not in Australia’s interests.⁵

General maritime treaty issues

- 5.10 We also received a submission from Dr Michael White QC, Executive Director of the Centre for Maritime Law at the University of Queensland. Dr White expressed support for the Protocol but raise some wider concerns about the implementation of international maritime treaties into Australia’s domestic law.
- 5.11 Dr White is critical of situations where governments implement legislation before they come into force internationally:
- ... on some occasions legislation is passed by one or more Australian Parliaments in areas of international marine practice and industry where there is no international agreement relating to it.⁶
- 5.12 He also draws attention to a situation where legislation has been enacted which imposes requirements more stringent than those provided for by an international treaty.⁷
- 5.13 Finally, he expresses concern about the construction of one of the provisions of the International Maritime Conventions Legislation Amendment Bill 2001, which seeks to implement the 1996 Protocol. This Bill is currently before the Parliament.⁸
- 5.14 We sought responses to each of these issues from the Department of Transport and the Attorney-General’s Department. Copies of Dr White’s submission and the responses are at Appendix F.

4 Commonwealth Department of Transport and Regional Services, *Submission No. 2 (LLMC)*, p. 1

5 Mr Alchin (DTRS), *Transcript of Evidence*, 25 June 2001, p. TR34

6 Dr Michael White QC (Centre for Maritime Law, University of Queensland), *Submission No. 1 (LLCM Convention)*, p. 1

7 Dr White cites the requirement under the *Protection of the sea (Civil Liability Act 2000)* to require compulsory certification of every ship over 400 tonnes to have liability coverage. He suggests that in this case the Government has acted in advance of international agreement on the *Bunker’s Convention*.

8 Dr Michael White QC (Centre for Maritime Law, University of Queensland), *Submission No. 1 (LLCM Convention)*, p. 3

Conclusion and recommendation

- 5.15 It is widely acknowledged in the maritime industry that inflation has eroded the value of the liability limits currently provided for in the LLMC Convention.
- 5.16 There is also widespread support for the new higher liability limits and the simplified procedure for updating of those limits established in the 1996 Protocol.
- 5.17 In our view it is appropriate that Australia should recognise and be part of a scheme that increases the amount that claimants may recover in the event of a ship accident, while at the same time not placing undue burden on shipowners or salvors.

Recommendation 4

- 5.18 **The Committee supports the proposed *Protocol to the Limitation of Liability for Maritime Claims Convention* and recommends that binding treaty action be taken.**

Withdrawal from and denunciation of ILO Conventions

Proposed treaty actions

- 6.1 This chapter considers two sets of proposed treaty actions:
- the proposed withdrawal of the instruments of ratification for four International Labour Organization (ILO) Conventions (No. 57, 76, 93 and 109) dealing with hours of work on board ship and manning; and
 - the proposed denunciation of two ILO Conventions (No. 15 and 21) dealing with the minimum employment age for trimmers and stokers and the protection of emigrants on board emigrant ships.

Withdrawal from Conventions No. 57, 76, 93 and 109

- 6.2 ILO Conventions No 57, 76, 93 and 109 (dated 1936, 1946, 1949 and 1958 respectively) were intended to regulate working conditions on board ships in order to maximise crew safety and efficiency. They include provisions on hours of work, manning levels, wages and minimum ages for employment.
- 6.3 Although Australia and other countries ratified these conventions, they have not come into force and the ILO has judged that they are unlikely ever to come into force. Accordingly, in August 1999 the ILO invited Australia and other countries to withdraw from these four conventions.
- 6.4 At the same time, the ILO called on member States to consider ratifying Convention No. 180, concerning Seafarers' Hours of Work and the

Manning of Ships, 1996. Ratification of Convention No. 180 is not a pre-requisite for withdrawal.

Denunciation of Conventions No. 15 and 21

- 6.5 Convention No. 15 regulates the employment of trimmers and stokers on coal-fired ships. It no longer has any practical application in Australia, or elsewhere, as trimmers and stokers are no longer employed on ships. Where coal-burning ships are still in use the firing of boilers is mechanised and the occupations to which the Convention applies no longer exist.
- 6.6 Convention No. 21 relates to the protection of emigrants on board emigrant ships. It no longer has any practical application as such vessels are no longer in use and the Convention is no longer applicable to Australian circumstances.
- 6.7 The ILO has 'shelved' Conventions No. 15 and 21, meaning that it neither promotes their ratification nor enforces the reporting obligations contained in the Convention. Moreover, the ILO has invited Australia and other countries to denounce the Conventions.
- 6.8 At the same time, the ILO called on member States to consider ratifying Convention No. 138, concerning Minimum Age for Admission to Employment, 1973 and Convention No. 97, concerning Migration for Employment (Revised), 1949. Ratification of these Conventions is not a pre-requisite for denunciation of Conventions No. 15 and 21.

Evidence presented

- 6.9 We were advised at our hearing, by representatives of the Department of Employment, Workplace Relations and Small Business, that the subject matter of the four conventions from which Australia is proposing to withdraw (dealing with hours of work on board ship and manning) are:

Already covered by International Maritime Organisation conventions, so the fact that we are withdrawing from the hours of work conventions does not mean ... that we do not have laws implementing them or that we are not party to treaties concerning these conventions.¹

1 Jean Ffrench (DEWRSB), *Transcript of Evidence*, 25 June 2001, TR24. Tina Lesses is concerned that these treaty actions may make 'Australia a worse place in which to live and work' (see *Submission No. 1*, p. 2)

6.10 We were also advised that there are essentially two issues which have encouraged the Government to withdraw from these conventions:

- first, the ILO has been reviewing the status of all of its conventions to ensure that its labour codes are up-to-date and relevant. It has, as a result identified a number of obsolete conventions (including the four maritime hours of work conventions) and has invited member States to withdraw from the conventions; and
- second, the Government is keen to support the general process of reviewing the currency of conventions and wishes to encourage wide international support for amendments to the Constitution of the ILO which would allow the ILO itself to abrogate obsolete conventions. In *Report 39* we expressed support for these amendments to the ILO Constitution.²

6.11 The National Interest Analysis notes that the ACTU is of the view that before withdrawing from Conventions No. 57, 76, 93 and 109 the Government should first commit to ratifying Convention No. 180. While the Government is in the process of considering its attitude to ratification of Convention No. 180, ratification is unlikely in the short-term.³

6.12 In relation to the denunciation of Convention No. 21, dealing with emigrants on board ships we were advised that the convention dealt with migrant workers and provided for inspection of emigrant ships to ensure that the rights of the workers were being observed in transit. These days:

... there are a lot more wide ranging human rights conventions covering [people] trafficking that are .. more effective and modern ... The ILO itself now chooses to focus more directly on the actual employment of migrant workers when they arrive in the country. ... [This is] because migrants tend to arrive by air these days and there is not such an issue of their welfare during a long sea voyage.⁴

6.13 A written submission by J. Williams also notes that 'ILO Conventions No. 15 and No. 21, provided they stand solitary, are well past their usefulness.'⁵

2 Jean Ffrench (DEWRSB), *Transcript of Evidence*, 25 June 2001, TR24. See also Joint Standing Committee on Treaties, *Report 39, Privileges and Immunities of the International Tribunal on the Law of the Sea and the Treaties Tabled on 27 February and 6 March 2001*, (April 2001), pp.31-4

3 *National Interest Analysis for ILO Conventions No. 57, 76, 93, 109*, pp.3-4

4 Jean Ffrench (DEWRSB), *Transcript of Evidence*, 25 June 2001, TR29

5 J. Williams, *Submission No. 4*, p.1

- 6.14 The National Interest Analysis notes that at the same time as denouncing Conventions No. 15 and 21, the ILO has invited Australia to consider ratifying Conventions No. 138 and 97. The new conventions concern the abolition of child labour and migration for employment. The Government is not presently pursuing ratification of the new conventions.

Conclusions and recommendation

- 6.15 Earlier this year, in *Report 39*, we supported the principle that outdated ILO Conventions, those being conventions that had lost their purpose or no longer made a useful contribution to attaining the objectives of the ILO, should be removed from the ILO's list of statutes.
- 6.16 The proposals to withdraw from Conventions No. 57, 76, 93 and 109 and to denounce Conventions No. 15 and 21 fall within this category. The actions will help ensure that ILO conventions remain relevant and up-to-date, and will clarify Australia's international obligations.

Recommendation 5

- 6.17 **The Committee supports Australia's withdrawal from:**
- **ILO Convention No. 57, Hours of Work and Manning (Sea), 1936;**
 - **ILO Convention No. 76, Hours of Work and Manning (Sea), 1946;**
 - **ILO Convention No. 93, Hours of Work and Manning (Sea), 1949; and**
 - **ILO Convention No. 109, Hours of Work and Manning (Sea), 1958.**

Recommendation 6

- 6.18 **The Committee supports Australia's denunciation of:**
- **ILO Convention No. 15, Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers, 1921; and**
 - **ILO Convention No. 21, Simplification of the Inspection of Emigrants on Board Ship, 1926.**

- 6.19 Some members of the Committee are not satisfied with the reasons given at page 4 by the Government in the National Interest Analysis (NIA) where it deals with why the request from the ILO to ratify Convention No 180 cannot be done at the same time as the denunciation of two ILO Conventions (No 15 and 21) dealing with the minimum employment age for trimmers and stokers and the protection of immigrants on board immigrant ships. The views expressed by the Government do not appear to be fully developed and, therefore, are not persuasive on their own.
- 6.20 The reasons provided by the Government in the NIA are that it is "... Australian treaty policy and practice to ratify a treaty only when compliance with its provisions can be demonstrated in both law and practice." *Inter alia*, Convention No. 180 requires that no person under the age of 18 years should work at night.
- 6.21 The argument raised in the NIA is that this convention cannot be given effect because there is no provision in Australian law that meets the requirement mentioned above. This reasoning appears flawed in practice, because the relevant government agency advises that treaties that are proposed to be ratified, which come before the Committee that require legislation to give effect to the treaty will have the necessary legislation introduced into Parliament.
- 6.22 The treaty information kit issued by the Department of Foreign Affairs and Trade does not support the view expressed in the NIA. The process suggested in this kit seems to support the proposition asserted above, that legislation would be introduced into parliament to give affect to the treaty if required.
- 6.23 In addition, the reasons for not ratifying Convention 180 mentioned above are also supported by two other grounds in the NIA.
- 6.24 These two further reasons may advance the Government's view as expressed in the NIA. However, little analysis is provided in the NIA to allow some members of the Committee to arrive at a concluded view about whether or not Convention 180 need not be ratified, because it is adequately covered by the conventions to which Australia is a party and / or that it may be superseded by later conventions in 2005.
- 6.25 Therefore, in light of the above, some members of the Committee are of the view that the request by the ILO to ratify the Convention No 180 should receive further investigation and that consideration be given to what action is needed to to allow a proposal for ratification to proceed as soon as practicable.

- 6.26 We note, however, that acceptance of the three new conventions (those being Convention No. 180, Convention No. 138 and Convention No. 97) is not a pre-requisite for the treaty actions we have recommended above.

ANDREW THOMSON MP

Committee Chairman

7 August 2001



Appendix A - Extract from Resolution of Appointment

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



Appendix B - National Interest Analyses

Agreement with Germany on Film Co-Production

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. Australia signed the Films Co-Production Agreement with the Federal Republic of Germany ('the Agreement') on 17 January 2001. Article 9 of the Agreement says that the Agreement shall enter into force when the parties have notified each other that their domestic requirements have been met. It is proposed that Australia provide such advice to the Federal Republic of Germany following tabling in Parliament and consideration by JSCOT.

Date of proposed binding treaty action

2. It is proposed that Australia's advice allowing for entry into force be provided at the expiry of the 15 sitting day tabling period.

Date of tabling of the proposed treaty action

3. 23 May 2001.

Purpose of the proposed treaty action and why it is in the national interest

4. The purpose of the Agreement is to foster cultural and technical development and exchange by facilitating international films co-productions with the Federal Republic of Germany. The Agreement will open up new markets for Australian film and enable a creative and technical

interchange between film personnel. It also has the potential to increase the output of high quality productions through the sharing of equity investment.

Reasons for Australia to take the proposed treaty action

5. The Agreement will help to ensure that an overall balance is achieved in the employment of nationals of both parties in major creative, craft and technical positions related to film co-productions under the Agreement.

6. Australian-German co-productions will gain financial benefits under the Agreement. In Australia, co-productions will be eligible to apply for funding from the Australian Film Commission ('the AFC') and the Australian Film Finance Corporation, and tax concessions on private investment through Divisions 10B and 10BA of the *Income Tax Assessment Act 1936*. In the Federal Republic of Germany, an official co-production is considered a German production for the purposes of official financial support.

Obligations

7. **Article 3 (3)** obliges the competent authorities in Australia and the Federal Republic of Germany to consider proposed co-productions according to their own policies and guidelines and the requirements set out in the Annex.

8. In respect of each film co-production between Australia and the Federal Republic of Germany, the Agreement obliges Australia and the Federal Republic of Germany to consider the provision of all the benefits that are or may be accorded in Australia or the Federal Republic of Germany to national films to:

- Australian producers and German producers (**Article 3 (1)**)
- producers from countries with which Australia or the Federal Republic of Germany has a similar treaty and who are co-production partners in the particular film (**Article 5**).

9. Once a co-production film is approved, **Article 6** requires Australia, subject to its laws, to facilitate entry, free of import duties and taxes of cinematographic equipment for the making of such a film, and to permit German citizens or citizens of the country of any third co-producer to enter and remain in Australia for the purpose of making or exploiting a co-production film. The Federal Republic of Germany is under the same obligation under **Article 6** in corresponding circumstances.

10. **Article 7** establishes the "Mixed Commission", comprised of equal numbers of Australian and German officials. The Mixed Commission will meet every two years to supervise and review the working of the Agreement. It may also be convened at the request of Germany or Australia and shall meet within six months of such a request.

