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JOINT STANDING COMMITTEE ON TREATIES

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JOINT STANDING COMMITTEE ON

TREATIES

Monday, 7 March 2005

Members: Dr Southcott *(Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Bartlett, Collins, Mackay, Mason, Santoro, Stephens and Tchen and Mr Adams, Mr Johnson, Mrs May, Ms Panopoulos, Mr Ripoll, Mr Scott and Mr Turnbull

Members in attendance: Senators Bartlett, Collins, Mackay, Mason, Santoro, Stephens and Tchen and Mr Adams, Dr Southcott, Mr Turnbull and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

- Agreement between the Government of Australia and the Government of the Republic of Poland relating to Air Services (Warsaw, 28 April 2004)
- Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999) *
- Amendment to the Agreement Establishing the European Bank for Reconstruction and Development (Paris, 29 May 1990) in order to admit Mongolia as a country of operations
- Termination of the Agreement between the Government of Australia and the Government of the Slovak Republic on Trade and Economic Cooperation (Canberra, 23 April 1999) *
- 2004 Amendments to the Schedule to the International Convention for the Regulation of Whaling, 1946
- United Nations Convention against Corruption (New York, 31 October 2003)
- Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea (Port Moresby, 30 June 2004) *
- Agreement on Bilateral Cooperation between the Government of Australia and the Government of the Kingdom of Thailand (Canberra, 5 July 2004) *
- Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries (Adelaide, 25 July 2004) *

* previously tabled on 4 August 2004 but lapsed with the prorogation of Parliament

WITNESSES

Committee met at 10.03 a.m.

CHAIR—Before opening this hearing, I require a committee member to move that submission Nos 1, 2-2.7 and 3 for the treaties tabled 7 December 2004 be received as evidence and be authorised for publication. That is now moved by Senator Mason and seconded by Senator Mackay.

I now declare open this public hearing of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee today will review nine treaties which were tabled in parliament on 7 December 2004. Six of these treaties were tabled in the parliament in August last year but the committee had not had an opportunity to review them before the parliament was prorogued on 31 August. They were re-presented to the parliament on 7 December. A further three treaties were also tabled in the parliament on that date. The program for today therefore is tight. Should the committee decide that further evidence is required to complete the review of any particular proposed treaty action, the relevant departments will be advised accordingly.

I understand that witnesses from the Department of Foreign Affairs and Trade and the Attorney-General's Department will be with us for today's proceedings, with witnesses from other departments joining us for discussion of the specific treaties for which they are responsible. To begin our hearing, we will take evidence on the Agreement between the Government of Australia and the Government of the Republic of Poland relating to Air Services (Warsaw, 28 April 2004). I now call representatives from the Department of Transport and Regional Services.

[10.05 a.m.]

MANNING, Mr Greg, Principal Legal Officer, Advisings Section, Public International Law Branch, Office of International Law, Attorney-General's Department

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

BOGIATZIS, Mr Nicholas Con, Assistant Secretary, Transport Markets Branch, Policy and Research Group, Department of Transport and Regional Services

KELLY, Mr Wayne Ronald, Assistant Director International Aviation, Transport Markets Branch, Policy and Research Group, Department of Transport and Regional Services

LUCAS, Mr Samuel Campbell, Assistant Director International Aviation, Transport Markets Branch, Policy and Research Group, Department of Transport and Regional Services

WELCH, Ms Elisabeth, Assistant Director, Transport Industry and International Policy Branch, Policy and Research Group, Department of Transport and Regional Services

Agreement between the Government of Australia and the Government of the Republic of Poland relating to Air Services

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make any introductory remarks before we proceed to questions?

Mr Bogiatzis—Yes. The treaty action proposed in relation to Australia and Poland is to bring into force the agreement that was signed for Australia by its ambassador to Poland, Mr Patrick Lawless, on 28 April 2004. Article 18 specifies that the agreement will enter into force when the parties have notified each other in writing that their respective requirements for its entry into force have been satisfied. The government proposes this be done as soon as practicable following the conclusion of 15 sitting days from the date the agreement was tabled in both houses of parliament.

Aviation arrangements of less than treaty status dating from March 2003 have preceded the agreement. These have permitted Qantas to market seats between Australia and Poland, in cooperation with British Airways between London and Warsaw, and have provided similar opportunities for Polish carriers.

The purpose of the treaty is to provide legal certainty for air services operating between Australia and Poland that facilitate trade and tourism between the two countries through freight and passenger transportation, and to provide greater air travel options for Australian consumers.

The agreement provides a legal framework for the operation of scheduled air services between Australia and Poland. It provides for access by Australian airlines to Poland and for the development of air services between the two countries based on capacity levels decided between the aeronautical authorities of the two parties. The agreement also increases the opportunities for the Australian community, particularly the tourism support industries, to access Poland.

The agreement does oblige Australia and Poland to allow the designated airlines of each country to operate levels of capacity for scheduled air services between the two countries as decided between the respective aeronautical authorities. To facilitate these services, the agreement also includes reciprocal provisions on a range of aviation related matters, such as safety, aviation security, capacity, customs regulation and the commercial aspects of airline operations, including the ability to establish offices in the territory of the other party and to sell fares to the public.

Australia has a standard draft air services agreement which has been developed in consultation with aviation stakeholders. This agreement does not differ in substance from the standard Australian draft at the time the agreement was negotiated. The agreement is to be implemented through existing legislation, including the Air Navigation Act 1920 and the Civil Aviation Act 1988. No financial costs to the Australian government are anticipated in the implementation of the agreement. Consultations were undertaken by relevant state and Australian government departments and agencies and with members of the Australian aviation and tourism industries prior to the negotiations with the aeronautical authorities of Poland on the agreement. Information on the agreement has been provided to the states and territories through the Commonwealth-State Standing Committee on Treaties. Further details are contained in annex 1 to the national interest analysis, the NIA. All major stakeholders supported the agreement.

In relation to future treaty action, article 14 of the agreement provides for amendment or revision by agreement of the parties. Any amendment to the agreement, including the annex, will be subject to Australia's domestic treaty action procedures. If a multilateral convention concerning air transport comes into force, the agreement is deemed to be amended as far as is necessary to conform with the provisions of that multilateral convention. Any future amendments to the agreement are likely to involve further deregulation of air service arrangements between the parties.

Article 16 of the agreement provides arrangements to be followed for termination. Either party may give notice in writing at any time through diplomatic channels. The agreement terminates one year after the date of receipt of that notice by the other party.

By way of background: over the past 10 years the Australia-Poland yearly origin-destination passenger market has grown from a base of just over 20,000, in 1994, to just over 31,000, 10 years later in 2004—an average annual growth rate of 4.4 per cent. Australian residents made up 57 per cent of the total in 2004.

Qantas Airways, by code sharing on British Airways services, was the major airline in the market, carrying a total of 25 per cent of origin-destination passengers. Singapore Airlines was the next major airline in the market, with about 21 per cent of the total, followed by Lauda Air, with nearly 20 per cent. No airline operates directly between Australia and Poland.

In terms of airfreight, to the year ended September 2004 exports from Australia were valued at around $11 million, and the main categories were medicinal and pharmaceutical products and professional scientific apparatus. The value of exports has increased significantly from $6.6 million in the year ended September 2003, nearly doubling. The total airfreight imports from Poland to the end of September 2004 were valued at $20.3 million. The main categories, by value, were electrical machines and appliances, telecommunications and miscellaneous manufactured goods. There was an increase from $17 million in the previous year.

Senator STEPHENS—I understand that the agreement concerns Qantas. Are any other airlines involved in that?

Mr Bogiatzis—The treaties and the agreements are always between the two countries, so the parties are the government of Australia and the government of Poland, and they define and establish the rights that can be exercised by designated airlines of the two countries. In the case of Australia, Qantas has been designated as an airline that can exercise those rights to Poland, and Qantas exercises those rights through a code-share with British Airways.

CHAIR—Thank you. As there are no further questions, we will now hear evidence on the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999).

[10.12 a.m.]

Montreal Convention for the Unification of Certain Rules for International Carriage by Air

CHAIR—Do you wish to make any introductory remarks before we proceed to questions?

Mr Bogiatzis—Yes. The Montreal convention substantially improves consumer protection in international carriage by air and, most importantly, it improves the international regime for air carriers' liability, particularly in relation to injury or death. Concluded in 1999, the Montreal convention is widely regarded as a major achievement in reaching a compromise between countries with disparate views on the nature of the aviation industry and on appropriate amounts of compensation for injury or death as a result of aviation accidents. The Montreal convention protects commercial international carriage of persons, baggage and cargo performed by aircraft for reward. The convention applies to carriage performed by governments and public and private bodies.

At present Australia's air carriers' liability is governed by the Warsaw system, which is made up of the Warsaw convention and a number of other international instruments. Today the aviation system is operated in an environment very different from the one upon which the Warsaw system was predicated. At the time of its creation, the Warsaw system capped liability limits. These limits are now unreasonably low. For this reason, liability limits must change.

The convention provides a new uniform code that includes measures such as electronic documentation to assist the smooth movement of air passengers, baggage and cargo. Most of Australia's major aviation partners are parties to the Montreal convention. By acceding to the Montreal convention, Australia will maintain its standing in international aviation. Accession

will allow Australian carriers, passengers and cargo forwarders to benefit from the improved provisions in relation to most international air travel to and from Australia.

The most practical effect of accession to the Montreal convention is the increase in compensation limits for victims of air accidents. Under the new system there will be two tiers of liability for the death of, or bodily injury to, an aircraft passenger. The first tier provides coverage for claims up to approximately $A200,000 based on a strict no-fault liability. The amount can only be reduced in the case of contributory negligence of the passenger or the person claiming compensation. The second tier provides cover for claims in excess of $A200,000, but it is fault based liability. For these claims the carrier is liable unless it proves that the damage was not due to its own negligence or action or failure to act. Theoretically the air carrier would be able to limit its liability under the second tier but not under the first.