11. The Annex, which forms part of the Agreement (**Article 8**), specifies the procedural requirements for making co-production films and sets out the financial liability of each co-producer for production costs.

Implementation

12. No new legislative measures are required to implement the obligations under the Agreement.

13. The *Income Tax Assessment Act 1936* would allow for tax concessions, and the *Migration Act 1958* and regulations would allow for entry into and temporary residence in Australia of co-production teams as envisaged by the Agreement.

14. The *Customs Tariff Act 1995*, the *Sales Tax Assessment Act 1992* and the *Sales Tax Imposition (Customs) Act 1992* impose duties and sales tax on equipment that is imported into Australia. The *Customs Act 1901* provides for the delivery of goods without formal Customs entry and without payment of the duty, provided a security or undertaking is established. No change is required in these legislative instruments to allow for the temporary admission, free of import duties and tax, of cinematographic equipment for the making of a co-production film as envisaged in the Agreement.

15. The Agreement will be administered by the AFC on behalf of the Commonwealth, as part of the Films Co-production Program.

16. There will be no change to the existing roles of the Commonwealth and States / Territories as a result of implementing the treaty action.

Costs

17. The costs to Australia of complying with the Agreement will include those of attending meetings of the Mixed Commission. These costs will be borne by the AFC.

18. The Australian Film Finance Corporation is the main source of funding for Australian films and co-productions and will fund proposed Australia / Federal Republic of Germany co-productions from existing funds. Co-productions funded by private investment on which tax concessions are claimed under Divisions 10B or 10BA of the *Income Tax Assessment Act 1936* will be a cost in terms of revenue forgone. In recent years there has been negligible private investment in co-productions under these divisions.

Consultation

19. The States and Territories have been informed of the proposed Agreement with the Federal Republic of Germany through the Commonwealth-States-Territories Standing Committee on Treaties.

20. The AFC's Industry Panel, consisting of representatives of the peak industry bodies and trade unions, including the Australian Screen Directors' Association, the Screen Producers' Association of Australia, the Australian Writers' Guild, the Australian Guild of Screen Composers, and the Media Entertainment and Arts Alliance, was consulted at all stages of the negotiations to ensure that the Agreement was in line with current industry practice and would provide potential benefits to the Australian industry. The Associations referred to are federal organisations and consult widely across all States and Territories. Information about the development of agreements is regularly updated in the Australian Film Commission's public documents, which invite comment.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

21. The Agreement does not provide for the negotiation of future legally binding instruments. The Agreement is also silent as to amendment. In the absence of an amendment provision, Article 39 of the Vienna Convention on the Law of Treaties would apply to allow amendment by agreement between the Parties.

Withdrawal or denunciation

22. **Article 10 (1)** specifies that the Agreement is made for an unlimited period of time. Either Party may give written notice of termination by 30 June in any year in which case the Agreement shall terminate on 31 December of that year. However, even when the Agreement has been terminated the Agreement shall continue as if in force in respect of any film made under the Agreement prior to termination (**Article 10 (2)**).

Contact details

Film and New Media Branch

Department of Communications, Information Technology and the Arts

Agreement on Social Security with New Zealand

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. It is proposed that Australia enter into a new Social Security Agreement with New Zealand.
2. When this Agreement enters into force, the Agreement between the Government of Australia and the Government of New Zealand on Social Security of 19 July 1994 will terminate. This termination will be subject to the provisions of Article 22.3 of the current Agreement and Article 26 of the new Agreement. Both these Articles preserve the entitlements of those persons currently receiving benefits under the current Agreement.

Date of proposed binding treaty action

3. The Agreement was signed on 28 March 2001.
4. In accordance with Article 28(1) the Agreement shall enter into force on 1 July 2002 provided that the Parties have notified each other by notes exchanged through the diplomatic channel that all matters necessary to give effect to this Agreement have been completed; otherwise it shall come into effect on the first day of the second month following the date of the last such notification.

Date of tabling of the proposed treaty action

5. 23 May 2001.

Purpose of the proposed treaty action and why it is in the national interest

6. The Agreement provides for access to Australian and New Zealand social security retirement and disability pensions. The Agreement is similar to Australia's Social Security Agreements with other countries. Under the Agreement residents of Australia and New Zealand will be able to move between Australia and New Zealand with the knowledge that their benefit rights are recognised in both countries.
7. The Agreement will bring economic and political benefits to Australia. Under the Agreement Australia and New Zealand will share financial responsibility for the provision of relevant social security benefits based on the proportion of working life residence spent by a person in each country. Australia currently bears a disproportionate cost in providing benefits under the present Agreement as New Zealand does not pay its pensions into Australia. Instead New Zealand partly reimburses Australia for payments made to former New Zealand residents. The new Agreement will address this disparity by ensuring that each country contributes to

the pension income of individuals based on their period of residence in the respective countries and by restricting the range of payments covered.

Reasons for Australia to take the proposed treaty action

8. Australia's network of bilateral social security agreements improves access to income support for people whose adult lives are split between Australia and the other country which is a party to the Agreement. Most people benefiting from the agreements are age pensioners. International social security agreements also improve income support coverage for people with disabilities and some carers.
9. Australia and New Zealand have had agreements on social security in place since the 1940s. The original Agreement and all succeeding agreements have been based on the "host country" principle which means the country in which a person resides takes responsibility for their social security entitlements.
10. The current Agreement has operated since 1994. Australia and New Zealand have benefited from the free flow of people across the Tasman which the current Agreement, together with trans-Tasman migration arrangements, have facilitated. However, the combination of the effects of the current Agreement and immigration policy vis-à-vis New Zealanders created an imbalance in relation to costs incurred by each country. The reimbursement arrangements in place to address this imbalance have proved to be increasingly unworkable due to their administrative complexity. In February 1999, New Zealand and Australia undertook a detailed review of social security arrangements, with a view to developing a sustainable long-term solution to the current problems created by the imbalance. As a result of this review it was agreed that a new Agreement on Social Security be negotiated.
11. The new Agreement with New Zealand follows the model of Australia's other ten agreements on social security. A key element in the new Agreement and other social security agreements Australia has (including with Italy, Canada, Spain, Malta, the Netherlands, Ireland, Portugal, Austria, Cyprus and Denmark) is the sharing of responsibility between the partners in providing adequate social security coverage for former residents of their country. The new Agreement coordinates the social security schemes of both countries and, at the same time, continues to give Australians and New Zealanders flexibility to live and work in either Australia or New Zealand. Unlike other agreements the Agreement with New Zealand applies not only to permanent residents and former permanent residents who migrated to Australia but also to persons who reside or resided in Australia using trans-Tasman travel arrangements.
12. For Australia, the Agreement will cover access to age pensions, disability support pensions (DSP) for the severely disabled and carer payments in respect of partners of persons who receive DSP. For New Zealand, it covers New Zealand superannuation, veterans' pensions and invalid benefits. The Agreement provides that both countries will share the financial responsibility for providing these benefits, based on the proportion of working age residence a

person has had in each country. This means that a person may be eligible for benefits from both countries if they lived in both countries during their working life and meet other eligibility criteria.

13. The new Agreement brings economic and political benefits to Australia through a more equitable sharing of the costs of benefits paid to former New Zealand residents living in Australia. At the same time the Agreement contributes and reaffirms the very positive and important role that freedom of trans-Tasman movement and a single Australia-New Zealand labour market play in the development of Closer Economic Relations between Australia and New Zealand.

Obligations

14. The Agreement places equivalent obligations on both Australia and New Zealand. Article 2 sets out for both countries the scope of the social security benefits covered by the Agreement as described in paragraph 12 of this analysis.
15. Article 3 describes the group of people to whom the Agreement applies. It provides that this Agreement shall apply to any person who is or has been an Australian resident or New Zealand resident. Article 4 is a statement of principle, common to all bilateral Social Security Agreements. It ensures that all persons to whom this Agreement applies to shall be treated equally in regard to rights and obligations derived from the Australian or New Zealand legislation or the Agreement.
16. Article 12 establishes the circumstances in which periods of residence in New Zealand can be used to satisfy the minimum residence requirements for an Australian benefit stipulated in the *Social Security Act 1991*. Under Article 12, the claimant is able to add these “deemed” periods to actual periods of residence in Australia in order to qualify for an Australian benefit in Australia. Article 8 imposes a similar obligation on New Zealand to treat the relevant periods of residence in Australia as periods of residence in New Zealand.
17. The method of calculating the rate of Australian benefits is set out in Article 13. This Article obliges Australia, when calculating a person’s entitlement, to modify the method of calculation under the *Social Security Act 1991*. The principle of the Agreement as put into effect by this Article is that the two countries contribute to the pension to the maximum level that a person would be entitled to in the country in which they reside. This Article and the equivalent Article relating to New Zealand (Article 10) ensures that the country of former residence pays a proportion of the pension based on the period lived in that country. The country of residence tops that pension up to the level that the claimant would otherwise be entitled to.
18. Article 16 obliges Australia and New Zealand to consult where there is disagreement on individual residency cases.
19. Article 17 and Article 18 oblige the two countries to exchange information on individual customers to ensure that they receive the correct entitlement from both countries and to ensure any information held by either country on customers is treated appropriately. Article 17 enables the lodgement of social security claims, notices or appeals in either country in

accordance with the administrative arrangements that are provided for in Article 21. Article 18 specifies how information on legislative change, technical changes and information on claim assessments will be held and transmitted.

20. Article 20 reinforces the controls in Article 17 and 18 by stating that, regardless of the substance of those two articles, neither country will be obliged to do anything that would not otherwise be legal. This reinforces the level of control needed to ensure that when dealing with individual information privacy and appropriate use are primary considerations.
21. Article 19 provides a mechanism by which both countries will recover overpayments of benefits caused by the subsequent grant of the other country's benefit, with arrears.
22. Article 24 sets out the means by which any disputes with regard to the interpretation or application of the terms of the Agreement are to be resolved. All differences are to be settled in the first instance by the competent authorities of both Parties (for Australia the competent authority is the Secretary of the Department of Family and Community Services). Article 24 also provides for the Parties to consult on matters in dispute at the request of either Party. If the dispute is not able to be resolved through consultation, Article 24 provides for the establishment of an arbitral tribunal. The decision of the tribunal will be final.

Implementation

23. A Schedule will be added to the Social Security (International Agreements) Act 1999 that will contain the full text of the Agreement. The regulation-making powers contained in Sections 8 and 25 of that Act will be used to implement the Agreement. Article 21 specifies that the Agreement will be implemented in accordance with separate administrative arrangements. These administrative arrangements are currently under negotiation and will be finalised by September 2001.

Costs

24. Over the forward estimates period (to July 2005), savings in Government outlays of around A\$ 93.9 million are expected as a result of implementation of the new Agreement. Under the existing Agreement, (which will terminate on entry into force of the new Agreement) Australia has borne the major costs of payments to former New Zealand residents living in Australia. Under the new Agreement, these costs are shared by both countries. It is expected that increased savings will also result from the narrower scope of the new Agreement.
25. Departmental costs of A\$ 14.5 million across the forward estimates period represent the costs of the implementation of the Agreement, including the costs of changes required to administrative processes including system changes, new forms, staff training and new work flows.

Consultation

26. State and Territory Governments were advised of the proposed new Agreement through the Commonwealth-States-Territories Standing Committee on Treaties. No comments have been received.
27. All publicity materials on new bilateral social security arrangements, announced by the Prime Ministers of Australia and New Zealand on 26 February 2001, included information on the new Agreement, its main provisions and a probable date of implementation.
28. Unlike migrants from other countries New Zealanders are not represented in Australia by specific community organisations. However, the views of major welfare organisations in Australia were sought but no comments were received. A list of these organisations is attached.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

29. The Agreement does not specifically provide for the negotiation of any future legally binding instruments. However Article 28.2(b) ensures the Agreement will continue in force until it is replaced with a new Agreement (see paragraph 30) and Article 25 contains provisions for amending the Agreement with the consent of both Parties.

Withdrawal or denunciation

30. Article 28 enables either Party to terminate the Agreement with relevant notice, while preserving the rights of those who have claimed or are receiving benefits at the time of termination.
31. Article 28 (2) specifies that the Agreement shall remain in force until either:
 32. the expiration of 12 months from the date on which either Party receives from the other the written notice through the diplomatic channel of the intention of either Party to terminate the Agreement; or
 33. the date of entry into force of a later treaty between the Parties relating to the same subject matter as this Agreement, and which the Parties intend shall govern the same subject matter in place of this Agreement .
34. Article 28(3) ensures that the Agreement shall continue to have effect in relation to all persons who:
 - are in receipt of benefits; or
 - have lodged claims for, and would be entitled to receive benefits.

Contact details

New Zealand Section
International Branch
Department of Family and Community Services

ATTACHMENT

The Welfare Organisations consulted were:

Mr Shawn Boyle	Ms Shirley Watters
Executive Director	Director
Western Australian Council of Social Service	Queensland Council of Social Service Inc

Ms Pam Simmons	Ms Dimity Fifer
Executive Officer	Chief Executive Officer
South Australian Council of Social Services	Victorian Council of Social Service

Mr Daniel Stubbs	Ms Linda Frow
Director	Senior Policy Officer
ACT Council of Social Service Inc	NSW Council of Social Service

Ms Sandra Koller	Ms Suzanne Varghese
National Welfare Rights Network	Co-ordinator
NSW	Welfare Rights Centre, Queensland

Ms Fiona McGuinness	Ms Carolyn Stuart
Coordinator	Chairperson
Welfare Rights Centre SA	Welfare Rights Centre, ACT

Ms Dale Nelson	Mr Michael Raper
Community Education Worker	President
Welfare Rights Unit Inc, Victoria	Australian Council of Social Services

Mr Albert Schluter OAM	Mr Nick Xynias OAM BEM
Chairperson	Chairperson
Ethnic Communities Council of Tasmania	Federation of Ethnic Communities' Councils of

	Australia Inc
Ms Beryl Mulder	Father Nicolas Frances
President	Executive Director
Multicultural Council of the Northern Territory	Brotherhood of St Laurence
Ms Irene Gibbons	Mr Kevin Byrne
Executive Director	Executive Director
Carers Association of Australia	Disability Council of NSW
Mrs Edna Russell	Ms Phillipa Smith
Secretary	Chief Executive Officer
Australian Pensioners and Superannuants Federation	Association of Superannuants Funds of Australia Ltd
Chief Executive Officer	Ms Norah McGuire
Australian Pensioner's and Superannuants's Federation	President
	Combined Pensioners & Superannuants Association
Ms Betty Hounslow	Ms Jane Alley
Director	Executive Director
Australian Council of Social Services	Northern Territory Council of Social Services
Ms Elizabeth De Vries	Chief Executive Officer
Executive Director	NSW Council of the Ageing
Tasmanian Council of Social Services	

Agreement on the Conservation of Albatrosses and Petrels

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. The proposed treaty action is the ratification of the Agreement on the Conservation of Albatrosses and Petrels (the Agreement). The final text of the Agreement was adopted in Cape Town, South Africa, 29 January - 2 February 2001.

Date of proposed binding treaty action

2. As soon as practicable after 7 August 2001.

3. At the time of tabling, the Agreement has not yet been signed. It is proposed that the Agreement be signed at an official ceremony in Canberra, tentatively scheduled for 20 June 2001.

4. In accordance with Article XVI the Agreement shall enter into force on the first day of the third month after at least five Range States or regional economic integration organisations have signed without reservation in respect of ratification, acceptance or approval, or have deposited their instruments of ratification, acceptance or approval.

Date of tabling of the proposed treaty action

5. 23 May 2001

Purpose of the proposed treaty action and why it is in the national interest

6. Albatrosses and petrels are highly migratory and Australia is a Range State for twenty-one albatross and six petrel species (all species are listed in Annex 1 of the Agreement). Albatrosses and petrels are amongst the most threatened groups of birds in the world and the Convention on the Conservation of Migratory Species of Wild Animals (CMS Convention) recognises all albatross species as threatened or endangered. Albatrosses and petrels are primarily threatened by incidental mortality associated with oceanic longline fishing activities. Other threats include ingestion of plastics and other marine debris, predators, changes to breeding habitats, pollution and disease.

7. Australia has promoted the development of this Agreement which seeks to coordinate and harmonise conservation actions undertaken in both the terrestrial and marine environment internationally to contribute significantly to the conservation of albatrosses and petrels and their habitats in the Southern Hemisphere. The Agreement brings international conservation standards

and actions in relation to albatrosses and petrels into line with those currently in place domestically in Australia, and as such there is no additional cost or obligations arising from the proposed treaty action.

Reasons for Australia to take the proposed treaty action

Background

8. The CMS Convention is a multilateral environmental Convention which has been in force generally since 1 November 1983 and to which Australia has been a Party since 1 September 1991. The CMS Convention aims to conserve terrestrial, avian and marine species that migrate across national jurisdictional boundaries or between national territorial waters and the high seas. The CMS Convention compels member states to protect migratory species of wild animals that live within or pass through their national jurisdictional boundaries. The CMS Convention establishes a framework for member states to assess and then list the conservation status of migratory species.

9. In 1997, because of their declining populations, Australia successfully proposed the listing of all Southern Hemisphere albatross species on the Appendices of the CMS Convention. Listing under Appendix II of CMS obliges Parties to the Convention to 'endeavour to conclude agreements' promoting conservation and management action on the listed species and to promote, cooperate in, and support research relating to those species.

10. At the 6th Conference of Parties to the CMS Convention in 1999 a resolution was passed calling upon all Range States for albatrosses to participate in the development of an Agreement to achieve and maintain a favourable conservation status for albatrosses and petrels. Additionally, the resolution requested that Australia initiate such discussions with all Range States to commence work towards this Agreement. Range States are defined as any State that exercises jurisdiction over any part of the range of albatrosses or petrels, or a State, flag vessels of which are engaged in taking, or which have the potential to take, albatrosses or petrels.

11. The first meeting to discuss the development of an agreement on the conservation of albatrosses and petrels was held in Hobart, Australia from 10 to 14 July 2000. The Hobart meeting made substantial progress towards the development of a draft Agreement and clarified a number of other important issues relating to albatross and petrel conservation. At the meeting seven petrel species were added because of their shared characteristics with albatrosses, including their threatened status. Additionally, many of the conservation actions undertaken for albatrosses will directly benefit petrel species as well. Formal negotiations were held in Cape Town, South Africa on 29 January - 2 February 2001, during which the final text of the Agreement was adopted.

12. There is significant ecological benefit gained by establishing an albatross and petrel conservation agreement. The CMS Convention integrates marine, terrestrial and species-specific conservation actions, thus providing this Agreement, through its relationship with the CMS Convention, with the ability to develop land-based and marine-based conservation measures and actions for targeted species. The Agreement also recognises that it will be essential to establish close, effective working relationships with a number of other international instruments that contain actions to minimise threats to seabirds. These instruments include Convention on the

Conservation of Antarctic Marine Living Resources (CCAMLR), Convention for the Conservation of Southern Bluefin Tuna (CCSBT), and the Food and Agriculture Organization (particularly in relation to their International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries).

13. The objective of the Agreement is to achieve and then maintain a favourable conservation status for albatrosses and petrels. The conservation status will be taken as favourable when all of the following conditions are met:

- i) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis;
- ii) the range of albatrosses and petrels is neither currently being reduced, nor is likely to be reduced, on a long-term basis;
- iii) there is, and will be in the foreseeable future, sufficient habitat to maintain populations of albatrosses and petrels on a long-term basis; and
- iv) the distribution and abundance of albatrosses and petrels approaches historic coverage and levels to the extent that potentially suitable ecosystems exist and is consistent with wildlife management principles.

14. The Agreement will achieve this through:

- focusing clearly and unequivocally on albatross and petrel populations on a global level, as a threatened group of birds, the full range of threats they face, and mechanisms for their conservation;
- facilitating a comprehensive understanding of albatross and petrel status, susceptibility and threats, as well as establishing valid and verifiable relationships between these categories;
- establishing an internationally agreed plan of action that details specific, immediate actions, which will conserve albatrosses and petrels more effectively;
- providing a framework for collecting, analysing and verifying data on albatrosses and petrels and establishing similar standards and methodologies for producing and making that data available around the world;
- facilitating the free flow of information between Range States; and
- establishing benchmarks at a species level.

15. With this kind of scientifically verifiable data, Parties to the Agreement will be better placed to cross reference with other international organisations concerned about seabird mortality and to set priorities within their own programs.

16. From a domestic perspective, the Agreement will also bring international conservation standards and actions into line with those currently in place domestically in Australia.

17. Australia has recently enacted regulations for the Australian longline fishing industry operating in areas known to have high levels of seabird interaction. The *Fisheries Management Amendment Regulations 2001 (No.1)* came into effect on 7 February 2001. The regulations require that all tuna longliners operating in areas of high seabird interaction set their longlines at night, use thawed baits on all hooks and use an approved "tori pole" apparatus (bird scaring device). Additionally, all pelagic tuna longline, demersal longline and dropline vessels are prohibited from discharging offal during line setting and are required to manage offal discharge during line hauling to reduce the attractiveness of the fishing vessel to the seabirds.

18. Following the listing of the incidental catch (or by-catch) of seabirds during oceanic longline fishing operations as a key threatening process, a Threat Abatement Plan (TAP) for the Australian Fishing Zone was prepared and has been in operation since 1998. The TAP prescribes an overall reduction of seabird by-catch and aims to achieve its objectives through the development and implementation of appropriate and effective mitigation measures, through the education of the fishing industry and the public, and through the collection of information to improve the knowledge of seabird-longline fishery interactions.

19. Australia also has a Recovery Plan for Albatrosses and Petrels which aims to ensure recovery of these threatened species in the wild and to facilitate critical research into the population status, biology and threats faced by albatrosses and petrels. A number of research projects, including genetic profiling of albatross populations and population monitoring are ongoing and provide valuable information on the target species, which could greatly benefit international understanding of these species.

20. The Agreement has been an Australian led initiative since 1997. Australia has played a significant role in the development and finalisation of this Agreement. For Australia not to ratify the Agreement would be inconsistent with this role. Additionally, Australia would be unable to contribute to, and subsequently benefit from, the harmonisation of information, data and conservation standards developed internationally under the Agreement. A decision not to ratify the Agreement would limit Australia's ability to continue to be a world leader in seabird conservation.

Obligations

21. The objective of the Agreement is to achieve and maintain a favourable conservation status for albatrosses and petrels. Parties are obliged to take measures, both individually and collectively, to achieve this objective.

22. The general conservation measures that Parties must undertake to achieve the objectives of the Agreement are outlined in Article III. This Article prescribes that Parties must act to conserve and restore albatross and petrel habitats, including the control non-native species and the implementation of measure to prevent or mitigate adverse effects on the conservation status of the species. Furthermore, Parties must, unless exempt, prohibit the taking of, or harmful interference with, albatrosses and petrels, their eggs or their breeding sites. Other key conservation measures require that Parties initiate research, training and education programs and exchange information with other relevant conservation programs. A fundamental element of the Agreement is capacity

building. Article IV requires Parties to give priority to capacity building through funding, training, information and institutional support.

23. Cooperation between Parties (Article V) is an essential component of the Agreement. Under this Article, Parties must cooperate to develop data collection, analysis and exchange systems as well as training and education programs. Parties must also cooperate to exchange information, knowledge and experience regarding adoption and enforcement of legislative and other management approaches to the conservation of albatrosses and petrels.

24. The Agreement also specifies obligations concerning the administration of the Agreement. For example, Article VII requires all Parties to designate an Authority and a Contact Point to undertake, monitor and control all activities related to this Agreement.

25. Generally, the Parties to the Agreement are to make their decisions by consensus, unless provided for otherwise in the Agreement (ie. amendment of its annexes). In the event that consensus cannot be achieved, decisions are to be adopted by a two-thirds majority of the Parties present and voting. Under Article VIII, each Party to the Agreement is entitled to one vote.

26. Article IX explicitly provides for the establishment of an Advisory Committee whose role it is to provide expert advice and information to Parties and the Secretariat. Each Party is entitled to one representative on the Committee. This Article outlines the responsibilities of the Committee.

27. The Secretariat is established under Article VIII. Australia undertook to act as Interim Secretariat until a permanent Secretariat is established at the first Meeting of the Parties. Additionally, Australia is the Depositary for the Agreement (provided for under Article XIX). As Depositary, Australia is responsible for transmitting certified copies of the English, French and Spanish versions of the Agreement to all Range States and the Secretariat. The Depositary must also notify Range States and the Secretariat of signatures, instruments of ratification, acceptance, approval or accession, the date of entry into force of the Agreement, any reservation or denunciation.

28. The settlement of disputes arising under the Agreement is addressed in Article XIV. This Article provides for the establishment of a technical arbitration panel for disputes of a technical nature. All other disputes in relation to the interpretation or application of the Agreement are subject to the provisions of Article XII of the CMS Convention.

29. The Agreement sets out the actions that the Parties shall progressively undertake in relation to albatrosses and petrels, consistent with the general conservation measures specified in Article III of the Agreement and in the Action Plan (Annex 2). In summary, these actions include:

- species conservation, including emergency measures, re-establishment schemes and control of non-native species;
- habitat conservation and restoration, which includes both land-based conservation and conservation of marine habitats;
- management of human activities, including impact assessment, incidental mortality in fisheries, pollutants and marine debris and disturbance in both marine and terrestrial habitats;

- research and monitoring, both at sea and on land for the collection, and improvement, of verifiable data on albatross and petrel populations;
- collation of information;
- education and public awareness; and
- implementation, including the development of conservation guidelines.

30. Parties are also obliged to support the implementation of the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (Article III) which complements the objectives of this Agreement.

31. The relationship of this Agreement with other international instruments and the obligations of Parties under those international instruments are recognised in various Articles of the Agreement and the Action Plan. Article XI prescribes that Parties shall promote the objectives of this Agreement and develop and maintain coordinated and complementary working relationships with all relevant international, regional and sub-regional bodies. Article XIII provides that the rights and obligations of Parties arising under other international instruments are not to be affected by this Agreement. This Article makes specific reference to the Antarctic Treaty, United Nations Convention on the Law of the Sea (UNCLOS) and CCAMLR.

Implementation

32. It is not anticipated that implementation of the Agreement will require changes to domestic legal or policy frameworks. Australia already has in place measures to protect its albatross and petrel populations. Twenty-one of the 24 species of albatrosses worldwide can be found within the Australian Fishing Zone (AFZ). Of these 21 species, four species have been listed under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) as nationally endangered and a further 13 species have been listed as nationally vulnerable. Additionally, all albatross breeding islands within the AFZ are protected according to their status as Nature Reserves, National Parks or World Heritage Areas.

33. In 1995, Australia listed the incidental catch (or by-catch) of seabirds during oceanic longline fishing operations as a Key Threatening Process on Schedule 3 of the *Endangered Species Protection Act 1992* (now included under the EPBC Act) and, accordingly, a *Threat Abatement Plan for the Incidental Catch (or by-catch) of Seabirds during Oceanic Longline Fishing Operations* (TAP) has been in operation since 1998. The TAP applies to the AFZ and prescribes an overall reduction in seabird by-catch.