Currently, Australian legislation imposes higher liability limits on air carriers than those imposed under the Montreal convention. As a matter of international law, Australia cannot impose these higher limits to foreign carriers operating to and from Australia. For carriage to which the Montreal convention applies, both Australian and foreign carriers would be subject to the liability limits imposed by the Montreal convention. However, these higher limits will continue to apply to Australian carriers in relation to non Montreal convention carriage if Australia accedes to the convention.

It is possible that for a few years Australia will have aviation partners who are still covered by the Warsaw system; however, the Montreal convention is being picked up very quickly. It is likely that blanket coverage by the convention will be achieved within the next decade. Failure for Australia to accede may harm its standing as a leading nation in international aviation reform. Traditionally Australia has promoted reform of the aviation industry and is one of the most liberal regulatory regimes in the world. Following the adherence of the European Community and its member states to the convention, it would be inappropriate for Australia not to accede—or appropriate for it to accede.

CHAIR—What would be considered non Montreal convention coverage for an Australian carrier?

Mr Bogiatzis—It would continue to be covered by our current provisions, which provide for full liability in relation to the airlines.

Ms Welch—'Non Montreal convention' covers those airlines that are still covered by the Warsaw system, which is a very complicated series of instruments.

CHAIR—I understand that, but in the NIA it says:

If Australia accedes to the Montreal Convention and amends the … Act … the 260,000 SDR limit will continue to apply to Australian carriers in relation to non-Montreal Convention carriage.

What is that talking about?

Ms Welch—It is talking about the difference between the Montreal liability limits and those under the Warsaw system.

CHAIR—I understand that, but, if we have amended the act, aren't the Australian carriers then under the Montreal convention liability limits?

Ms Welch—The act will make provision for the different limits until they all become the same.

Mr Bogiatzis—If I can clarify: if those other airlines are signatories to the Montreal convention then they would be covered by the Montreal provisions. If they are not yet signatories to Montreal then they would be covered by the Warsaw provisions.

CHAIR—Okay, but if we are signatories to the Montreal convention and we enact the legislation then our carriers are covered by the Montreal convention?

Ms Welch—Depending on the country to which the carrier is flying.

CHAIR—Right.

Mr Bogiatzis—So we would be covered by both. We would be covered by the Montreal convention for those countries that have also signed up to Montreal and we would be covered only under the Warsaw system for those countries that are still only under Warsaw.

CHAIR—I see. So it depends on where they are flying to, not so much what nationality the carrier is?

Ms Welch—That is correct. If Qantas, for example, is flying to Indonesia, once we have acceded to the Montreal convention we will be covered by that convention. However, Indonesia—this is just an example—is a party to the Warsaw convention of 1929 and to the Guadalajara convention of about midway through last century. In that case, when Qantas flies to Indonesia it would be covered by the Warsaw convention and the Guadalajara protocols.

CHAIR—Can I ask you about Singapore, Malaysia and the United Arab Emirates—are they parties to the convention as well?

Ms Welch—Singapore has not acceded yet, as far as we are aware, but it is planning to. As for Malaysia, I would need to check the list. There are 63 countries that have so far acceded.

Mr Lucas—Malaysia is not a party to Montreal at this stage.

CHAIR—And the United Arab Emirates?

Mr Lucas—The United Arab Emirates is a party to Montreal.

CHAIR—Which of our significant routes is not a party to the Montreal convention?

Mr Lucas—With the accession the year before last of the United States and now by members of the European Union, all of our key routes, such as New Zealand, the United States, Europe and Japan, are covered. At the moment Singapore is not covered, but we understand that Singapore is moving to accede to Montreal.

CHAIR—What about Hong Kong?

Mr Lucas—Hong Kong is, by my understanding, covered by China, which has signed the treaty but has yet to bring it into force.

Mr WILKIE—I see article 33 of the Montreal convention brings in a fifth jurisdiction. Can you provide some examples of where that fifth jurisdiction would be used where the other four would not actually apply?

Ms Welch—An example of the fifth jurisdiction being used would be of an Australian who wished to bring an action in a country where liability limits are significantly lower than they are in Australia. That person would have an opportunity to bring an action in Australia rather than in the country where the accident occurred.

Mr WILKIE—But the actual compensation amounts get reviewed every five years. Is that right?

Ms Welch—That is correct. At the moment they are limited by the Warsaw convention to about $A20,000. One of the main problems of being a signatory in the Warsaw system was the fact that those liability amounts were not indexed, so they have stayed at about 1929 levels. Now they will be kept up to date.

Mr WILKIE—I think we reviewed the Warsaw convention a few years ago—I remember that coming before us.

Senator MACKAY—I would like some more information on the consultation process itself. What organisations or individuals did the department receive submissions from? More particularly, were the states active in discussions?

Ms Welch—The states were active in discussions as were all the major aviation representatives, including the Board of Airline Representatives of Australia, Qantas and Ansett, at the time. Everybody is very supportive of the proposal to accede to this convention.

Senator MACKAY—Other than the two individuals who wanted a better international regime.

Ms Welch—That is correct. They were academic lawyers.

Senator MACKAY—Were they of any note?

Ms Welch—They were academic lawyers.

Mr Lucas—It is worth noting on that issue that the two people who argued for a better system had been hoping that Australia would have tackled some of the more contentious issues that almost caused the negotiations on the convention to break down. Both of those lawyers were present at the negotiations as observers. I have now been informed verbally by the two lawyers in person in my conversations with them that they now feel that we are better off moving to

accede to Montreal. They have, to a certain extent, changed their opinion on that in the time since the extensive consultation process.

Senator MACKAY—So there is pretty much unanimity. Is that what you are saying?

Mr Lucas—Yes.

CHAIR—Thank you very much for your evidence this morning. We will now hear evidence on the amendment to the Agreement establishing the European Bank for Reconstruction and Development (Paris, 29 May 1990) in order to admit Mongolia as a country of operations. I now call representatives from the Treasury.

[10.24 a.m.]

BRAKE, Mr Roger, General Manager, International Finance Division, Department of the Treasury

McNICHOL, Ms Kirsty, Development Banks Unit, International Finance Division, Department of the Treasury

THOMPSON, Mr Hector, Manager, Development Banks Unit, International Finance Division, Department of the Treasury

Amendment to the Agreement Establishing the European Bank for Reconstruction and Development

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Brake—Yes. As context: the EBRD was established in 1990, following the end of the Cold War, to support former communist states in Central and Eastern Europe to promote private and entrepreneurial initiative in a democratic environment. Since its inception, the EBRD has progressively moved its focus of operations east, with projects in Russia and Central Asia along with more traditional countries of operations in Central and Eastern Europe. However, Mongolia is not eligible for lending under the current EBRD agreement.

When Mongolia applied to join the EBRD, the board of directors noted that Mongolia was in the sphere of influence of the former Soviet Union, was located next to the Russian Federation and Kazakhstan and faced difficulties similar to those of other countries of operations of the bank. The board of directors voted unanimously in favour of Mongolia becoming a country of operations.

The Treasurer, as a governor of the EBRD, determined that Australia through the EBRD could play an effective role in fostering transition towards an open market based economy in Mongolia and hence voted in favour of the resolution, as did all other governors. The amendment to the agreement establishing the EBRD being examined today will facilitate Mongolia becoming a country of operations for the EBRD and thus allow Mongolia to benefit from financial and other assistance from the EBRD.

CHAIR—I was interested to see that Mongolia had been admitted. Are there any limits to the numbers of countries that potentially can receive reconstruction and development support from the European bank?

Mr Brake—The articles discuss which members can be eligible for the operations of the EBRD. It is essentially those countries in Europe, and that is why there needs to be the

amendment to admit Mongolia. If there are other countries outside that pretty strict definition, they would also need a new amendment to the articles.

CHAIR—How were the Central Asian republics included? Was there a previous process like this?

Mr Thompson—Presumably they were part of the Soviet Union.

Mr TURNBULL—I had some dealings with the EBRD and Russia in the early nineties, and it seemed to cover the former Soviet Union republics.

Mr WILKIE—How many member countries are there?

CHAIR—We have got a list here. There are 60.

Mr WILKIE—Everybody has to agree to admit Mongolia. Is anyone likely to oppose it?

Mr Brake—All of those countries have a governor and all the governors have agreed, so we would not be expecting any opposition amongst those countries. Quite a few of them have already gone through the ratification process.

Mr ADAMS—Do we put money into this bank? Australia makes a contribution, does it?

Mr Brake—We put in a capital subscription.

Mr ADAMS—We did or we have?

Mr Brake—We have.

Mr Thompson—We are still making payments under that capital subscription.

Mr ADAMS—How much is it?

Mr Thompson—I think it is 200 million euros.

Mr ADAMS—Annually?

Mr Thompson—No, that is a capital subscription. We pay that over a period of time and we are still making payments for our last capital subscription.

Mr ADAMS—Is that 10 years, 20 years, 100 years?

Mr Brake—My recollection is there are only a few years to go.

Mr ADAMS—We do not know.

CHAIR—It is on page 215.

Mr ADAMS—What does it say, Chair?

CHAIR—It says 'Capital subscription: 200 million euros'.

Mr ADAMS—Over what period?

Mr Thompson—I think the final payment is due either this year or next year.

Mr ADAMS—Fifteen years.

Senator TCHEN—I noticed that, apart from Australia and Mongolia, the other countries in the Asia-Pacific region are Japan and South Korea. I can understand Australia being a part of this because of our international position, obviously, and Japan is also a world economic superpower. Can you recall why South Korea is a member?