34. A draft *Recovery Plan for Albatrosses and Giant Petrels* has also recently been prepared by the Department of the Environment and Heritage. The overall objective of the Recovery Plan is to minimise the threats due to human activity to albatrosses and giant petrels to ensure their recovery in the wild and to acknowledge the central role of the TAP in eliminating the principal threats to albatrosses and petrels. The Recovery Plan also prescribes a range of objectives, actions and criteria linked to the conservation of these birds. The EPBC Act imposes obligations on persons

(particularly Commonwealth agencies) not to take any action that contravenes a threat abatement plan or a recovery plan.

35. Effective management of our domestic fishing fleets complements the conservation and management actions prescribed under the TAP. Domestic longline fishing activities are regulated by the Australian Fisheries Management Authority (AFMA). AFMA have recently introduced new fishing regulations to ensure albatrosses and petrels are further protected from domestic longline fishing activities. These regulations have been in force since 7 February 2001.

36. The Australian fishing industry is also taking domestic action to enhance the conservation status of albatrosses and petrels. The industry is actively participating in the development of novel and effective techniques to reduce seabird by-catch in the AFZ and is bound by the regulations established by AFMA.

37. Australia is a Range State for the one albatross species on Appendix I, ten of the twelve species included on Appendix II and six of the seven petrel species on Appendix II. Existing legislation, namely the EPBC Act (formerly the *National Parks and Wildlife Conservation Act 1975*, the *Whale Protection Act 1980* and the *Endangered Species Protection Act 1992*), together with State and Territory legislation, enables Australia to give effect to its domestic obligations. The Agreement will serve to strengthen domestic protection for albatrosses and petrels whilst imposing no further onus on the industry as all actions to mitigate their impact are already included in the TAP.

38. As the Interim Secretariat for the Agreement, Australia is responsible for developing an indicative secretariat budget and options for a scale of contributions for circulation to prospective Parties for consideration and consultation. Australia is also required to organise the first Meeting of the Parties, consult with all prospective Parties to the Agreement on issues to be canvassed at the first Meeting of the Parties and develop various supporting documents to be considered by the meeting.

Costs

39. Australia already has a strong protection and conservation management regime in place for albatrosses and petrels. It is not anticipated that the implementation of this Agreement will require any domestic agencies or management arrangements to be put in place and therefore no additional costs in this regard are anticipated.

40. All participants at the recent Cape Town meeting agreed that the cost of establishing and maintaining a Permanent Secretariat should be kept to a minimum and Australia, in its role as Interim Secretariat, will endeavour to explore cost saving mechanisms in preparation for the first Meeting of the Parties.

41. If Australia is one of the first five Range States to ratify and participate in the first Meeting of the Parties, it will have the opportunity to influence decisions relating to the budget and scale of contributions to ensure the scale is fair and does not impose an unnecessary burden on Australia.

Consultation

42. Extensive national consultation has been conducted throughout the listing of albatrosses and petrels on the Appendices of the CMS Convention and the subsequent development of the Agreement with Commonwealth Ministers, State and Territory Ministers, non-government and environmental organisations, and the fishing industry. Additionally, to facilitate ease of access to relevant information, a web site was established which provided updated information, the text of the Agreement and reports of meetings.

43. With the support of Commonwealth Ministers with a portfolio interest in this treaty action, the Minister for the Environment and Heritage wrote to his counterparts in the States and Territories seeking their views on the addition of albatrosses in 1997 and the addition of petrels to the Appendices of the CMS Convention in 1999. A favourable response was received from all jurisdictions. Recently the Minister wrote to State and Territory Environment Ministers to highlight the success of the final negotiation meeting on the Agreement and to provide final copies of the Agreement text and meeting report.

44. State and Territory Environment Ministers have also been kept fully informed of the progress of the development of the Agreement through the Australian and New Zealand Environment and Conservation Council, where the Agreement was a long-standing agenda item, and through the Commonwealth-State-Territory Standing Committee on Treaties.

45. The development and finalisation of the Agreement was also strongly supported by non-government conservation and environmental organisations, including the Humane Society International, the Australian Conservation Foundation, and the Australian Marine Conservation Society.

46. Extensive consultation was undertaken with the fishing industry in the development of the TAP, and continues during its implementation. Representative fishing industry groups supported the previous listing of albatross species and the inclusion of the seven petrel species on the Appendices of the CMS Convention.

47. Regular consultation was also conducted on the development of the Agreement with the fishing industry through the Australian Seafood Industry Council (ASIC), AFMA Management Advisory Committees, the East Coast Tuna Boat Owner's Association, the Tuna Boat Owners Association of Australia, the South East Non-Trawl Association and the Western Australian Pelagic Longline Association. Both draft and final copies of the Agreement text were provided to these peak organisations, allowing opportunity to comment.

48. The ratification of the Agreement will impose no further onus on the industry as all actions to mitigate their impact are already included in the TAP. Ratification provides an opportunity for measures to be implemented internationally reflecting those already in place domestically.

Future treaty action: amendments, protocols, annexes, other legally binding instruments

49. Article XII provides that the Agreement may be amended at any ordinary or extraordinary Meeting of the Parties. An amendment to the Agreement, other than an amendment to its annexes, shall be adopted by a two-thirds majority of the Parties present and voting. Amendments enter into force for accepting Parties on the thirtieth day after the date on which two-thirds of the original Parties to the Agreement have deposited their instruments of acceptance.

50. Any additional annex or amendment to an annex shall be adopted by a two-thirds majority of the Parties present and voting and shall enter into force for all Parties on the ninetieth day after the date of its adoption by the Meeting of the Parties, except for Parties that have entered a reservation in this regard.

51. Any amendment to the Agreement or its annexes will constitute a separate treaty action and be subject to the usual domestic treaty making process including the tabling of a National Interest Analysis.

Withdrawal or denunciation

52. Article XVIII of the Agreement provides that a Party may denounce this Agreement by written notification to the Depositary at any time. The denunciation shall take effect twelve months after the date on which the Depositary has received the notification.

Contact details

Wildlife Scientific Advice

Wildlife Australia

Environment Australia

Protocols to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. It is proposed that Australia consent to be bound by the Protocol of May 1996 to amend the Convention on Limitation of Liability for Maritime Claims (the 1996 Protocol) through lodgement of an instrument of accession with the Secretary-General of the International Maritime Organization (IMO), in accordance with Article 10 of the 1996 Protocol.
2. Article 11 of the 1996 Protocol provides that it shall enter into force generally ninety days following the date on which ten States have expressed their consent to be bound by it. As at 30 April 2001, four States¹ had expressed their consent to be bound. It is not possible to predict when ten States will have expressed their consent.

Date of proposed binding treaty action

3. It is proposed that Australia consents to be bound by the 1996 Protocol through lodgement of an instrument of accession with the Secretary-General of IMO as soon as practicable after Australia's domestic requirements for entry into force have been met, including amendments to the *Limitation of Liability for Maritime Claims Act 1989*.

Date of tabling of proposed treaty action

4. 23 May 2001

Purpose of the proposed treaty action and why it is in the national interest

5. The 1996 Protocol amends the 1976 Convention on Limitation of Liability for Maritime Claims (the LLMC Convention) to which Australia has been a Party since 1991. The LLMC Convention allows a shipowner or salvor to limit the total amount of damages they can be required to pay for damages caused by the ship, the shipowner or the salvor in accordance with limits set out in the LLMC Convention. The 1996 Protocol increases the liability limits that apply to a shipowner or a

¹ Russian Federation, United Kingdom, Finland and Norway.

salvor arising from the operation of a ship or salvage operations and establishes a simplified procedure for future updating of those liability limits.

6. While it is important to provide limits to liability so that a shipowner or salvor is not exposed to unlimited liability in cases of claims to which the LLMC Convention applies, there is also a need to provide for reasonable compensation for a party that suffers damage as a result of an incident involving the ship or salvage operations. The amendments to the liability limits proposed by the 1996 Protocol will increase the existing limits to take account of the erosion of the value of existing limits by inflation.

Reasons for Australia to take the proposed treaty action

7. The 1996 Protocol amends the LLMC Convention to provide for enhanced compensation and to establish a simplified procedure for updating the limitation amounts applicable under the Convention. The LLMC Convention and 1996 Protocol, upon its entry into force, shall together constitute a single instrument as between the Parties to the Protocol.

BACKGROUND

8. The LLMC Convention established uniform rules relating to limitation of liability for maritime claims made against shipowners and salvors.

9. Under the LLMC Convention, persons entitled to limit liability are:

- (a) shipowners, as defined in Article 1(2) to mean the owner, charterer, manager and operator of a seagoing ship;
- (b) salvors, as defined in Article 1(3) to mean any person rendering services in direct connection with salvage operations; and
- (c) any such person for whose act, neglect or default the shipowner or salvor is responsible (Article 1(4)).

10. The LLMC Convention sets out rules governing availability of claims, the exclusion of claims and conduct barring limitation of claims. It also includes formulas for calculating limits of liability and identifies the unit of account on which the calculations are based.

The 1996 Protocol to amend the LLMC Convention

11. In recognition that the liability limits in the LLMC Convention had been eroded by inflation, a diplomatic conference prepared the 1996 Protocol to provide for enhanced compensation and to establish a simplified procedure for updating the limitation amounts.

12. Both the LLMC Convention and the 1996 Protocol use the same method of calculating liability limits. For passengers, the liability limit is based on the number of passengers the ship is certified

to carry; in other cases, the liability limit depends on the gross tonnage of the ship. The following three tables compare the mode of calculating liability limits (expressed in terms of “Units of Account”²) for ships in both the LLMC Convention and the 1996 Protocol.

Passenger claims

LLMC Convention	1996 Protocol
46,666 Units of Account multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate, but not exceeding 25 million Units of Account (Article 7)	175,000 Units of Account multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate (Article 4)

Claims for loss of life or personal injury (other than passenger claims)

(Article 6 of the LLMC Convention and Article 3 of the 1996 Protocol)

Size of ship (tons)	Liability limit (Units of Account)	
	LLMC Convention	1996 Protocol
500 or less	333,000	2,000,000
501-2,000	plus 500 for each ton from 501-2,000	2,000,000
2,001-3,000	plus 500 for each ton from 2,001-3,000	plus 800 for each ton from 2,001-3,000
3,001-30,000	plus 333 for each ton from 3,001-30,000	plus 800 for each ton from 3,001-30,000
30,001-70,000	PLUS 250 FOR EACH TON FROM 30,001-70,000	plus 600 for each ton from 30,001-70,000
in excess of 70,000	plus 167 for each ton in excess of 70,000	plus 400 for each ton in excess of 70,000

Other claims

² Liability limits in both the LLMC Convention and the 1996 Protocol are expressed in terms of “Units of Account”. One Unit of Account is the same as a Special Drawing Right (SDR) as defined by the International Monetary Fund. The value of the SDR varies from day to day in accordance with changes in currency values. As at 30 April 2001, one SDR was worth approximately \$A2.45.

(Article 6 of the LLMC Convention and Article 3 of the 1996 Protocol)

Size of ship (tons)	Liability limit (Units of Account)	
	LLMC Convention	1996 Protocol
500 or less	167,000	1,000,000
501-2,000	plus 167 for each ton from 501-2,000	1,000,000
2,001-3,000	plus 167 for each ton from 2,001-3,000	plus 400 for each ton from 2,001-3,000
3,001-30,000	plus 125 for each ton from 3,001-30,000	plus 400 for each ton from 3,001-30,000
30,001-70,000	plus 125 for each ton from 30,001-70,000	plus 300 for each ton from 30,001-70,000
in excess of 70,000	plus 83 for each ton in excess of 70,000	plus 200 for each ton in excess of 70,000

13. The increased liability limits in the 1996 Protocol reflect the increased costs of loss or damage that may be caused while still providing a limit on the potential liability of a shipowner. While the implementation of the 1996 Protocol would increase the amount claimants may recover, it should not place an undue burden on shipowners or salvors. Implementation of the Protocol may result in a minor increase in insurance costs for some shipowners and salvors. The precise amount of any increase is impossible to estimate as an insurer would take into account the quality and track record of a ship when setting the premium.

Obligations

14. As a Party to the LLMC Convention, Australia is obliged to allow shipowners, salvors and other persons for whose act, neglect or default the shipowners or salvors are responsible to limit their liability in accordance with the LLMC Convention. This obligation will extend to the higher limits set out in the 1996 Protocol if Australia becomes a Party to the Protocol and it enters into force generally.

15. Article 2 (which is not amended by the 1996 Protocol) of the LLMC Convention provides that the following claims are subject to limitation of liability:

- (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- (b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- (c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;

(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) *claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;*

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his or her liability in accordance with the Convention, and further loss caused by such measures.

16. When Australia's instrument of accession was lodged in 1991, Australia made a reservation in accordance with Article 18 to exclude the operation of paragraphs (d) and (e).

17. Article 7 of the 1996 Protocol replaces Article 18(1). New Article 18(1)(a) repeats the existing Article 18(1) to allow a State to reserve the right to exclude the application of Article 2, paragraphs (1)(d) and (e). As referred to above, Australia made a reservation in relation to the application of those paragraphs at the time of becoming a Party to the LLMC Convention and that reservation shall remain in place.

18. New Article 18(1)(b) allows a State to reserve the right to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention). Australia is not a party to the HNS Convention. If Australia becomes a party to the HNS Convention, the question of a reservation in relation to that Convention would be considered at that time.

19. Article 2 of the 1996 Protocol amends Article 3(a) of the LLMC Convention to specifically exclude claims for special compensation made under Article 14 of the International Convention on Salvage, 1989 (the Salvage Convention) from the limitations of liability set out in the LLMC Convention. Article 14 of the Salvage Convention provides for the payment of special compensation to a salvor if the salvor, by his or her salvage operations, has prevented or minimised damage to the environment.