Mr Brake—I do not know. I do understand that all OECD countries are members of the EBRD and South Korea is a member of the OECD.

Senator TCHEN—I asked that because, as you said in your preamble, Mongolia is not in Europe. But I suppose it was admitted because it was within the former Soviet Union's sphere of influence. It seems to me that one could also argue that it is potentially within China's sphere of influence. Has any consideration been given to China's attitude towards Mongolia being included in the European Bank for Reconstruction and Development's area of operations?

Mr Brake—By Australia?

Senator TCHEN—No, by China. Do we know whether China has any position on it? Again, we have a very close relationship with China. It might be in our national interest to be knowledgeable about how the Chinese feel about it.

Mr Brake—I do not believe China is a member of the EBRD.

Senator TCHEN—No, I do not think that it is. But China has been known to react in an idiosyncratic way to international movements and relationships. If the answer is no, just say no.

Mr Brake—As far as I am aware, we have had no feedback from China expressing concerns to the Australian authorities about the prospective membership of Mongolia in the EBRD.

CHAIR—Thank you very much.

[10.32 a.m.]

THRELFALL, Mr Peter Nicholas, Executive Officer, Northern, Central and Eastern Europe Section, Department of Foreign Affairs and Trade

WOODS, Mr John Magnus Lamond, Director, Northern, Central and Eastern Europe Section, Department of Foreign Affairs and Trade

Termination of the Agreement between the Government of Australia and the Government of the Slovak Republic on Trade and Economic Cooperation

CHAIR—We will now hear evidence on the termination of the Agreement between the Government of Australia and the Government of the Slovak Republic on Trade and Economic Cooperation (Canberra, 23 April 1999). Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Woods—Yes. Thank you for inviting the Department of Foreign Affairs and Trade to appear today to address the Slovak Republic's request to terminate the trade and economic cooperation agreement with Australia. This agreement was signed on 23 April 1999 and entered into force on 8 June 2000. The Slovak Republic, like other EU accession countries, has been required to terminate its bilateral trade agreements with third parties as a condition of its entry to the EU customs union. Unlike many of Australia's trade and economic cooperation agreements with EU accession countries, the agreement with the Slovak Republic is less than five years old and requires mutual agreement to its termination. Our agreements with other EU accession countries were terminated in 2003 and 2004 by unilateral notification and exchange of diplomatic notes.

Australia's bilateral relations with Slovakia are good, and the request to terminate the agreement will not affect either Australia's trade or diplomatic relations with Slovakia. When in 1999 this agreement was signed, there were political considerations to take into account—namely, the wish to assist Slovakia's economic and political transition. It was also to bring into effect a more contemporary trade agreement than the 1972 agreement on trade relations between Australia and the former Czechoslovak Socialist Republic, which divided into two countries in 1993.

Slovakia is one of Australia's smaller trade and investment partners, with two-way trade currently worth approximately $25 million. It is ranked 95th. Direct Australian investment in Slovakia is at the moment limited to the insurance sector. In 2004, Australian exports to Slovakia were a mere $3.34 million, although they had been as high as $11.7 million in 2002. Imports from Slovakia have steadily increased and are now at around $22.3 million. This is double the level of imports recorded in 2000.

Australia's major exports to Slovakia have included wool, telecommunications equipment and some confidential items. However, in 2004 there were no exports of wool, and exports of telecommunications equipment and computers fell significantly. Imports include rubber tyres, glassware, plastics, nitrogen compounds and paper manufactures. Australian export opportunities to Slovakia will continue to be limited by the small size of the market and the availability of cheaper raw materials from Slovakia's traditional trading partners such as the Russian Federation and the Ukraine. However, we see some scope to boost commodity exports, including minerals and raw materials, and exports in a range of niche industry sectors such as education and tourism. In the education sector, there has been some success in attracting Slovak students to Australia; we had 2,362 student enrolments from Slovakia in 2003.

Quite clearly, as you are aware, this department supports the termination of this agreement with Slovakia.

CHAIR—In the NIA, it says that we have the right to seek offsetting market access benefits should market access deteriorate significantly due to the change in tariffs. How would you decide if that has happened?

Mr Woods—That is a process where, within the Department of Foreign Affairs and Trade, we would consult with our colleagues, particularly those working on WTO issues, and look at that over a period of time. Again, it is a question of the level of trade. Also, we would need to make an evaluation of any particular reasons that may be actionable in that case.

Mr Threlfall—Can I add that, under the WTO agreement, under article XXIV:6, there are provisions for a country affected by a trade union agreement such as the European Union customs union to negotiate, and those negotiations are currently under way in Europe.

CHAIR—Have you had advice from Austrade that it is not expected to impact? Are there any Australian businesses that are unduly exposed in trade with the Slovak Republic?

Mr Woods—Not as far as we are aware. We do not see any negative impact as a result of this action.

Mr WILKIE—Can I ask something out of curiosity. In order to become members of the EU, they have had to comply with the rules there. But we have this bilateral agreement in place which has different sets of rules applying. Does that mean that they apply bilateral rules in trading with Australia now or are they applying the EU rules?

Mr Woods—As a member of the EU, they are brought under the auspices of the EU, so those rules apply.

Mr WILKIE—So I suppose it is fair to say that, in trading with Australia, they are actually in breach of the agreement and this is just trying to sort that problem out.

Mr Woods—Yes. It is their request to terminate this agreement according to their accession to the EU.

Mr ADAMS—You do not know if we are going to lose anything with this agreement? Is that the evidence you are giving us?

Mr Woods—We are very confident that there will not be any loss at all to Australia as a result of this action.

Mr ADAMS—In the offsetting exercise that can go on, because we have had an agreement with them, when they go into the EU could that be in our favour or be a benefit to us?

Mr Threlfall—As I mentioned earlier, the negotiations come under article XXIV:6 of the WTO agreement. The Australian government, in negotiations with the Europeans, will assess the balance of trade as a consequence of the enlargement of the EU. There may be various compromises through negotiation on what compensation there may be.

Mr ADAMS—We import about $10 million more than we export.

Mr Threlfall—It is more a case of the commodities and the variation in duties being exposed prior to the accession countries joining the European Union. Tariff rates may have been changed, so that is where the negotiation is under way and that is then balanced and negotiated.

Senator TCHEN—You said it is a rule of EU accession that the acceding country must renounce all bilateral agreements with other countries that do not accord with the EU. Was Australia aware of this rule during its negotiations with the Slovak Republic, knowing the republic wanted to join the EU? Were we aware of it?

Mr Woods—We would have been aware of it. We would have been aware of it because this is not the first accession to the EU that has taken place. Certainly, bringing the trade regimes of the countries acceding to the EU under the auspices of the EU is something that we would anticipate in that context.

Senator TCHEN—If the trade agreement with the Slovak Republic was only signed in 1999 and came into force that same year, and the Slovak Republic had been seeking accession to the EU for quite some time before that, why did we go ahead with this bilateral treaty knowing that it was going to become void in due course?

Mr Woods—There was no certainty as to when the accession would be completed. There was some uncertainty at that stage about just when that would happen, so the assessment was made that we should conclude the agreement anyway in the context of our bilateral relationship with Slovakia.

Mr Threlfall—It was our understanding at the time that Slovakia was one of the least progressed countries in their EU negotiations. At the time there was no surety that they would join when the other countries joined the European Union.

Senator TCHEN—Does Australia have bilateral treaties with any other countries that might be seeking accession to the EU?

Mr Woods—We would have to check on that for you.

Senator TCHEN—In that case, can you also check whether we are negotiating with countries that are seeking accession to the EU?

Mr Woods—Yes, we will do that.

CHAIR—There are no more questions. Thank you very much for your evidence this morning.

[10.44 a.m.]

BARRINGTON, Mr Jonathon Harold Sutherland, Senior Policy Adviser, Australian Antarctic Division, Department of the Environment and Heritage

PRESS, Dr Anthony James, Director, Australian Antarctic Division, Department of the Environment and Heritage

2004 Amendments to the Schedule to the International Convention for the Regulation of Whaling, 1946

CHAIR—Welcome. Thank you for coming up from Tasmania for the hearing. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Dr Press—Yes, thank you. The amendments to the schedule to the convention maintain the existing moratorium on commercial whaling and modify the provisions for aboriginal subsistence whaling. These modifications are in Australia's national interest because they maintain the strong opposition we have to commercial whaling but support the access of some indigenous communities to whales and whaling to meet demonstrated traditional, cultural and nutritional needs. The first set of amendments substitute the dates for the coming year on commercial whaling catch limits, all of which are set at zero in accordance with the schedule. The amendments are required annually to maintain the moratorium on commercial whaling and the currency of the schedule itself. They are straightforward: the amendments substitute the dates 2004 and 2005 for 2003 and 2004 et cetera. They are procedural.

The second set of amendments modifies the provisions for aboriginal subsistence whaling in the Northern Hemisphere. These amendments are made from time to time to alter the provisions governing the four quotas currently approved by the commission for the taking of whales by aboriginal communities. They bring them into line with the other provisions so that there is consistency in the provisions for subsistence whaling by aboriginal communities. We have a large consultation process in the whaling community. A number of parties are consulted in the lead-up to the annual IWC meetings and, consequently, as a result of decisions made by the IWC.

CHAIR—Do the amendments regarding aboriginal subsistence for the Northern Hemisphere apply to the Bequian people as well?

Dr Press—This set of amendments applies specifically to the Chukotka people in the Bering-Chukchi-Beaufort Sea area and, off the east coast of America, the Makah tribe.

CHAIR—While we have you here, we have some provisions for aboriginal subsistence whaling in the Northern Hemisphere. How is progress on making the Southern Hemisphere free of whaling?