20. Article 8 of the 1996 Protocol introduces a default "tacit acceptance" procedure for updating liability limits as an alternative to the current procedure set out in Article 21 of LLMC. In brief, amendments to the limits previously circulated by IMO and adopted by a meeting of the Legal Committee of IMO will automatically come into effect 18 months after being notified to all Contracting Parties, unless one quarter of those States that were Contracting States at the time of the adoption of the amendments advise that they do not accept the amendments. The tacit acceptance procedure will mean that future amendments to the liability limits will be able to be made in a much shorter time because there will be no need to wait until the requisite number of acceptances have been lodged with IMO. Apart from speed, tacit acceptance means that everyone involved knows in advance when an amendment will enter into force rather than having to wait until the requisite number of acceptances is lodged with IMO.

21. Under the tacit acceptance procedure, all Parties to the 1996 Protocol shall be bound by an amendment to liability limits unless they denounce the Protocol at least six months before the amendment enters into force (Article 8(9)).

22. Article 21 of the LLMC Convention, which currently sets out procedures for increasing liability limits, is not amended by the 1996 Protocol. The effect is that two separate mechanisms for altering liability limits will exist. However, it is unlikely that the mechanism set out in Article 21 would be used as the process set out in Article 8 is simpler.

Implementation

23. The 1996 Protocol would be implemented in Australia by amendment of the *Limitation of Liability for Maritime Claims Act 1989*. It would be proposed that an amendment to that Act will come into operation on the date that the 1996 Protocol enters into force generally.

Costs

24. Accession to the 1996 Protocol would not impose any additional costs on the Government of Australia. There are no provisions in the 1996 Protocol that would require contributions to international organisations, nor would any new domestic agency be required as a result of entering into the 1996 Protocol.

25. As noted above, it is expected that implementation of the Protocol will result in a minor increase in insurance costs for some shipowners and salvors but the amount of such increases cannot be quantified.

Consultation

26. The States and Territories were advised of the 1996 Protocol through the Commonwealth-States-Territories Standing Committee on Treaties' Schedule of Treaty Action. To date, there have been no requests from the States or Territories for further information. The 1996 Protocol does not require State or Territory cooperation for its domestic implementation.

27. The March 1999 edition of *Maritime Update*, distributed by the then Maritime Division of the Commonwealth Department of Transport and Regional Services, sought comment from readers on the proposal to become a party to the 1996 Protocol. *Maritime Update* is distributed widely within the maritime industry. The *Maritime Update* article was reproduced in the April 1999 edition of the Newsletter of the Maritime Law Association of Australia and New Zealand.

28. Letters were written by the Chairman of the Marine and Ports Group to all of its members. The Marine and Ports Group (now known as the Australian Maritime Group) is a body of senior officials from the relevant departments of each of the States and the Northern Territory and, at the time of writing the letters, included the Executive Director of the Association of Australian Ports and Marine Authorities. The Australian Maritime Group is chaired by the First Assistant Secretary of the Cross-Modal and Maritime Transport Division of the Commonwealth Department of Transport and Regional Services. Further letters were written to relevant organisations within the shipping and insurance industries.

29. All responses received to letters and to the articles in *Maritime Update* and the Newsletter of the Maritime Law Association of Australia and New Zealand either supported Australia becoming a Party to the 1996 Protocol or simply sought further information which was provided. There has been no opposition to Australia becoming a Party to the 1996 Protocol.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

30. Any future amendments to the liability limits set out in the 1996 Protocol, once it has entered into force, will be made by a default mechanism of the tacit acceptance procedure as described in Obligations. Article 8 of the 1996 Protocol will place the following conditions on any future amendment of limits:

- (a) No amendment of the limits may be considered less than five years from the date on which the 1996 Protocol was opened for signature (1 October 1996) nor less than five years from the date of entry into force of any previous amendments to the limits.
- (b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the LLMC Convention as amended by the 1996 Protocol increased by six per cent per year calculated on a compound basis from the date on which the 1996 Protocol was opened for signature (1 October 1996).
- (c) *No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the LLMC Convention as amended by the 1996 Protocol multiplied by three.*

31. The 1996 Protocol itself does not provide for any future legally binding instruments. However, Article 13 provides that IMO may convene a Conference for the purpose of revising or amending the Protocol. IMO will be required to convene such a Conference at the request of not less than one-third of the Contracting Parties.

Withdrawal or denunciation

32. Article 19 of the LLMC Convention provides that the Convention may be denounced by a Party to the Convention at any time after one year from the date on which the Convention entered into force for that Party. Denunciation would be effective on the first day of the month following the expiration of one year after the date of deposit of the instrument of denunciation, or on such later date, if any, as is specified in the instrument.

33. In accordance with Article 12 of the 1996 Protocol, it may be denounced by a Party to the Protocol at any time after it enters into force for that Party. Denunciation would be effective twelve months after the date of deposit of the instrument of denunciation, or on such later date, if any, as is specified in the instrument.

Contact details

Cross-Modal and Maritime Transport Division

Department of Transport and Regional Services

Withdrawal of ratification of International Labour Organisation Conventions:

NATIONAL INTEREST ANALYSIS

International Labour Organization (ILO) Convention No 57: Convention concerning Hours of Work on Board Ship and Manning, done at Geneva on 24 October 1936

International Labour Organization (ILO) Convention No. 76: Convention concerning Wages, Hours of Work on Board Ship and Manning, done at Seattle on 29 June 1946

International Labour Organization (ILO) Convention No. 93: Convention concerning Wages, Hours of Work on Board Ship and Manning (Revised 1949), done at Geneva on 18 June 1949

International Labour Organization (ILO) Convention No. 109: Convention concerning Wages, Hours of Work on Board Ship and Manning (Revised 1958), done at Geneva on 14 May 1958

Proposed Binding Treaty Action

1. The proposed binding treaty action is withdrawal of the instruments of ratification for the International Labour Organization (ILO) Conventions listed above.

Date of proposed binding treaty action

2. As soon as practicable after 21 August 2001.

Date of tabling of the proposed treaty action

3. 23 May 2001.

Purpose of the proposed treaty action and why it is in the national interest

4. The ILO is a specialised agency of the United Nations. The ILO establishes and supervises international labour standards which are embodied in either Conventions or Recommendations (the latter are not legally binding). Australia has been a member of

the ILO since its establishment in 1919 and has ratified 57 out of the ILO's 183 Conventions. 50 of these Conventions remain in force for Australia. If the international labour standards promulgated by the ILO are to continue to be both effective and relevant, member States must be able to

consider and review their ratification of out of date and irrelevant Conventions and take appropriate action, including the withdrawal of instruments of ratification.

5. It is appropriate to withdraw Australia's instruments of ratification for these four Conventions as they have not come into force, and are unlikely ever to come into force given that they were adopted at least four decades ago. This action will demonstrate that Australia does not support the retention of these Conventions in the international labour code.

Reasons for Australia to take the proposed treaty action

6. In 1997, the International Labour Conference adopted a Constitutional amendment which would allow the abrogation or repeal of any ILO Convention that had "lost its purpose" or that "no longer made a useful contribution" to attaining ILO objectives. This amendment has not yet come into effect. The matter of Australia's acceptance of the Constitutional amendment was tabled on 27 February 2001. In its report tabled on 18 April 2001, the Joint Standing Committee on Treaties stated that it supported Australia's acceptance of the amendment and recommended that binding treaty action be taken.

7. In this context, the Government decided to review the ILO Conventions ratified for Australia with a view to identifying those that were obsolete. A preliminary analysis has revealed six Conventions which would fall into this category. Two of these obsolete Conventions are the subject of another National Interest Analysis.

8. Four of these Conventions, which all deal with working conditions on-board ships, - Convention No. 57, Convention No. 76, Convention No. 93, and Convention No. 109 - were ratified for Australia. These Conventions, however, never came into force and thus are not binding on Australia.

9. In August 1999, the ILO invited Australia and other countries to withdraw from these four Conventions. Withdrawal from these four obsolete Conventions will send a signal to the ILO and its members that Australia does not support their retention in the international labour code.

10. At the same time, the ILO invited Australia to consider ratifying Convention 180, concerning Seafarers' Hours of Work and the Manning of Ships, 1996. The Government's position with regard to Convention 180 is considered below under the section entitled "Future treaty action".

Obligations

11. The aim of all these Conventions is to regulate working conditions on-board ships in order to maximise crew safety and efficiency. They include variously, provisions on hours of work, manning levels, wages and minimum age for employment. If the Conventions had entered into force, Australia would have been obliged to ensure that certain minimum standards for wages, manning levels, maximum hours of work (including the working of overtime) and minimum age for employment were adhered to on-board ships.

Implementation

12. The four Conventions were ratified for Australia on the following dates: Convention 57 - 24 September 1938; Convention 76 - 25 January 1949; Convention 93 - 3 March 1954; and Convention 109 - 15 June 1972. These Conventions were ratified on the basis of Commonwealth law and practice alone. As noted in paragraph 8 above, none of these Conventions have entered into force and Australia has not had to implement any of their provisions or report to the ILO on their implementation.

Costs

13. There are no costs associated with the withdrawal of Australia's instruments of ratification of these Conventions.

Consultation

14. On 23 February 1999, the Minister for Employment, Workplace Relations and Small Business formally requested the views of the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) in respect of the proposed treaty action. The ACCI and the ACTU are, respectively, the employer and worker organisations which represent Australia in the ILO.

15. The ACTU responded on 6 May 1999. In its response, the ACTU considered that the Government should first commit to ratifying Convention 180 before withdrawing from Conventions 57, 76, 93 and 109. In a response on 30 August 1999, the ACTU was advised that its comments did "not constitute a persuasive argument not to proceed with the withdrawal". The ACTU subsequently indicated at a meeting of the International Labour Affairs Committee of the National Labour Consultative Council that it accepted that consultations on this matter had been finalised. The ACCI indicated support for the proposal in a letter dated 11 August 2000.

16. In accordance with Australian treaty-making policy and practice, the Department of Employment, Workplace Relations and Small Business has undertaken consultation with its State and Territory counterparts. A letter advising of the proposal to withdraw Australia's instruments of ratification of the Conventions was sent to each State and Territory Government on 18 August 2000. However, because the Conventions were originally ratified on the basis of Commonwealth law and practice alone, the proposal should not impact on the States and Territories. All State and Territory Governments have replied, either indicating support for the proposals, or not objecting to the proposals. The New South Wales Department of Industrial Relations also recommended ratification of Convention 180, in consultation with the interested parties. The department responded to New South Wales in similar terms to paragraph 18 below.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

17. The ILO has called on ratifying member States to withdraw from the four Conventions and at the same time to consider ratification of Convention 180. However, ratification of Convention 180 is not a pre-requisite for withdrawal from the four Conventions which are the subject of this National Interest Analysis.

18. Convention 180 seeks to update the principles governing employment on-board ships (as set out in the earlier Conventions) by bringing them into line with modern work practices. While the Government is in the process of considering its attitude to ratification of Convention 180, ratification is unlikely in the short term, for the following reasons:

It is Australian treaty policy and practice to ratify a treaty only when compliance with its provisions can be demonstrated in both law and practice. Convention 180 requires, amongst other things, that no person under the age of 18 years should work at night, and there is no provision in Australian law that meets this requirement.

The remaining subject matter of Convention 180 is already adequately covered by the provisions of other Conventions to which Australia is party. For example, safety and fatigue management aspects of manning levels and hours of rest are addressed in two International Maritime Organization Conventions - the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers and the International Convention for the Safety of Life at Sea. The minimum age for employment at sea is addressed by two other ILO Conventions, Convention 7 and Convention 58, both concerning the Minimum Age for Admission of Children to Employment at Sea.

- a) Convention 180 has not yet come into force, and it may be superseded by a proposal to update existing ILO maritime standards and consolidation into a new framework ILO Convention on maritime labour standards which will be considered by the ILO Conference in 2005.

Withdrawal or denunciation

19. As Conventions 57, 76, 93 and 109 have never come into force, the formal denunciation provisions set out under the Conventions do not apply. The appropriate process in these four cases is for Australia to withdraw its instruments of ratification.

Contact details

International (ILO) Section

Workplace Relations Policy and Legal Group

Department of Employment, Workplace Relations and Small Business

Denunciation of International Labour Organisation Conventions:

NATIONAL INTEREST ANALYSIS

International Labour Organization (ILO) Convention No. 15: Convention fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers, done at Geneva on 11 November 1921

International Labour Organization (ILO) Convention No. 21: Convention concerning the Simplification of the Inspection of Emigrants on Board Ship, done at Geneva on 5 June 1926

Proposed binding treaty action

1. The proposed binding treaty action is denunciation of the International Labour Organization (ILO) Conventions listed above.

Date of proposed binding treaty action

2. Australia's instrument of denunciation of these two Conventions would be deposited with the Director-General of the ILO in Geneva as soon as practicable after 21 August 2001. The denunciation will take effect one year after the date on which it is registered with the ILO's International Labour Office.

Date of tabling of the proposed treaty action

3. 23 May 2001.

Purpose of the proposed treaty action and why it is in the national interest

4. The ILO is a specialised agency of the United Nations. The ILO establishes and supervises international labour standards which are embodied in either Conventions or Recommendations (the latter are not legally binding). Australia has been a member of

the ILO since its establishment in 1919 and has ratified 57 out of the ILO's 183 Conventions. 50 of these Conventions remain in force for Australia. If the international labour standards promulgated by the ILO are to continue to be both effective and relevant, out of date and irrelevant Conventions must be able to be denounced.

5. The ILO has “shelved” Conventions 15 and 21 which means that it does not promote their ratification or enforce reporting responsibilities. The shelving of the Conventions is an acknowledgment that the ILO considers them to be out of date and irrelevant to current circumstances. Although the ILO no longer supervises Australia’s application of these Conventions, they remain subject to the possibility of complaints and representations concerning failure to implement their provisions. Denunciation of these Conventions would clarify Australia’s legal position. Denunciation would also express support for the ILO’s shelving of the two Conventions and demonstrate Australian support for any future ILO decision to abrogate the Conventions.