Dr Press—Australia has maintained a long opposition to commercial whaling anywhere in the world. At the moment there is whaling being undertaken in the Southern Hemisphere due to the loophole that exists in the convention which allows for the lethal killing of whales under scientific permits. In the near future we do not see that that situation would change, but Australia and others are still maintaining a very strong commitment to an international moratorium on all forms of commercial whaling, including scientific whaling.

Senator MACKAY—In relation to the exemption for scientific research et cetera and the fact that there is whaling going on under that provision, which countries are primarily responsible for the use of that exemption?

Dr Press—At the moment there is scientific whaling conducted by Japan in the Antarctic, in the north Pacific and in Japanese waters. There is also scientific whaling being conducted by Iceland.

Senator MACKAY—Can I take it from your comments that it clearly goes beyond the nature of what may be regarded as scientific?

Dr Press—Australia's view is that that whaling is not scientific but is commercial whaling by means of a loophole in the convention.

Senator MACKAY—Do we have any figures as to the scale of it?

Dr Press—Yes. Under the scientific whaling exemptions, there were 845 taken in 2003-04. That included 440 minke whales in Antarctica. In the north Pacific, there were 100 minkes, 50 Bryde's, 50 sei whales and 10 sperm whales. In Japanese waters, there were also 50 minke whales taken. In the north Atlantic, there were 37 minke whales taken.

Senator MACKAY—That is Iceland and Japan?

Dr Press—Correct.

Senator MACKAY—Presumably in the Southern Hemisphere it is mainly Japan.

Dr Press—Yes.

CHAIR—Is Norway no longer conducting whaling?

Dr Press—Norway does conduct whaling, but by way of an objection to that particular application of the convention.

CHAIR—Sorry?

Dr Press—Norway has an objection to that particular application of the convention and actually takes 600 to 700 whales in the north Atlantic.

Senator JACINTA COLLINS—But not under the exemption?

Dr Press—Not under the scientific whaling exemption.

CHAIR—They are a member of the International Whaling Commission but they are going their own way?

Mr Barrington—At the time of the moratorium, Norway lodged an objection to the moratorium on commercial whaling and is not therefore bound by that moratorium.

Dr Press—They legally carry out their whaling by way of not having recognised the application of that part of the convention to them.

Mr ADAMS—The Norwegians used to say that traditionally they had eaten whale meat, didn't they? Is that their argument? Can you give us their argument?

Dr Press—It would be very difficult for me to try to speak on behalf of another country in that regard, but they have a national position which maintains that they have the right to continue whaling.

Mr ADAMS—Because of their traditional ways?

Dr Press—It may be more complicated than that. I would not like to say that it was solely because of their tradition.

Mr ADAMS—They do not come to the convention and put a case?

Dr Press—They attend the convention and argue in favour of the lifting.

Mr ADAMS—Do you attend the convention?

Dr Press—I have not attended the convention, no. The whaling commissioner and others have attended, but I have not.

Mr ADAMS—I was wondering whether any of that gets written up. Is there nothing that gets written up so that one can understand what the argument is?

Dr Press—There are a number of academic papers as well as the record of the convention itself.

Mr ADAMS—I know that, and I have read the ones on the scientific arguments, but I have not read the arguments about Norway. You cannot help me there?

Dr Press—Not directly. I am sure we could provide you with some background on Norway's position.

Mr ADAMS—Okay.

CHAIR—As they are in your home state, perhaps you can make a visit.

Mr ADAMS—We did take whales 200 years ago. They are back in the Derwent, but we are not taking them now. I would like to ask about the aboriginal people in the Northern Hemisphere that take them. Do they take them by traditional means?

Dr Press—Under the provisions—those that are made available under the schedule—aboriginal people are able to take whales for traditional purposes and for subsistence and dietary needs.

Mr ADAMS—I am talking about the way they actually take them from the sea. Do they use a hand thrown harpoon or do they use a mechanical harpoon?

Dr Press—I cannot answer that question, but maybe my colleague can.

Mr Barrington—It varies from location to location. An example would be where an initial strike is made using a traditional lance and then the animal is dispatched as humanely as possible using explosive devices. While the subsistence whaling can continue, it still needs to be undertaken in as humane a way as is practicable at this time.

Mr ADAMS—Originally, whales were endangered. How many species are now endangered in the oceans of the world?

Dr Press—I would have to take that on notice. I could not tell you how many are actually endangered and by what criteria they are defined, but I could certainly make that available if you wished.

Mr ADAMS—That would be good. Thank you.

Senator MACKAY—I have one question in relation to instances where commercial whaling is in breach of the moratorium. I think Norway fits into that category, doesn't it, in that it objected?

Dr Press—It is not in breach of the moratorium. It lodged an objection to that provision.

Senator MACKAY—It lodged an objection, therefore it is not covered by the moratorium.

Dr Press—It is not bound by that.

Senator MACKAY—What other countries which are major hunters of whales fit into that category?

Dr Press—There are none other than the ones that we have named.

Senator MACKAY—So we have Norway, because it lodged an objection; Iceland; and Japan, because it used section 8. Is it section 8?

Dr Press—Article 8.

Senator MACKAY—Article 8 is in relation to so-called scientific purposes. Is that it, that you are aware of?

Dr Press—Yes.

Senator TCHEN—Dr Press, from what you have just said, it is actually impossible to breach this convention, because anyone who wishes to breach can simply object to it.

Senator MACKAY—That is exactly right. If you lodge an objection, you are not covered by it.

Senator TCHEN—Japan is actually the real gentleman here because it conducts something which is not in breach.

Senator MACKAY—It is sneakier.

Senator JACINTA COLLINS—Welcome to the world of self-regulation.

Senator TCHEN—Whereas Norway simply objects.

Dr Press—When that provision was coming into force, the convention did allow countries to lodge an objection to the application of the provisions, and that is what Norway did. In that sense it certainly is not in breach of the convention.

Senator TCHEN—I just wanted to clarify, Dr Press. I know you did not draft the convention.

Dr Press—It is quite an old convention.

CHAIR—Thank you very much. As you can see, there is always a lot of interest from the committee on matters related to whaling. Perhaps we will have to come down to Hobart to visit you to discuss these issues at greater length.

Dr Press—You would be most welcome.

CHAIR—Thank you for coming up to give evidence today on these amendments.

[11.00 a.m.]

BANNERMAN, Mr Bruce Kenneth, Principal Legal Officer, Funding and Assets of Crime Section, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

BLACKBURN, Ms Joanne, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

MANNING, Mr Greg, Principal Legal Officer, Advisings Section, Public International Law Branch, Office of International Law, Attorney-General's Department

WESTMORELAND, Ms Kate, Legal Officer, International Legal Cooperation Team, International Crime Branch, Criminal Justice Division, Attorney-General's Department

PALU, Mr Mark, Director, Coherence and Strategic Issues, Policy and Multilateral Branch, Australian Agency for International Development

DRENNAN, Mr Peter, National Manager, Economic and Special Operations, Australian Federal Police

BOHN, Mr David Anthony, Group Manager, Policy, Australian Public Service Commission

MOWBRAY-d'ARBELA, Mr Marc, Branch Manager, Legislative Review Branch, Department of Finance and Administration

BRINE, Mr Matthew Jason, Manager, Governance and Insolvency Unit, Corporations and Financial Services Division, Department of the Treasury

United Nations Convention against Corruption

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Blackburn—Thank you. With your indulgence, Chair, I have a short opening statement to put a framework around this convention. As members of this committee would be aware, corruption is accepted as having a wide range of corrosive effects on societies, ranging from the undermining of democracy and the rule of law; the distortion of markets, impeding international trade; and facilitating activities such as organised crime and terrorism. Australia also recognises corruption as a major impediment to development, and the fight against corruption is seen as an integral tool in poverty reduction.

The convention we are considering here this morning is the first global binding international instrument to comprehensively deal with corruption. Australia will be one of the first Western

countries to ratify the United Nations Convention against Corruption, assuming that the report from this committee recommends that that course of action take place. Our early ratification will enhance our international profile as a country committed to fighting corruption. Ratifying UNCAC in 2005 will be particularly timely in light of the declaration of APEC leaders in Santiago in November 2004. One of the key planks of that declaration calls on APEC member economies to adopt UNCAC and other key international instruments to fight corruption.

Ratification of UNCAC will also complement other initiatives Australia has in place in this area. We have recently ratified the UN Convention Against Transnational Organised Crime. Australia has also ratified the OECD's foreign bribery convention and is an active participant in the Asian Development Bank-OECD anti-corruption initiative. Australia has an overseas aid program that is strongly focused on assisting Asia-Pacific countries to combat corruption and also participates in the work against international money-laundering arrangements.

The convention has both broad mandatory obligations and optional provisions. As is common with multilateral treaties, it leaves the detailed implementation to state parties. The convention has five parts: prevention, criminalisation of conduct, international cooperation, recovery of assets, and technical assistance. Chapter 2, the prevention chapter, has measures directed at both the public and the private sectors, aiming to increase transparency and efficiency, requiring public servants to make financial and other disclosures and requiring public finance to be transparent and accountable.

Australia meets these obligations through measures such as the regulation of the Australian Public Service and similar regulation of state and territory public services; systems for the management and accountability of public money at the Commonwealth level under the Financial Management and Accountability Act and the Commonwealth Authorities and Companies Act; regulation of financial institutions and corporations through legislation such as the Corporations Act, the Australian Securities and Investments Commission Act and the Australian Prudential Regulation Authority Act; and also the creation of our anti-money-laundering system under the Financial Transaction Reports Act.