Reasons for Australia to take the proposed treaty action

6. In 1997, the International Labour Conference adopted a Constitutional amendment which would allow the abrogation or repeal of any ILO Convention that had “lost its purpose” or that “no longer made a useful contribution” to attaining ILO objectives. This amendment has not yet come into effect. The matter of Australia’s acceptance of the ILO Constitutional amendment was tabled on 27 February 2001. In its report tabled on 18 April 2001, the Joint Standing Committee stated that it supported Australia’s acceptance of the amendment and recommended that binding treaty action be taken.

7. In this context, the Government decided to review the ILO Conventions ratified by Australia with a view to identifying those that were obsolete. A preliminary analysis has revealed six Conventions which would fall into this category. Four of these obsolete Conventions are the subject of another National Interest Analysis.

8. Two of these Conventions - Convention 15 and Convention 21 - were identified as being appropriate for denunciation as they are, in effect, obsolete. The ILO has shelved these Conventions, which means that it does not promote their ratification or enforce reporting responsibilities.

9. Convention 15 regulates the employment of trimmers and stokers on coal-fired ships. The ILO has invited Australia and other parties to denounce this Convention. The Government proposes denunciation of Convention 15 as it does not have any practical application in Australia (or elsewhere) as trimmers and stokers are no longer employed on ships. Where coal-burning ships are still in use the firing of boilers is mechanised and the occupations to which the Convention applies no longer exist.

10. At the same time the ILO invited Australia and others to denounce Convention 15, the ILO also suggested that countries consider ratifying Convention 138, concerning Minimum Age for Admission to Employment, 1973. Convention 138 requires member States to develop and pursue a national policy to ensure the effective abolition of child labour. The Government’s position with regard to Convention 138 is considered below under the section entitled “Future treaty action”.

11. Convention 21 is concerned with the protection of emigrants on-board emigrant ships. The ILO has invited Australia and other parties to denounce this Convention. The Government

proposes denunciation of Convention 21 as, in the Australian context, such vessels are no longer in use and the Convention is no longer applicable to Australian circumstances.

12. At the same time the ILO invited Australia and others to denounce Convention 21, the ILO also suggested that countries consider ratifying Convention 97, concerning Migration for Employment (Revised), 1949. Convention 97 contains a series of measures designed to govern conditions in which migration for employment can take place and to guarantee equality of treatment for migrant workers in a number of fields. The Government's position with regard to Convention 97 is considered below under the section entitled "Future treaty action".

Obligations

13. Convention 15 entered into force generally on 20 November 1922. The Convention was ratified for Australia on 28 June 1935 and it has been in force for Australia since that date. Since its adoption, the Convention has been ratified by sixty-seven countries. Twenty-seven countries including Australia, Canada, the UK, New Zealand and Singapore are currently party to the Convention. Forty countries have denounced this Convention.

14. Although Convention 15 remains open to ratification, the ILO no longer promotes it. In March 1985, the ILO Governing Body decided not to request detailed reports from those countries (including Australia) which had ratified the Convention as it was no longer relevant.

Convention 15 will be closed to ratification when all existing parties to it have denounced it, either through ratification of Convention 138 (referred to in paragraph 10 above) or by a declaration communicated to the Director General of the International Labour Office.

15. The Convention regulates the employment of trimmers and stokers on "all ships and boats, of any nature whatsoever, engaged in maritime navigation, whether publicly or privately owned [but not] ships of war" (Article 1). It fixes a minimum age of 18 years for employment of persons on vessels as trimmers or stokers (Article 2). However, this minimum age does not apply to young persons on school or training ships provided their work is approved and supervised by the relevant public authority, or to young persons employed on vessels other than steam ships (Article 3). If only persons of between the ages of 16 and 18 years are available for employment as trimmers and stokers in a given port, two such persons must be employed to fill each vacancy. Such persons must be at least 16 years of age (Article 4). In order to facilitate the implementation of the Convention's provisions, Article 5 provides that every shipmaster is required to keep a register of all persons under the age of 18 years employed on board, or to list their names and dates of birth in the articles of agreement (which is the contract of employment between the seafarer and the shipowner). The articles of agreement must also contain a brief summary of the provisions of the Convention (Article 6). Article 10 provides that each ILO Member which ratifies the Convention must take "such action as may be necessary to make these provisions effective".

16. Following deposit of Australia's instrument of denunciation, these obligations will remain in force until one year after the date on which it is registered by the ILO. Although Australia remains

bound by the Convention until it is denounced, the Convention no longer has any practical application.

17. Convention 21 entered into force generally on 29 December 1927. The Convention was ratified for Australia on 18 April 1931 and it has been in force for Australia since that date.

Since its adoption, the Convention has been ratified by thirty-three countries. Thirty countries including Australia, the UK, France, Argentina and Brazil are currently party to the Convention. Three countries (Albania, Belgium and New Zealand) have denounced this Convention.

18. Although Convention 21 remains open to ratification, the ILO no longer promotes it. In March 1985, the ILO Governing Body decided not to request detailed reports from those countries (including Australia) which had ratified the Convention as it was no longer relevant.

Convention 21 will be closed to ratification when all existing parties to it have denounced it.

19. The Convention is concerned with the conditions and protection of emigrants on board emigrant vessels. The main purpose of the Convention is to provide for the appointment of official inspectors and to regulate their activities on-board emigrant vessels.

20. Article 1 provides that the terms “emigrant vessel” and “emigrant” are to be “defined for each country by the competent authority in that country”. Article 2 provides that the official inspection of an emigrant vessel for the protection of emigrants is to be “undertaken by not more than one Government”. However, this Article further states that there is nothing to “prevent another Government from occasionally and at their own expense placing a representative on board to accompany their nationals carried as emigrants in the capacity of observer, and on condition that [such observer] shall not encroach upon the duties of the official inspector”. Article 3 states that as a general rule the official inspector “[shall] be appointed by the Government of the country whose flag the vessel flies”. The Convention provides that the Government which appoints the official inspector is responsible for determining the “practical experience and the necessary professional and moral qualifications required” but that the individual appointed must not be “in any way either directly or indirectly connected with or dependent upon the shipowner or shipping company” (Article 4).

21. The principal function of the official inspector is to ensure the observance of the rights of emigrants under the laws of the flag country, other applicable law, international agreements or under the terms of their contracts of transportation (Article 5). Article 6 provides the authority of the ship’s master on-board the vessel is in no way limited by the terms of the Convention and that the official inspector is not to interfere in the exercise of this authority.

The official inspector is to provide a report to the Government of the flag country and the ship’s master within eight days of the arrival of the vessel at its port of destination (Article 7). The Government of the flag country is required to transmit the official inspector’s report to any other Government concerned where such Government has requested that this be done.

Article 11 provides that each ILO Member which ratifies the Convention must take “such action as may be necessary to make these provisions effective”.

22. Following deposit of Australia's instrument of denunciation, these obligations will remain in force until one year after the date on which it is registered by the ILO. Although Australia remains bound by the Convention until it is denounced, the Convention no longer has any practical application.

Implementation

23. Australia ratified Convention 15 on 28 June 1935 on the basis of Commonwealth law and practice alone. The *Navigation Act 1912*, Section 48A(1), stipulates that a minimum age for employment at sea may be prescribed. *Marine Orders Part 3 (Seagoing Qualifications)* at order 8A(1) provides that the minimum age for employment at sea is 16 years of age, excepting for the purposes of Section 15 of the *Navigation Act* where the orders prescribe minimum ages for certain grades of certificate of competency. In all cases these exceed 16 years of age. Agreements between a master and crew members are required to be in a prescribed form which is laid down in the *Marine Orders Part 53*. This form includes provision for the master to list the names and dates of birth of all persons under 18 years of age employed on board the vessel. As neither trimmers nor stokers are employed on Australian ships, there are no specific legislative provisions concerning their minimum age for employment. While there are four coal-fired ships in use in Australia, these have automatic loaders and do not use trimmers and stokers. Manually loaded coal-fired ships went out of service during the 1950s, and the separate classifications for trimmers and stokers went out of use by the 1960s.

24. Australia ratified Convention 21 on 18 April 1931 on the basis of Commonwealth law and practice alone. Emigrant vessels are no longer in use. The principal modern period for emigrant vessel arrivals in Australia extended from just after the Second World War until 1970. It appears that the most recent such arrival was in 1977, and in any case almost certainly not later than 1980. Therefore, this Convention is no longer applicable to Australia's circumstances, and there is no specific legislation implementing it.

Costs

25. There are no costs associated with denunciation of these Conventions.

Consultation

26. As a party to ILO Convention 144, concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, Australia is required to consult with representative organisations of employers and of workers on "proposals for the denunciation of ratified Conventions" (Article 5.1(e)).

27. On 23 February 1999, the Minister for Employment, Workplace Relations and Small Business formally requested the views of the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) with regard to the proposed denunciation of

Conventions 15 and 21. The ACCI and the ACTU are, respectively, the employer and worker organisations which represent Australia in the ILO.

28. The ACTU responded on 6 May 1999 indicating support for the proposals to denounce Conventions 15 and 21 and the ACCI indicated support for the proposals in a letter dated 11 August 2000.

29. In accordance with Australian treaty-making policy and practice, the Department of Employment, Workplace Relations and Small Business has undertaken consultation with its State and Territory counterparts. A letter advising of the proposal to denounce the Conventions was sent to each State and Territory Government on 18 August 2000. However, because the Conventions were originally ratified on the basis of Commonwealth law and practice alone, the proposal should not impact on the States and Territories. All State and Territory Governments have replied, either indicating support for the proposals, or not objecting to the proposals.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

30. As noted in paragraph 10 above, the ILO has invited Australia to consider ratifying Convention 138 at the same time as denouncing Convention 15. It must be noted that ratification of Convention 138 is not a pre-requisite for denunciation of Convention 15.

31. Convention 138 requires member States to develop and pursue a national policy to ensure the effective abolition of child labour and to progressively raise the minimum age for admission to employment to a level consistent with the fullest physical and mental development of young persons. Upon ratification, countries must specify a minimum age for employment which is not to be less than the age of completion of compulsory schooling and in no circumstances less than 15 years of age. The minimum age for hazardous employment, (defined in Article 3 of Convention 138 as employment which, by its nature or the circumstances in which it is carried out, is likely to jeopardise the health, safety or morals of young persons) must not be less than 18 years, or 16 years if the health, safety and morals of the young person are fully protected.

32. The Government is not presently pursuing ratification of Convention 138 as a number of compliance difficulties have been identified. It is Australian treaty policy and practice to ratify a treaty only when compliance with its provisions can be demonstrated in both law and practice. Australia's compliance difficulties arise from the need to establish a universal minimum age for employment of 15 years through statutory regulation, subject to exemptions specified in the Convention eg for light work for young persons aged 13-15 years. There is no universal minimum age for employment legislation in Australia, although there is legislation addressing specific occupations, such as employment at sea. The minimum age for employment in Australia is, for practical purposes, determined by provisions in relevant State and Territory legislation regarding the minimum school leaving age. In all States and Territories this age is 15 years, except for in Tasmania where the age is 16 years.

33. Australia is party to two other ILO Conventions concerning minimum age for employment at sea. They are Convention 7, concerning Fixing the Minimum Age for Admission of Children to

Employment at Sea, 1920 and Convention 58, concerning Fixing the Minimum Age for the Admission of Children to Employment at Sea (Revised), 1936.

34. As noted in paragraph 12 above, the ILO has invited Australia to consider ratifying Convention 97 at the same time as denouncing Convention 21. It must be noted that ratification of Convention 97 is not a pre-requisite for denunciation of Convention 21.

35. Convention 97 stipulates that an employment service shall be available for migrants which provides adequate information free of charge. Migrants should have adequate medical attention while travelling and on arrival. Migrants shall be treated no less favourably than the nationals of a ratifying member States in regard to remuneration, trade union membership, accommodation, social security and employment taxes. Where migrants and their families have been admitted on a permanent basis they shall not be returned to their territories of origin if, because of illness or injury sustained subsequent to entry, they are unable to follow their occupations.

36. The Government is not presently pursuing ratification of Convention 97 as a number of compliance difficulties have been identified. It is Australian treaty policy and practice to ratify a treaty only when compliance with its provisions can be demonstrated in both law and practice. Australia's compliance concerns relate to treatment of temporary entry visa holders, and the restrictions on social security entitlements. Additionally, as the ILO has suggested that Convention 97 should be revised, Australia considers that ratification would not be appropriate at this time.

37. Australia is party to ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation, 1958. This Convention provides appropriate protection against discrimination in employment and occupation based on race, colour, sex, religion, political opinion, national extraction or social origin.

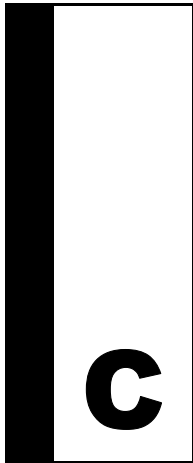
Withdrawal or denunciation

38. Convention 15 and Convention 21 have the same provisions concerning denunciation at Article 12 and Article 13 respectively. These Articles state, "A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered with the International Labour Office."

39. In accordance with these Articles, Convention 15 was open to denunciation from November 1932, and Convention 21 was open to denunciation from December 1937. It is proposed that Australia's intention to denounce these Conventions be communicated to the ILO through the deposit of an instrument of denunciation with the Director-General of the International Labour Office. The ILO procedures for denunciation require reasons for denunciation to be provided to the ILO at the same time as the instrument is deposited and these are published in the ILO's *Official Bulletin*.