Chapter 3 provides four core corruption offences with a number of supporting optional offences. The convention does not include a definition of corruption. It defines a range of conduct which is intended to form part of the offences. The primary criminalisation for Australia is through the bribery and foreign bribery offences in the Criminal Code and offences for improperly dealing with public money under the Financial Management and Accountability Act and various provisions of the Corporations Act. The convention has extensive provisions for international cooperation amongst state parties. These measures include the provision of mutual legal assistance; extradition arrangements; and measures to support the tracing, freezing, seizure and confiscation of the proceeds of corruption. For Australia to fully comply with chapter 4, regulations will need to be made under both the Mutual Assistance in Criminal Matters Act and the Extradition Act. It is proposed that they would be made before the ratification is completed.

The asset recovery provisions in chapter 5 are unique in that UNCAC is the first major international agreement which requires state parties to return assets obtained through corruption to the country from which they were stolen. Australia's implementation of these requirements is through the Proceeds of Crime Act and the Mutual Assistance in Criminal Matters Act. Chapter 6 relates to technical assistance and encourages a collaborative approach to developing domestic

and international techniques to combat corruption. Australia has various programs, particularly those through AFP as well as cooperation programs and AusAID development assistance programs, which meet our obligations under this chapter.

The convention is large and quite complex. However, its structure, which groups the key issues into chapters, helps us to work through them. The implementation of the obligations is a whole-of-government endeavour underlined by the range of Australian government agencies here to assist the committee today. We are happy to take your questions.

CHAIR—Thank you. Just to put it on the record, there are no changes required to Commonwealth legislation?

Ms Blackburn—There are no changes required to Commonwealth legislation. The only piece of legislative activity which we believe we have to take is to make regulations under the Mutual Assistance in Criminal Matters Act and the Extradition Act. Those regulations will provide that state parties to this multilateral treaty are declared to be parties with which mutual assistance and extradition can be done. We have a range of regulations already made under the Extradition Act. That is the way in which we attempt to meet our obligations, such as the provision of mutual assistance and extradition, to state parties to the convention in relation to the offences which are created by the convention. But they will be regulations which we would seek to put forward and have made by the Executive Council before the ratification instrument is deposited.

CHAIR—Extradition acts are currently done bilaterally?

Ms Blackburn—Australia has a range of bilateral treaties which cover our extradition arrangements. But we also have a series of regulations made under the Extradition Act which implement obligations which are in very similar terms to those in this convention for multilateral treaty arrangements. In fact, according to my latest list, there are 14 sets of regulations which seek to implement arrangements which are very similar to those in this convention.

CHAIR—So the regulations would mean that we would then have extradition arrangements with any parties to the convention?

Ms Blackburn—Yes, for the purposes of investigating and prosecuting the offences which are created by the convention.

CHAIR—So it is only for those purposes?

Ms Blackburn—Yes.

CHAIR—For example, in the last week or two prominence has been given to a case in Sierra Leone. It has been mentioned that we have no extradition arrangements with Sierra Leone. But that is not an area which would come under the regulations to be made under the Extradition Act?

Ms Blackburn—That is correct. If Sierra Leone is a party, and I believe it is one of the countries which has ratified this—

CHAIR—Yes, it is a party and it has ratified it.

Ms Blackburn—If Sierra Leone and Australia are parties to this convention, once it comes into force—and it is not in force yet—these extradition regulations will have the effect of declaring Sierra Leone to be an extradition country for the purposes of the offences created by this convention.

Mr TURNBULL—Ms Blackburn, you said that this treaty requires no new pieces of Commonwealth legislation. But would you agree with me that the treaty would certainly enable the Commonwealth parliament, if it so chose, to enact legislation implementing some of the objectives of this treaty?

Ms Blackburn—To the extent that the treaty brings into play the Commonwealth's external affairs power, I assume so. Perhaps my colleague from the Office of International Law could confirm that position.

Mr Manning—That is right. Just to confirm what Mr Turnbull has said, once the treaty gives rise to obligations at international law for Australia, the Commonwealth, if it so desired or thought it appropriate, could implement those measures through legislation, relying on the external affairs power.

Mr TURNBULL—For example, pursuant to article 6, the Commonwealth could establish a national ICAC to deal with corruption at federal, state and municipal levels. Would you agree with that?

Mr Manning—The Commonwealth could implement any measure reasonably adapted to implement the provisions of the treaty. I am not as familiar with the contents of the treaty as are others at this table but, as I said, the Commonwealth could implement any measure reasonably adapted to implement the treaty.

CHAIR—And the Commonwealth now would not have the power to implement a national ICAC?

Mr Manning—As Ms Blackburn said, the Commonwealth could seek to rely on a number of heads of power in the Constitution, such as some of the measures that have been implemented already by the corporations power. It is probably not a task of the Office of International Law to examine what it could do now under existing heads of power; but certainly, once these obligations exist for the Commonwealth, it could do so relying on the external affairs power. I could not say one way or the other whether it could do so already.

Mr TURNBULL—In the treaty, there are provisions which are mandatory and which require the state party to do something; article 6 was the one I mentioned a moment ago. But there are also provisions, such as article 7.3, which speak in language of consideration. Article 7.3 states:

> Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

Is it the understanding of the representatives of the Attorney-General's Department that this would enable the Commonwealth parliament, under the external affairs power, to pass a national law that governed the funding of candidates for elected office and the funding of political parties, regardless of whether they were standing as candidates for federal or state parliaments or local councils?

Ms Blackburn—I would make two points in response. We do not regard as mandatory the provisions of articles 6.1 and 7.3, which you have mentioned. Clearly, they are optional provisions that a country can choose to implement.

Mr TURNBULL—With great respect, you are not answering my question. My question was: does it give you the power? Obviously article 7 is not mandatory, because it is saying that the state 'shall consider'. But would that give you the power to do it?

Ms Blackburn—As I indicated, I wished to make two points. Firstly, they were not mandatory requirements. Secondly, in answer to your question about the process of putting forward this convention for ratification, no consideration has been given within the Attorney-General's Department to either of the matters that you raise in support of the analysis of this convention.

Mr TURNBULL—With respect, you said that you regard article 6 as not being mandatory. It uses the word 'shall'.

Ms Blackburn—The words that are used are 'shall, as appropriate'. We do not regard that as a mandatory obligation. We do, however, regard Australia as very well placed to meet those obligations through existing institutions that are in place at both the Commonwealth and the state levels.

Mr TURNBULL—Could I take you to another section, dealing with the private sector, article 12. Article 12.1 says:

Each State … shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector …

You would agree with me that that is mandatory, wouldn't you?

Ms Blackburn—Yes, I would agree with that.

Mr TURNBULL—So would you agree that that would give the Commonwealth extensive additional jurisdiction, pursuant to the external affairs power, over the areas of jurisdiction referred to in article 12?

Ms Blackburn—I feel somewhat handicapped in answering these questions. I am not here as a constitutional law expert, nor have I undertaken that analysis, so I cannot answer the question that you have just posed.

Mr TURNBULL—Is there anyone from your delegation that can?

Ms Blackburn—Since it asks us to express an opinion on a constitutional law issue which we have not undertaken analysis of, I do not have anyone here with me who can do that.

CHAIR—In that case, could the question be taken on notice by the Attorney-General's Department?

Ms Blackburn—As a hypothetical question?

Mr Manning—If I may, I would like to answer the question. I understand the question to be: once Australia has this obligation in international law, what legislative power does it give rise to under the external affairs power? It comes back to what I said before. Australia, under the external affairs power, would have the power to take measures that reasonably implement the obligations under that article. So the answer would be yes.

Mr TURNBULL—Thank you, Mr Manning. I think that is correct. It seems clear to me that this treaty potentially confers on the Commonwealth very substantial additional jurisdiction which could even extend to regulating state public services if it chose to do so. The question I come back to that I asked Ms Blackburn—she said she was not able to answer it; perhaps you might be able to—is: do you see a distinction between the grant of, in effect, additional jurisdiction to the Commonwealth parliament, pursuant to the external affairs power, by clauses which are mandatory, which like article 12.1 say 'Each state party shall take measures'—which is clearly mandatory language—and clauses like the one I referred to earlier, article 7.3, which says, 'Each state party shall consider taking appropriate legislation'? It speaks of consideration where appropriate, and it is more discretionary language. Do you believe the latter is capable of granting jurisdiction under the external affairs power?

Mr Manning—It is capable of granting jurisdiction but, as Ms Blackburn pointed out, the nature of the obligation is very different. On the one hand, one requires action; on the other hand, one does not require action. So the assessment still has to take place as to the proper way of implementing the obligation that arises in international law.

Mr TURNBULL—Thank you.

Mr WILKIE—I suppose it has been covered already in some respects, but in real terms what does ratification of this treaty require Australia to do with regard to introducing measures to deal with corruption? Are there any measures we need to introduce in addition to those we already have in place anyway?

Ms Blackburn—The analysis that we have done to date suggests that we are presently fully compliant with the mandatory obligations in terms of legislation, and we comply with many, but not all, of UNCAC's optional provisions. That is through a combination of Commonwealth and state legislation and also through a variety of programs and cooperation arrangements. As I said in my opening statement, our analysis suggests that we are presently fully compliant, with the exception of the two sets of regulations which I have mentioned.

Mr WILKIE—Why do you think only nine countries have ratified it?

Ms Blackburn—There are 15 ratifications to date. Our understanding at the moment is that a large number of countries are considering it. The convention only opened for signature on 9 December 2003. It is in fact open for signature until 9 December 2005. At this point, we are still in the signature period. Our advice from the UN treaties office is that they have some expectation that the 30 ratifications will be achieved this year and then the convention will come into force 90 days after the 30th ratification.

Mr WILKIE—I may have missed it, but what process is in place to ensure that those countries that ratify actually do comply when the convention comes into force, as opposed to just ratifying the convention?

Ms Blackburn—The convention includes an arrangement for the convening of an assembly of states parties once the convention has come into force. That is a fairly normal way of monitoring a convention. The assembly of states parties has terms of reference which are in the convention, which include assessment and monitoring of implementation of the convention amongst states parties.

CHAIR—Is there any reason that the ratification has been faster in developing countries and slower in developed countries?

Ms Blackburn—I have no information to answer that question.

CHAIR—Are there any developed countries which have ratified it to date?

Ms Blackburn—It obviously depends on your definition of 'developed countries'. The 15 countries which have ratified are Algeria, Benin, El Salvador, Kenya, Madagascar, Mauritius, Mexico, Namibia, Nigeria, Peru, Romania, Sierra Leone, South Africa, Sri Lanka and Uganda.

CHAIR—Under article 6, a state party will have a body or bodies that will prevent corruption. What would these bodies be currently? Would the National Crime Commission be one?

Ms Blackburn—I think we have a number of bodies. I think Australia meets this obligation through a combination of Commonwealth legislation which establishes a number of bodies at Commonwealth level, such as the Australian Public Service Commission and ASIC. We have government bodies such as ASIC, the AFP and the Australian Crime Commission. We also have in place procedural safeguards through auditing and public budgets. There is also some self-regulation—for example, through the ASX voluntary corporate governance guidelines—and cooperation with regional international authorities. Of course there are also, as you know, a number of bodies at state level that cover these areas. The words of article 6 are fairly broad. The emphasis in article 6 is on prevention. We have taken that to cover a range of bodies which participate in both the regulatory and the education and public awareness arrangements.

Mr TURNBULL—Turning to article 12, do you agree with me that this provision would enable the Commonwealth parliament to make a law dealing with judicial conduct—in particular to prevent corruption by the judiciary—and that that law would apply to judges, whether they were federal or state judges?

Ms Blackburn—Are we talking about article 11?

Mr TURNBULL—Yes.

Ms Blackburn—Greg, would you like to comment on that?

Mr Manning—Article 11 does give rise to an obligation for state parties to take measures to strengthen integrity and prevent opportunities for corruption amongst the judiciary. Your question was whether this would give the Commonwealth the right to make a law about it. It certainly could give rise to that, I suppose, but it would come under the external affairs power. Of course, Australia has the right to implement these things in accordance with its usual constitutional processes, so I imagine it is not something that the Commonwealth government has to do. It just has to be satisfied in terms of its obligation that it occurs in Australia.

Mr TURNBULL—We have touched on a couple of things now, Mr Manning, but you would agree with me, wouldn't you, that the external affairs power would give the Commonwealth parliament, once this treaty was in force, the ability to legislate on a range of matters across state and federal jurisdictions? Presently, it does not have that jurisdiction.

Mr Manning—I would like to make one proviso, if I may. As I said before, I have not been involved in the consideration of this convention, so I am speaking off the top of my head rather than giving a considered legal opinion, which is something else that I am unable to do. But certainly the obligation that this provision gives rise to is that Australia takes particular measures in relation to all of its courts. Obviously, though, as I said, if the Commonwealth is of the view that the states do that already, there is no need for the Commonwealth to take any action at all.

Mr TURNBULL—There is no need, but the Commonwealth would have the power.

Mr Manning—Quite possibly, but, as I said, I am not really in a position to give a conclusive view.

Mr TURNBULL—Okay, thank you.

Senator MACKAY—The committee notes that the states and territories were consulted but in fact showed varied interest in the treaty process. I wonder whether anybody would like to comment on what that means precisely.

Ms Blackburn—The consultation arrangements are, from memory, detailed in attachment A to the NIA, and we set them out quite extensively. When we were starting the preliminary negotiations on the convention, we convened an IDC of all of the Commonwealth and state agencies to ensure that we had full coverage of all of the Commonwealth interests. We then held four consultation meetings, which the states and territories were invited to attend. As I said, we had varying representation at those. I think Victoria and the ACT, from memory, were regular attendees. Others came in and out. We had presentations in the standing committee on treaties, where of course all states and territories are represented. Most recently, in the preparation for ratification we consulted with all states for their advice on their current compliance with the provisions of the legislation and we have had responses from all states and territories.

CHAIR—In the consultation with the states, has the increasing Commonwealth legislative power come up at all?

Ms Blackburn—No, not that I am aware of. It was a thought that arose in the previous discussion. I do not believe that this convention is unique in that respect. There are a number of conventions which have the same effect that Mr Turnbull identified. However, this convention, like others—and this is the point that Mr Manning has made—makes it very clear that it is entirely up to the state party how it implements this. Also, much of the language in these particular provisions is very clearly in accordance with the constitutions and the domestic arrangements of the state parties, as is appropriate. So there is no assumption in the text of this convention that implementation in the federal system will be done by legislation or that all of the implementation, either legislative or otherwise, will be done at the federal level.

Senator MACKAY—Under annexure A, at point 13, whilst they indicate that no new legislation is required from their perspective, it says that improvements may be required to existing legislation, but that is not specified.

Ms Blackburn—No, at a particular point in our consultations, in preparing to table the convention, we needed essentially advice from the states and territories as to whether they thought their legislation was compliant with the mandatory obligations. In the course of that, they indicated that, while they thought they were compliant, it was possible that some of their legislation needed to be addressed. However, we have had further consultation with the states and further consideration of our own on whether those concerns would prevent us from ratifying the treaty. An example is that some of the states were concerned that they did not have legislation prohibiting the bribery of foreign officials. That was simply put forward in their initial comments, and of course our view is that they do not need to have that because we have division 70 of the Criminal Code, which comprehensively provides for that offence.

Another concern raised by one state was that the statute of limitations period may not fully comply with UNCAC. Again, I am going back and looking at that. Article 29 states that state parties shall, where appropriate, have the longer statute of limitations period. Therefore, it is not a mandatory requirement. Therefore, our view is that it remains a matter for the states and territories to determine their relative statutes of limitations for the offences. Some concern has also been raised by a number of states that they did not comply with article 31, which relates to freezing, seizure and confiscation. The particular issue there is the capacity to return proceeds of crime to the state from which they had been unlawfully extracted. There are a number of jurisdictions which do not have equitable sharing arrangements at the moment. We feel quite confident that in the particular circumstances where that convention obligation would come into play we would have available both federal offences, federal proceeds of crime and mutual assistance legislation, which would enable Australia to meet that obligation.

Senator MACKAY—So is it now the case that no state or territory has indicated that any legislative amendment would be required as a result of UNCAC? Is that right?

Ms Blackburn—That is correct—for the mandatory obligations.

Senator MACKAY—Just following on from the previous line of questioning, are they assuming that any federal jurisdictional issues will be covered at the federal jurisdictional level?

Ms Blackburn—I am not sure I understand the question.

Senator MACKAY—They are obviously looking at their own jurisdictions. They are saying, 'Within our own jurisdictions, no amendments, new legislation or amendments to existing legislation is required,' but are you saying that it was not put to them that there may be consequential changes at the federal jurisdictional level, from a legislative perspective?

Ms Blackburn—No, the proposition we put to the states was clearly about our current legislative arrangements. Regarding the various issues I just tracked through with you, the states had raised concerns, and our position was that existing federal law enabled Australia to be compliant with the obligation and that no action was required by the states.

Senator MACKAY—So the advice provided to them was that there would be no legislative amendments or changes at the federal jurisdictional level?

Ms Blackburn—That is right—there are no proposals that we have under discussion with the states to make additional Commonwealth legislative change for the purposes of being compliant with this legislation, other than the two sets of regulations that I have mentioned.

Senator MACKAY—Did any of the states query whether this would be the case in the future or whether this was likely to change?

Ms Blackburn—I am not aware of that question being asked.

Senator MACKAY—Were assurances given prospectively with respect to that?

Ms Blackburn—I think it would be highly unlikely that such assurances would be given. That would not be an appropriate assurance to give.

Senator MACKAY—Thank you.

CHAIR—Are there any further questions?

Mr ADAMS—Following on from the previous questions, was nothing raised with the states or did the states never raise the issue that they might lose power because of this treaty?

Ms Blackburn—That issue has not been raised in the consultations with the states, nor has it been raised in the industry consultations or in our preparation for this hearing.

Mr ADAMS—I see they did not go to Vienna either.

Ms Blackburn—There is usually a bottom line with the private sector and attending UN conferences is sometimes not perceived as contributing to that.

Mr ADAMS—So there was no discussion about the changes to external powers that this treaty might bring to the states?

Ms Blackburn—No. The conversations during the negotiation of the conventions and the consultation in terms of preparation for this ratification process have been exclusively on the basis of the current system, which has implementation at Commonwealth, state and territory level and it is believed to be appropriate and adequate for Australia to meet its obligations.

CHAIR—Are there any further questions?

Mr ADAMS—No.

CHAIR—The matter of whether there will be any increases to the Commonwealth's legislative power arising from ratification of this treaty is very important and the committee will need to consider that very carefully. There are a couple of questions that we will need to have answered by the Attorney-General's Department prior to considering this treaty. One question is the one Mr Turnbull asked about whether it will be possible not so much for a current Australian government but for a future Australian government 20 years or 30 years down the track to legislate in the area of state judges. Was there a second question?

Mr TURNBULL—The first question is: to what extent does the Attorney-General's Department believe that the external affairs power would confer on the Commonwealth parliament additional jurisdiction—that is to say, jurisdiction over subject matters not presently within Commonwealth jurisdiction—as a consequence of this treaty being entered into and coming into force? The second question is: could the Attorney-General's Department respond to whether that enhancement of jurisdiction referred to in the first question is affected by whether the language in the relevant article of the treaty is mandatory, for example, as in article 12, or apparently discretionary, as in article 7 and, in particular, in article 7.3?