Contact details

International (ILO) Section
Workplace Relations Policy and Legal Group
Department of Employment, Workplace Relations and Small Business



Appendix C - Submissions

Agreement with Germany on Film Co-Production

Submission No.	Organisation / Individual
1	Mrs D Knoch
2	Department of Communications, Information Technology and the Arts

Agreement on Social Security with New Zealand

Submission No.	Organisation / Individual
1	Department of Family and Community Services
2	Mrs D Knoch
3	Ministry of Premier and Cabinet (WA)

Agreement on the Conservation of Albatrosses and Petrels

Submission No.	Organisation / Individual
1	Senator the Hon Robert Hill
2	National Parks Association of NSW
3	Human Society International
4	Mr Barry Hebbard

5	Mrs D Knoch
6	Ministry of Premier & Cabinet (WA)
7	Premier of Queensland
8	Environment Australia

Protocols to amend the Convention on Limitation of Liability for Maritime Claims

Submission No.	Organisation / Individual
1	Dr Michael White QC

Withdrawal of ratification of International Labour Organisation Conventions –

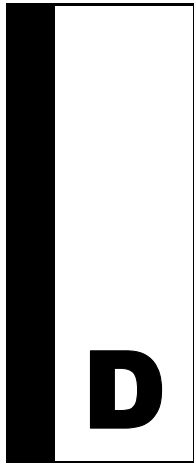
- Hours of work and Manning (Sea) 1936;
- Wages, Hours of Work and Manning (Sea) 1946;
- Wages, Hours of Work and Manning (Sea) 1949; and
- Wages, Hours of Work and Manning (Sea) 1958.

Submission No.	Organisation / Individual
1	Ms Tina Lesses
2	Mrs D Knoch

Denunciation of International Labour Organisation Conventions-

- Minimum Age (Trimmers and Stokers); and,
- Inspection of Emigrants Convention.

Submission No.	Organisation / Individual
1	Ms Tina Lesses
2	Mrs D Knoch



Appendix D - Witnesses at Public Hearing

Monday, 4 June 2001, Canberra

Attorney-General's Department

John Atwood, Principal Legal Officer, Office of International Law

Department of Foreign Affairs and Trade

Robyn Stern, Director, International Law Section

Agreement on the Conservation of Albatrosses and Petrels

Environment Australia

Geoffrey Baker, Assistant Director, Wildlife Scientific Advice, Wildlife Australia, Natural Heritage Section

Narelle Montgomery, Assistant Director, Wildlife Scientific Advice, Wildlife Australia, Natural Heritage Section

Australian Fisheries Management Authority

Andrew McNee, Senior Manager, Tuna and Bill fisheries, AFMA

Department of Agriculture, Fisheries and Forestry

Dr Nathan Evans, A / Manager, Sustainable Fisheries Section, Fisheries and Aquaculture Branch

Department of Foreign Affairs and Trade

Gregory French, Director, Sea Law and Antarctic Policy Section, Legal Branch

Agreement on Social Security with New Zealand**Department of Family and community Services**

Roger Barson, Assistant Secretary, International

Marion Carrick, Director Agreements, International Branch

Anthony Watts, Director New Zealand Section

Agreement with Germany on Films Co-Production**Department of Communications, Information Technology and the Arts**

Megan Morris, General Manager, Film and New Media

Dr Paul Salmond, Manager Film Industry Section

Rebecca Tibbits, Assistant Manager, Film Industry Section

Monday, 25 June 2001, Canberra**Attorney-General's Department**

Stephen Bouwhuis, Principal Legal Officer

Department of Foreign Affairs and Trade

Douglas Laing, Executive Officer, Environment Branch

Peter Scott, Acting Director, International Law Section

Withdrawal of ratification of International Labour Organisation Conventions –

- Hours of work and Manning (Sea) 1936;
- Wages, Hours of Work and Manning (Sea) 1946;
- Wages, Hours of Work and Manning (Sea) 1949; and
- Wages, Hours of Work and Manning (Sea) 1958.

Department of Employment, Workplace Relations and Small Business

Jean Ffrench, Director, International (ILO) Section, Labour relations Policy Branch

John Stewart, Acting Assistant Commissioner, Labour Relations Policy Branch

Denunciation of International Labour Organisation Conventions-

- Minimum Age (Trimmers and Stokers); and,
- Inspection of Emigrants Convention

Department of Employment, Workplace Relations and Small Business

Jean Ffrench, Director, International (ILO) Section, Labour Relations Policy Branch

John Stewart, Acting Assistant Commissioner, Labour Relations Policy Branch

Protocols to amend the Convention on Limitation of Liability for Maritime Claims.**Department of Transport and Regional Services**

Robert Alchin, Policy Officer, Cross Modal and Maritime Support

Sarah Brasch, Assistant Secretary, Cross Modal and Maritime Support

Agreement on the Conservation of Albatrosses and Petrels**Environment Australia**

Geoffrey Baker, Assistant Director, Wildlife Australia

Howard Bamsey, Deputy Secretary, Environment Australia

Narelle Montgomery, Assistant Director, Environment Australia

Australian Fisheries Management Authority

Andrew McNee, Senior Manager, Tuna and Billfish Fisheries,

Department of Agriculture, Fisheries and Forestry

Michael Drynan, Project Manager,



Appendix E – Regulation Impact Statement

Agreement with Germany on Film Co-Production

REGULATION IMPACT STATEMENT

Background to the Commonwealth Co-production Program

The Australian film industry would not be viable without Commonwealth assistance due to the high-cost, high-risk nature of film production.

Commonwealth government assistance to the film production industry is directed toward cultural objectives. These are to promote Australian culture and to enrich the cultural life of all Australians. To achieve these objectives the Commonwealth provides the opportunity for Australians to tell Australian stories, and the production of a diverse range of film and television product reflecting different points of view and enabling different voices to be heard.

Commonwealth measures directed specifically at assisting the film production industry include:

- direct and indirect funding;
- constraints on the import of foreign actors; and
- a minimum quota of Australian programs on the commercial television networks.

Funding arrangements

The principal means by which the Commonwealth provides assistance to the film production industry is by direct funding through the Australian Film Finance Corporation and indirect funding through tax concessions on private investment under Divisions 10B and 10BA of the *Income Tax Assessment Act 1936*. Development assistance is available through the Australian Film Commission. Legislation - the *Australian Film Commission Act 1975* and Sections 124ZAA and 124K

of the *Income Tax Assessment Act 1936* - defines those productions which may be eligible for funding. These definitions not only include films or proposed films with a significant Australian content made wholly or substantially in Australia, but also “films made pursuant to an agreement or arrangement entered into between the Government of Australia or an authority of the Government of Australia and the Government of another country or authority of the Government of another country”.

These agreements/arrangements are known as co-production agreements. Australia enters into co-production treaties or less than treaty arrangements only where the government of the other country also provides assistance to its film producers. Individual films are granted ‘official co-production’ status on a case-by-case basis by the Australian Film Commission (AFC). In making its decision, the AFC considers guidelines that have been established following extensive industry consultation, and the advice of an Industry Advisory Panel.

Australian producers of official co-productions are eligible to apply for funding from Commonwealth sources, and the co-production partner is able to apply for funding assistance in the other country.

Importing of film equipment

The *Customs Tariff Act 1995* and *Sales Tax Assessment Act 1992*, *Sales Tax Imposition (Customs) Act 1992*, impose duties and sales tax on equipment that is imported into Australia. Under this agreement Australia will be obliged, subject to its laws, to facilitate temporary import of cinematographic equipment free of import duties and taxes for the making of official co-productions.

Importing of overseas actors

The *Migration Act 1958* and the *Migration Regulations 1994* impose constraints on the entry of foreign nationals into Australia to work. Australia will be obliged in the proposed agreement with Germany to permit nationals and citizens of Germany to enter and remain in Australia for the purpose of making or exploiting a co-production, subject to the requirement that they comply with the laws relating to entry and residence.

Australian content requirements

Official co-productions are “Australian programs” for the purposes of meeting the Australian Content Standard made under the *Broadcasting Services Act 1992*. This requires commercial television licensees to meet a minimum transmission quota for drama, children’s and documentary programs.

Problem identification

In the absence of an official co-production agreement with Germany, producers of German-Australian films that are made as unofficial co-productions would almost certainly not have access to direct or indirect funding from the Commonwealth, nor would they qualify as “Australian programs” for the purpose of meeting the Australian Content Standard made under the *Broadcasting Services Act 1992*, because of the likelihood or possibility that they might not be

considered to have a significant Australian content or be made wholly or substantially in Australia. This would place Australian producers at considerable disadvantage given the difficulty of raising funding for film production from non-Government sources.

Impacts

With the proposed co-production agreement with Germany in place, official co-productions will have access to all benefits available to Australian productions. Reciprocal benefits will be accessible in Germany for German producers (for example funding available through the German Federal Film Fund and the various *Länder* subsidy systems).

Objective

The objective of the proposed co-production agreement with Germany is to foster cultural and industry development and cultural exchange through facilitating co-productions which:

- increase the output of high quality productions by sharing equity investment with Germany;
- open up new markets in Germany for Australian films;
- share the risk (and cost) of film production;
- facilitate interchange between Australian and German film makers, particularly those in the principal creative positions; and
- strengthen existing diplomatic ties between Australia and Germany.

Options

Treaties are the established international form under which official co-production agreements are made. This co-production agreement with Germany is similar to agreements with other countries with changes being made only as they relate to the specifics of German government support to the film industry. The form of the agreement has been developed by the Australian Film Commission over several years in consultation with the Industry Advisory Panel.

Because the agreement covers access to Government funding, self-regulation is not appropriate in this circumstance.

Assessment of Impacts

The groups affected by this proposal include:

- consumers;
- the Australian film industry;
- the Commonwealth Government.

Costs*Consumers:*

No costs

Film Industry

In Australia the additional financial cost incurred by an Australian producer is the \$250 application fee applied by the Australian Film Commission which partially covers the costs of processing the application. The producer will also incur some additional legal fees in setting up the contracts for the production. The forms and guidelines for the granting of co-production status are standard between countries: no additional requirements will be required for Australian-German co-productions as compared to other co-productions.

A German co-producer will have to make separate application to the competent authority in Germany.

Commonwealth Government

The cost of administering the agreement with Germany will be borne by the Australian Film Commission.

The administrative costs of processing applications for official co-production status will be partly covered by the application fee.

Where funding assistance is sought from one of the two main funding agencies, the Australian Film Finance Corporation and the Australian Film Commission, the administrative costs of processing funding applications will be borne from within each agency's existing budget.

Commonwealth funding of officially sanctioned German-Australian co-productions will come from funds allocated for film funding assistance. No additional Budget funding will be required. When seeking funding assistance from the Australian Film Finance Corporation or the Australian Film Commission, Australian producers of official co-productions will be competing with other all other funding applications, including co-productions with Germany and other countries. They will not have access to funds specifically allocated by the Australian Film Finance Corporation to Australian productions.

Benefits*Consumers*

Consumers may benefit from a more diverse film product allowing for greater choice.

Australian film industry

The Australian film industry will benefit from:

- opportunities to make films (in cooperation with German producers) that otherwise may not have been made and consequential employment opportunities for industry participants;

- potentially increased audiences overseas; and
- the interchange of film personnel, equipment and actors.

Commonwealth Government

The Commonwealth Government will benefit from the strengthening of existing diplomatic ties with Germany.

In addition, when a co-production is partly funded in Germany, the risk to Australian funding sources will be reduced.

Consultation

The Australian Film Commission's Industry Advisory Panel, consisting of representatives of the peak industry bodies and trade union, including the Australian Screen Directors' Association, the Screen Producers' Association of Australia, the Australian Writers' Guild, the Australian Guild of Screen Composers, and the Media Entertainment and Arts Alliance, was consulted at all stages of the negotiations to ensure that the proposed agreement with Germany was in line with current industry practice and would provide potential benefits to the Australian industry. All groups were in favour of the proposed agreement.

Restriction on competition

This agreement places no restriction on competition.

Conclusion and Recommended option

Official co-productions constitute a third category of film production in Australia alongside intrinsically Australian productions and offshore productions. They constitute an additional channel for production where creative elements and financial inputs are shared between partners from different countries.

The assessment of creative and financial inputs undertaken by the Australian Film Commission's Industry Advisory Panel satisfies the cultural and industry imperatives that underpin government assistance to the film industry.

It is recommended that the film co-production agreement be approved.

Implementation and review

Now that it has been signed, this co-production agreement between Australia and Germany will take domestic effect in Australia after it has been tabled in Parliament for 15 sitting days, and after the consequent diplomatic exchange of notes, in accordance with Government policy (as expressed in the Joint Statement made on 2 May 1996 by the Minister for Foreign Affairs and the Attorney-General).

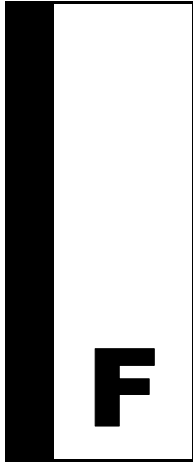
The Australian Film Commission will administer the agreement.

No new legislative measures are required to implement the obligations under the agreement.

The agreement specifies that it remains in force for an initial period of three years from the date of its entry into force, and shall be renewed and remain in force by tacit acceptance for successive periods each of three years, unless written notice to terminate is given by either Australia or Germany at least six months before the end of any period of three years.

A Mixed Commission comprising Australian and German officials will meet every two years after the date of entry into force of the agreement, and thereafter within six months of a request to meet by either party, to supervise and review the working of the agreement. The Commission is required to verify that an overall balance between Australia and Germany has been achieved in fund transfers, financial contributions, and in the employment of creative, craft and technical personnel.

The Department of Communications, Information Technology and the Arts has recently completed a review of the impact of co-production agreements. The review has recommended a systematic review of all current co-production treaties and memoranda.