Ms Blackburn—I understand your second question. On listening to your first question it either has a yes answer—which I suspect is not necessarily what you are looking for—or are you asking us to go through each article of the convention and identify where that will bring in powers which are not presently thought to be available to the Commonwealth? I am not sure what your timetable is. That would be a fairly extensive piece of work. Could you narrow it to particular areas?

Mr TURNBULL—I can speak only for myself; my colleagues on the committee can disavow this. But I would suggest that, if the answer to the first question is yes, which it clearly is—

CHAIR—Then that is a large increase in Commonwealth power.

Mr TURNBULL—Then it is a large increase in Commonwealth power. You might hit the highlights, Ms Blackburn, with an indication of the major areas of enhancement, without trying to be completely comprehensive. The second question—and I do not have a view on it; I do not know what the answer is—deals with the situation where you can have a treaty which says, 'The contracting state shall do something.' Clearly, consistent with the High Court's authority in this area, it imposes on the Commonwealth the power to do something and, under the external affairs power, if doing that requires it to do things which would not otherwise be within the other heads of power, then power is thereby enhanced or increased. But what about a situation where the language says, 'The states shall consider doing such or shall, if appropriate, do such and such?'

Does that enhance power in the same way? I am not sure whether that issue has been considered by the courts.

Ms Blackburn—I understand the issue that you are raising there, and we can certainly take that question on notice.

Mr TURNBULL—Thank you very much.

Ms Blackburn—We will, in answer to the first question, seek to perhaps identify the key areas that you have expressed some interest in and answer the question of whether this convention, if we were a party to it, would expand the power presently available.

Mr TURNBULL—And what about a national election funding law? A lot of people would think that was a good idea.

Senator MACKAY—There is a corollary, of course, and that is, depending on what answers are gleaned from the two questions that Mr Turnbull determined, that that again does raise the issue as to whether we need to go back to the states and say, 'When we said that there was no planned change to Commonwealth legislation, there could well be in this instance over the next 30 or 40 years.' I was alluding to that in my line of questioning—that they believe they have an assurance that there will be no change.

Ms Blackburn—I will just clarify that. My evidence was not to the effect that that assurance was given. The question was not raised by the states. We did not in our consultations with them specifically raise any question about what might happen in the future. Consultations were conducted on the basis that our assessment was that no present change was required in order for Australia to be compliant. There were no discussions about any possible or proposed changes.

Senator MACKAY—No, but my point is that, if the answers to questions 1 and 2 actually determine that, yes, there could be a change, then obviously you will have to go back to the states and advise them of that, in which case they may or may not raise objections.

CHAIR—Are there any further questions?

Senator TCHEN—Yes. I want to raise a matter of concern. Ms Blackburn, in your initial response to Mr Turnbull's two questions, you indicated that you would have some concern if the department had to go through this convention article by article. As I understood it, the implication was that, firstly, you have not done it and, secondly, if you do have to do it, in response to his question, it would be too time consuming. Is that correct?

Ms Blackburn—I will clarify that. We have certainly done an article-by-article analysis of this convention, and we have analysed each article of the convention in terms of, 'Does Australia presently comply with those requirements?' We have done that by assessment of existing Commonwealth law, existing state and territory law, and existing programs at both state and federal levels. We have certainly done that. As I understood Mr Turnbull's question, the analysis is to go and look at a particular article and determine whether that article gives power to legislate in a particular area above and beyond the power that the Commonwealth might presently have to

legislate in that area. That is not an analysis that we have done for the preparation for ratification.

Senator TCHEN—How long do you think such an analysis would take?

Ms Blackburn—We have now clarified that the committee would like us to focus on a couple of areas—election funding and the coverage of state judges—and I can think of a couple of other areas which would be of particular interest. At this stage I would propose that we identify a couple of key areas where the question as to whether the convention would give the Commonwealth power to legislate in areas which it traditionally has not done so does arise and deal with that.

Mr TURNBULL—Ms Blackburn, in your consideration do not be stingy in your advice to us.

Ms Blackburn—I will not be stingy.

Mr TURNBULL—If in your consideration you see areas where there is apparent scope for enhanced Commonwealth jurisdiction it would be worth bringing them to our attention. Obviously, a national ICAC would be clearly comprehended by this. That would be a revolutionary change to the way this subject matter has been dealt with historically. The article on the private sector goes well beyond corruption; it really starts talking about the regulation of accounting standards and so forth. There could be some very interesting implications there. But certainly in terms of law enforcement it would appear to grant very substantial power to the Commonwealth to cover the field.

CHAIR—That was another question: does this treaty entering into force give the Commonwealth the power to legislate for a national ICAC with a purview of state and municipal matters?

Ms Blackburn—We will take the question on notice and deal with that.

Senator TCHEN—Ms Blackburn, can I remind you also that when the chair posed the question to you he referred to what a Commonwealth government might be able to do in 20 or 30 years time. So comprehensiveness would be far more relevant to our concern than specific issues—or as relevant.

Ms Blackburn—Hopefully, I understand.

CHAIR—I think we have agreed now with the department and they will get back to us on that. Thank you very much.

Ms Blackburn—Thank you very much.

CHAIR—Thank you for your evidence.

[11.47 a.m.]

CAMPBELL, Mr William McFadyen, General Counsel, International Law, Attorney-General's Department

MANNING, Mr Greg, Principal Legal Officer, Advisings Section, Public International Law Branch, Office of International Law, Attorney-General's Department

YOUNAN, Miss Houda, Senior Legal Officer, Attorney-General's Department

LEHMANN, Mr Paul, Director, Good Government Section, Papua New Guinea Branch, Australian Agency for International Development

LAWLER, Mr John, Deputy Commissioner, Australian Federal Police

ROSE, Mr Andrew John, Executive Officer, International Law and Transnational Crime Section, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

THOMSON, Mr Gerald Bruce, Director, Papua New Guinea Political Section, Department of Foreign Affairs and Trade

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea

CHAIR—We will now hear evidence on the Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea (Port Moresby, 30 June 2004). Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Thomson—I have a short prepared statement that I can read. Firstly, thanks for the opportunity to provide the introductory remarks. Before I begin I would like to express our regret that we were not in a position to table the treaty in parliament in the regularly required period. As you will be aware, the agreement provides a legal framework for the Enhanced Cooperation Program agreed by ministers of Australia and Papua New Guinea in December 2003.

It took the governments of Australia and Papua New Guinea quite a bit longer to reach agreement on the treaty than we had anticipated. This caused considerably delay in the implementation of the ECP. When agreement was finally reached on the treaty, the situation was such that the Australian government wanted to move quickly to bring the agreement into force so

that we could proceed as quickly as possible with the deployment of Australian police and officials under the ECP. The agreement was signed on 30 June 2004, the PNG parliament passed enabling legislation on 27 July and the agreement came into force on 13 August, when foreign ministers Downer and Namaliu exchanged first person notes.

The first officials deployed under the treaty arrived in Papua New Guinea on 16 August 2004 and the first police arrived on 29 August. I should note that eight officials had been in place in advisory roles since February 2004. The agreement and associated national interest analysis were tabled in both houses of parliament on 4 August and were scheduled to be considered by the committee until the federal election was called. The agreement was subsequently included in a list tabled in both houses of parliament on 7 December.

Under the Enhanced Cooperation Program, Australia is taking a more direct role in assisting Papua New Guinea to address its key challenges, particularly law and order, justice, economic and financial management, public sector reform and improved governance. When fully rolled out, the ECP will involve up to 210 members of the Australian Federal Police and around 64 officials working in line positions in the PNG police force, public service and judiciary. There are currently 136 police in place, 117 in Port Moresby and 19 on the island of Bougainville. There are 37 officials in place at the moment. Another six officials are scheduled to arrive today, including four prosecutors. The remainder will deploy in the coming months. We are hopeful that the ECP will be fully deployed by the middle of the year.

The officials currently deployed come from 13 Australian government agencies and are working in a range of PNG agencies, including the PNG department of the Prime Minister and National Executive Council, treasury and finance, transport, defence, justice and attorney-general, foreign affairs and immigration and personnel management. We also have people in the auditor's office, the Internal Revenue Commission and the Civil Aviation Authority.

As we have outlined in the national interest analysis, the agreement provides Australian police and officials with the powers and protections they need to operate in line positions. The agreement is of a similar nature to the bilateral agreement concerning additional police and other assistance to Nauru and the multilateral agreement which has now been signed by all Pacific countries in relation to the Regional Assistance Mission to the Solomon Islands.

The agreement helps ensure that Australian police and officials working in Papua New Guinea have the necessary powers to perform their duties as in line personnel in the Royal Papua New Guinea Constabulary and the PNG public service. All personnel deployed under the ECP work alongside their PNG counterparts and share their powers and functions. At all times, Australian police and officials are expected to observe and respect PNG laws and regulations. This is included in the agreement and supported by a code of conduct developed specifically for the Enhanced Cooperation Program. The agreement contains provisions on jurisdiction designed to protect Australian police and officials serving within the PNG bureaucracy and to particularly guard them from vexatious claims. Australians working in PNG under the ECP will be engaged in potentially sensitive work, and in order to protect them from vexatious claims it was desirable to agree to these jurisdiction provisions. Australia has not and did not seek blanket immunities for ECP personnel.