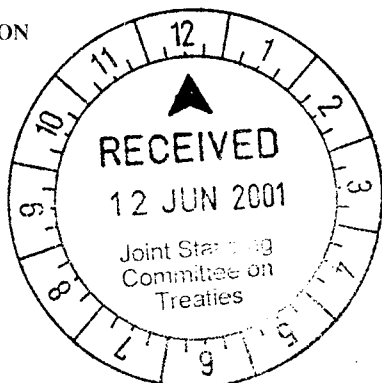
Appendix F – Correspondence about maritime treaties

Three items of correspondence are attached:

- a letter from Dr Michael White, Executive Director, Centre for Maritime Law, University of Queensland (dated 7 June 2001);
- a letter from Bob Alchin, Cross-Modal and Maritime Division, Commonwealth Department of Transport and Regional Services (dated 1 August 2001) commenting on some of the matters raised in Dr White's letter; and
- a letter from Mr Bill Campbell, First Assistant Secretary, Office of International Law, Commonwealth Attorney-General's Department (dated 2 August 2001) also commenting on some of the matters raised in Dr White's letter.

DR MICHAEL WHITE QC
EXECUTIVE DIRECTOR

DR SARAH DERRINGTON
DIRECTOR



7 June, 2001

The Secretary,
Joint Standing Committee on Treaties,
Parliament House,
Canberra,
ACT. 2600.

Dear Secretary,

I refer to the invitation by the Commonwealth Joint Standing Committee on Treaties to contact the committee on the treaties set out in the advertisement in the Weekend Australian of 26-27 May 2001. The treaties directly relevant to the areas of interest to our Centre for Maritime Law are the protocols to the *Limitation of Liability Convention* and the ILO Conventions.

In relation to the *Limitation of Liability Convention* my only comment is that it is desirable that Australia become a party to and implement the 1996 Protocol. The *Convention on Limitation of Liability for Maritime Claims*, 1976 has already been given domestic force in Australia by the *Limitation of Liability for Maritime Claims Act* 1989, so it is desirable the the 1996 Protocol should also be given domestic force in Australia. It is desirable that once a treaty or a protocol is accepted by sufficient countries to become part of the international law and practice it should be implemented by Australia, but not until then. I will return to this point shortly. As to the ILO Conventions, that were also mentioned in the advertisement, and the plan that they should be withdrawn, I have no comment not having sufficient background in them to be in a position to do so.

Returning to the general practice of Australia concerning the timing of the implementation of international treaties, I wish to raise my concern that I see instances of the Commonwealth, and sometimes the States, implementing international marine treaties before they come into force internationally. Further, and much worse, is that on some occasions legislation is passed by one or more of the Australian Parliaments in areas of international marine practice and industry where there is no international agreement relating to it. Much worse, is where legislation is passed that expressly contradicts an international treaty, practice or industry norm in the marine area. Why I emphasise the marine area is that it is truly international and I believe it is generally accepted that it is in the national interest that Australia be a consistent international supporter of international practice and treaties.



Maritime Claims
Submission No.1.....

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As a contravention of this principle, I particularly have in mind, as one example, the provisions of the *Protection of the Sea (Civil Liability) Act 2000*.

As in most countries, oil spill insurance from tankers in Australia is the subject of a whole system of International Maritime Organization (IMO) international conventions and implementing legislation. This system gives adequate insurance protection for oil spills from oil tankers carrying more than 2,000 tonnes of oil cargo, but it has long been a problem that if a non-tanker spills bunker oil then there may be no compulsory fund against which the costs of clean-up and damages can be recovered. This deficiency was addressed by the IMO in a new draft *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (the *Bunkers Convention*) that was agreed on 23 March 2001.

In Australia, the Commonwealth Government recently passed legislation to enforce some aspects of this deficiency. It is to be found in the *Protection of the Sea (Civil Liability) Amendment Act 2000*, which amendments came into effect on 6th April 2001. The amending Act has four main objectives. One of them was to require every ship over 400 gross tonnes entering or leaving an Australian port to have insurance that will cover damages claims and clean up costs that may result from oil pollution from bunkers (Schedule 1, Part 1). As mentioned, the tankers already have to have this certificate but this is a new compulsory requirement for other ships. (Many of the non-tankers have this insurance anyway, but this is making it compulsory).

In this regard, the Australian Government has acted in advance of the international community because the *Bunkers Convention* has only just been agreed (March 2001) and it will take some time, perhaps some years, to come into effect. Further, the *Bunkers Convention* only applies to ships of 1,000 tons (refer Article 7; Section 19B; Schedule 3, Section 24) yet the Australian Act applies to ships of 400 tons. It is always unfortunate when a country feels that it may act outside the international framework in such things and there seems no good reason for Australia to do so in this case. So in two major instances the Australian legislation has offended against the principle.

There is further legislation that raises a matter of concern. This is contained in the *International Maritime Conventions Legislation Amendment Bill 2001*, which was introduced into the Federal Parliament in April 2001. There are four objectives of this Bill, one of which is to amend the *Limitation of Liability for Maritime Claims Act 1989* to take account of the 1996 Protocol to the *Limitation Convention* (LLMC). As mentioned above, I see no difficulty about this.

However, the concern is raised where this amending Act amends the *Protection of the Sea (Pollution from Ships) Act 1983*. One of those amendment includes that a 'prescribed officer' may require a vessel to discharge sewage to a reception facility if that officer is of the opinion 'that it is reasonable to do so'. This last phrase, that if an officer is of the opinion that 'it is reasonable to do so', is troubling. It is not good legislation in that it leaves something to the opinion of a government official without laying out a more objective test. If the officer behaves quite unreasonably it is almost impossible to obtain relief against that behaviour because the Bill provides that the officer only has to hold the 'opinion' that it is reasonable. No matter how

outrageous the conduct that officer is unlikely, when challenged, to admit that he or she was quite unreasonable in holding that opinion.

These are two aspects that I would like to submit for the consideration of the Committee. Could I conclude by stating that I consider the function of the Committee in bringing more detailed and skilled attention to the matter of Australia's international treaties is very important work. Not sufficient attention has been paid to this area, and Australia's pool of people skilled in this area is far from large which emphasizes the need for the Committee to be diligent. I commend the Committee for this work.

Yours sincerely,

A handwritten signature in black ink that reads "Michael White". The signature is written in a cursive, flowing style.

Dr Michael White QC
Executive Director,
Centre for Maritime Law,
University of Queensland.



Our Reference: S2000/0196
Contact: R. Alchin
Telephone: 6274 7661
Email: Bob.Alchin@dotrs.gov.au

Mr Bob Morris
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Mr Morris

I refer to Dr White's letter of 7 June 2001 to the Committee. Dr White has two specific concerns.

Dr White's first concern relates to amendments made to the *Protection of the Sea (Civil Liability) Act 1983* by the *Protection of the Sea (Civil Liability) Amendment Act 2000*. Amongst other things, the amending Act requires all ships of 400 gross registered tons and over (other than tankers carrying more than 2,000 tons of oil as cargo) to have evidence of insurance to cover their liabilities in case of pollution damage. The liability limits generally are those set out in the Limitation of Liability for Maritime Claims Convention 1976 (the LLMC Convention). When the 1996 Protocol to amend that Convention enters into force in Australia, liability limits will increase.

Compulsory insurance was recommended in *Ships of Shame*, the December 1992 Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure. Specifically, that report recommended that the "Australian Government require proof of possession of adequate Protection and Indemnity insurance cover as a prior condition of entry of any foreign vessel into Australian ports". This recommendation was initially rejected by the Government because the Government was reluctant to engage in unilateral action.

In a further report of November 1995, the House of Representatives Standing Committee on Transport, Communications and Infrastructure examined progress on implementation of the recommendations of the *Ships of Shame* report. The Committee provided the following comment on the recommendation for compulsory insurance:

Following extensive consultation internationally and acknowledgment by the IMO through the Marine Environment Protection Committee (MEPC) that it was appropriate for member Governments to initiate action of their own accord in their ports and territorial sea, the Government has agreed to introduce new legislation to require vessels to carry proof of insurance at least to the equivalent to the requirements of the Civil Liability Convention.

When the Australian legislation was being developed, it was prepared in accordance with what was expected to be in the Bunkers Convention, including applying to ships of 400 gross registered tons and over. The application of the Bunkers Convention to ships over 1,000 gross registered tons was not finally decided until the Diplomatic Conference in March 2001. You will note that the Australian legislation applies the limits of the LLMC Convention (rather than the limits of the Civil Liability Convention) which are the preferred liability limits of the Bunkers Convention as adopted by the International Maritime Organization.

If Australia becomes a party to the Bunkers Convention, the relationship between the terms of that Convention and the existing insurance requirements will be considered in the development of the necessary implementing legislation.

The second specific concern raised by Dr White relates to amendments to the *Protection of the Sea (Prevention of Pollution from Ships) Act 1993* contained in the International Maritime Conventions Legislation Amendment Bill 2001. That Bill was introduced into the House of Representatives on 4 April 2001 but has not yet been debated.

Dr White suggests that the proposed power of a prescribed officer to require the discharge of sewage into a reception facility where he or she is "of the opinion that it is reasonable to do so" should be qualified by a more objective test. One of the circumstances in which this power would be exercised would be if the prescribed officer believed that a ship would need to discharge sewage before it reaches its next port of call. By requiring the ship to discharge sewage into a reception facility, the likelihood of pollution by discharge into the sea is reduced.

The power of prescribed officers to require the discharge of sewage into a reception facility is unlikely to be used very often. Because it is not possible to foresee all circumstances where that power may need to be used, it is not possible to formulate an objective test.

The Bill was examined by the Senate Standing Committee for the Scrutiny of Bills (see Alert Digest No. 6 of 2001 dated 23 May 2001). While commenting on other aspects of the Bill, the Committee had no comment on the matter raised by Dr White.

I am happy to discuss any of the above matters further if required.

Yours sincerely

Bob Alchin
Cross-Modal and Maritime Transport Division
1 August 2001



Office of International Law

2 August 2001

Mr Bob Morris
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Mr Morris

COMMENT ON ISSUES RAISED BY THE CENTRE FOR MARITIME LAW

I refer to your facsimile message to Stephen Bouwhuis of this Office dated 23 July 2001 requesting comments on the issues raised in a letter to the Secretary of the Joint Standing Committee on Treaties from Dr Michael White QC of the Centre for Maritime Law, University of Queensland.

2. Dr White has made a number of comments on maritime legislation and its relation to international law and practice. As requested, I will provide comments on matters raised by Dr White.
3. Dr White states that 'it is desirable that once a treaty or protocol is accepted by sufficient countries to become of the international law and practice, it should be implemented by Australia, but not until then'. In my view, this skirts the real question that should be asked. That is, whether it is in Australia's interests to become a party to a treaty. Views and attitudes of other countries to that treaty are but one element in deciding whether it is in Australia's interests to accept the treaty. Furthermore, Dr White's statement seems to imply that Australia should always be a follower and not a leader in treaty actions, even when an action would be clearly in Australia's interests. If every country acted on that basis, then few treaties would enter into force.
4. Secondly, Dr White refers to his concern that in some cases the Commonwealth and the States implement maritime treaties before they come into force internationally.
5. A preliminary point is that in the case of most maritime treaties, the constitutional power to implement the provisions of the treaty exists irrespective of entry into force of the treaty for Australia. In this respect, relevant constitutional powers include the trade and commerce power and the power with respect to matters physically external to Australia.
6. Furthermore, it may well be that implementation of a particular aspect of an international convention will be in Australia's interest even though the convention has not yet entered into force. Let me give a hypothetical example. Assume an international convention had been negotiated under which ships of member States were not to discharge oil in the exclusive economic zone ('EEZ') and territorial sea of any country. Also, assume that it had not entered into force. It would be open to Australia to introduce such a prohibition applicable to its territorial sea and EEZ

irrespective of whether the convention had entered into force. Presumably, that prohibition on discharge of oil would be in Australia's interests. Also, it would be consistent with Australia's international obligations irrespective of that fact that the convention had not entered into force. This is because, under general international law, Australia is able to control such matters within its EEZ and territorial sea.

7. Dr White states 'further, and much worse, is that on some occasions legislation is passed by one or more Australian parliaments in areas of international marine practice and industry where there is no international agreement relating to it'.

8. This statement does raise issues of sovereignty. Provided Australia is acting consistently with international law, then the absence of an international agreement on a marine matter should not, of necessity, prevent Australia from taking action on that matter.

9. The issue concerning bunker oil pollution damage that is raised later in the letter from Dr White is a good example. At the time legislation was introduced into the Parliament to require ships over 400 gross tonnes to carry a relevant insurance certificate, there was no international convention governing the issue (it was being negotiated). However, there was a real lacuna in relation to the lack of insurance to cover damages claims and clean up costs of bunker fuel spills. Certainly, it was not in the interests of Australia to await the entry into force of an international regime before it enacted legislation to protect the Australian coast.

10. If the international community is slow to respond to a genuine need, such as that in relation to insurance for bunker fuel spills, then there is no reason why Australia should avoid taking action itself. Indeed, the very fact that countries, including Australia, felt it necessary to take domestic action on insurance for bunker fuel spills provided an impetus for the international community to address the matter.

11. In summary, the value of international action in relation to marine matters should not be underestimated. Nevertheless, the absence of a treaty on a particular marine matter does not prevent Australia from taking its own action provided that in so doing it acts consistently with existing international law.

12. Dr White also has queried the appropriateness of legislation conferring administrative discretions on government officers that are dependent on those officers coming to an opinion. The conferral of administrative discretions is common practice. Furthermore, making the exercise of a discretion dependent on reaching an opinion 'that it is reasonable to do so', ensures that the discretion is not completely unfettered. At the same time, it does allow for flexibility of application to a wide variety of circumstances. This may not be the case if set criteria had been established.

13. Thank you for the opportunity to provide this comment.



Bill Campbell
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2 August 2001