The agreement establishes a system of concurrent jurisdiction to deal with alleged breaches of PNG law. Under this system, Australia will have the primary right to exercise jurisdiction for actions taken by designated persons—that is, people deployed under the ECP—in the course of or incidental to official duties and for alleged offences involving Australian personnel or property. Personnel can be charged under the Crimes Overseas Act. Alleged offences committed outside official duties will be investigated to determine if there is a case to answer. If there is a case, Australia and Papua New Guinea will consult through a joint steering committee to decide which country will exercise jurisdiction. In such cases, the exercise of jurisdiction will require agreement by both Australia and Papua New Guinea. Australians deployed to PNG will not be subject to PNG civil courts for actions taken in the course of or incidental to official duties. Claims regarding actions taken outside official duties will be discussed through the joint steering committee.

The agreement contains a number of procedural protections for Australian personnel, including an obligation to notify Australian authorities immediately and, if a designated or related person under the treaty is taken into custody, to hand the person over to Australian authorities. Members of the committee may be aware that elements of the PNG legislation implementing the agreement have been challenged in the PNG Supreme Court, including those relating to jurisdiction and conferral of powers on police. We do not know when the PNG Supreme Court will bring down its decision.

CHAIR—Thank you very much. Could you please explain why the national interest exemption was used for this treaty?

Mr Thomson—As I said, the process of negotiating the treaty took quite a bit longer than we had anticipated and, given the situation in PNG and the nature of the assistance that we were providing, Australian ministers wanted to ensure that we could deploy the police and officials as soon as possible. So when we finally got agreement on the treaty, Mr Downer wrote to the committee to seek the exemption.

CHAIR—In the past there have been national interest exemptions for the Solomon Islands, Nauru and Papua New Guinea. Those are the ones that come to mind. Are there any in the pipeline that we might be interested in?

Mr Thomson—Certainly not relating to Papua New Guinea, and I do not think there are any others relating to any other parts of the Pacific.

Mr Campbell—Not that we are aware of.

CHAIR—There is no planned use of the national interest exemption?

Mr Campbell—National interest exemptions mostly come up in relation to matters of some urgency. The Solomon Islands was a good example of that. A request was made, then the treaty was negotiated quite quickly and there was a need for the additional assistance to be provided.

Mr Thomson—Also in that case, after Mr Downer had written to the committee to seek the exemption I understand—although I am not 100 per cent sure—that the committee was given a briefing out of session on the ECP treaty.

CHAIR—Not that I remember. It might have been the foreign affairs committee. It was not us. In fact, I think that would be a good idea. I flag that. We are going through a review of the committee's work. Next year it will be 10 years that the committee has been operating. I fully understand why national interest exemptions are used, but I also think that, given there is often a timelag between the signing of the treaty and the treaty entering into force, even when the NIE is used, perhaps we could have an out of session briefing or something like that so at least we will have had a chance to look at it.

Mr WILKIE—And particularly in that case, where the negotiations went on for some time. The agreement was signed on 30 June, and the election was not until December. There was a period of time in which we could have looked at it and had some feedback.

Senator MACKAY—Why is it a bilateral agreement as opposed to an agreement that may involve, say, New Zealand?

Mr Thomson—It is because at the time we discussed with PNG the assistance that is being provided through the Enhanced Cooperation Program it was only ever envisaged that it would be Australia providing the assistance.

Senator MACKAY—Has that changed?

Mr Thomson—No, that has not changed.

Mr ADAMS—Is there any training component in this? Are we training anybody?

Mr Thomson—Yes. There is an extensive training program for the police.

Mr Lawler—The Australian Federal Police are working very closely with the Royal Papua New Guinea Constabulary. The assistance provided is mentoring and support. There is effectively a sharing of skills across a range of activities within the law enforcement sector, from criminal investigations through to general policing duties through to anticorruption investigations and a range of other activities. Certainly at the forefront of that cooperation is the issue of training and capacity building.

Mr ADAMS—Regarding the whole cost of this, I think we have $800 million extra in aid programs. Does anyone know the actual cost of all the personnel?

Mr Thomson—When the ECP was first agreed, we thought it was going to be implemented a bit sooner than it was. At the time, Australian ministers agreed to fund an amount of $1.1 billion to 30 June 2008, including $805 million in new funding to the Australian Federal Police. The additional money is being funded from the existing bilateral aid program with Papua New Guinea, so it is not additional funding.

Mr WILKIE—This question is probably directed to Mr Lawler, and it concerns the ability of the Federal Police to sustain these types of deployments. The Federal Police are to be congratulated on the effort they have undertaken in the past. It has been well documented that people have really appreciated their effort and that they have done a fantastic job in overseas deployments. How many Federal Police members do we currently have overseas?

Mr Lawler—Thank you very much for those comments. They are appreciated by the Australian Federal Police. There is also broader law enforcement. You would of course be aware that the Enhanced Cooperation Program involves police from the states and territory jurisdictions, and their support is also very welcome and very necessary. As at 24 February 2005, the AFP had 136 assisting Australian police members deployed to Papua New Guinea. Of those, 111 are members of the Australian Federal Police and 25 are state and territory officers. As you heard in the opening statement, that number will grow progressively to 210 police personnel in the country. That includes 19 police and one Department of Foreign Affairs and Trade adviser to Bougainville. There is a support group here in Australia to support and provide logistics and administration for the deployment.

Mr WILKIE—Do we have any officers serving in other locations?

Mr Lawler—Yes, we do. The Australian Federal Police is represented extensively internationally. It has a number of different dimensions to its overseas deployments. Please do not quote me on the exact numbers as of today, but it has in the order of 65 personnel serving as liaison officers across the globe, in approximately 32 countries. We also have members deployed to Thailand, due to the disaster of the tsunami on 26 December 2004. We currently have in the order of 30 personnel still in that country. We have police deployed to assist the Indonesian national police and the Philippines national police in a variety of operational contexts, and we have capacity building missions in East Timor, Nauru and the Solomon Islands, which of course would be well known to the committee.

Mr WILKIE—How is the AFP going about managing such a large number of personnel being deployed overseas? Have you looked at anything to do with recruitment, for example? Has that been a problem with having so many people overseas?

Mr Lawler—As you have heard, we have been well supported by government in terms of the financial capacity to undertake the work that the government has asked us to do across these activities. We have embarked upon an extensive recruiting campaign for the Federal Police across a range of disciplines, for both sworn and unsworn personnel, particularly specialists, given the nature of transnational crime and the nature of the tasks that we are being asked to undertake in these various missions.

I would also like to say that the Australian Federal Police have a quite highly developed and sophisticated prioritisation model, which enables us to deploy key resources to the highest priority tasks and to monitor and adjust staffing in particular functional streams or crime types, as and when required. That has proved to be very successful, enabling us to deliver against the challenges that have presented at short notice, such as the Bali bombing, the JW Marriott bombing and the bombing of the Australian Embassy in Jakarta. Those have all been activities that the AFP, along with support from a range of government agencies, have been able to respond to very quickly without unduly affecting the core business of the AFP in areas such as protection, narcotics, the exploitation of children and women, economic crime investigations and across matters of counterterrorism domestically. We have been able to achieve that, I think, with very positive results for all to see.

Mr WILKIE—If we go back to that recruitment area that you were talking about previously, there have been stories in the press recently about some states having a lot of difficulty in

actually getting officers, in getting people who have the skills necessary to be effective police officers. Do you have that problem with the AFP, or have you been able to address that?

Mr Lawler—Certainly, the skills required of law enforcement officers are skills that are developed over many years. Of course, this involves not only having suitable tertiary qualified applicants but also having experience in law enforcement across its many disciplines. It is fair to say that some skill sets are in keen demand, particularly in the context of, for example, computing skill sets and computer forensics. Some of those are specialist niche skills.

We have been very fortunate in the AFP, I think by virtue of the mandate of the organisation, to be able to attract high-quality applicants. We do have a significant waiting list of personnel who have, unsolicited, come to the AFP and expressed an interest in joining us in response to recent advertisements for specific tactical skills that we require for the organisation. Particularly for our offshore missions, we have had strong demand. But it is fair to say that law enforcement skills are keenly sought.

Mr WILKIE—Does the number of people that we have overseas stretch the resources in terms of having people on the ground to fulfil their duties here?

Mr Lawler—As I indicated earlier, the answer to that is no. The reality is that the nature of transnational law enforcement, the nature of the world in which we live, means that we need to prioritise and to respond efficiently to the taskings that we have from time to time. There will be peaks and troughs in the response that is required, and it is an issue of making sure that the organisation is able to receive, analyse and adjust its resourcing models to meet what might be the highest priorities at a given point in time. So, yes, we do find ourselves under pressure from time to time, but that is ameliorated by the systems that I have spoken about and the flexible team model that we have, which enables the organisation to efficiently move resources to meet the high priority tasks that we face.

Mr WILKIE—Thank you.

CHAIR—Thank you very much for your evidence today.

[12.09 p.m.]

BLISS, Mr Michael Edward, Director, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

INGRUBER, Mr Franz, Director, Thailand, Vietnam and Laos Section, Mainland South-East Asia and South Asia Branch, South and South-East Asia Division, Department of Foreign Affairs and Trade

KLUGMAN, Ms Kathy, Assistant Secretary, Mainland South-East Asia and South Asia Branch, South and South-East Asia Division, Department of Foreign Affairs and Trade

Agreement on Bilateral Cooperation between the Government of Australia and the Government of the Kingdom of Thailand

CHAIR—I welcome officers of the Department of Foreign Affairs and Trade. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Klugman—That would be useful. Thank you very much, Dr Southcott. The Australia-Thailand agreement on bilateral cooperation is about taking to a new level the mainly non-trade dimensions of the increasingly important relationship we have with Thailand. I will trace very briefly the background to the treaty. At the beginning of 2004, in January, the Thai foreign ministry proposed to Australia the negotiation of a broad framework agreement at treaty level to cover all areas of potential bilateral cooperation which were not envisaged to be covered under the Thailand-Australia Free Trade Agreement. In that sense we are dealing here with a duo of treaties with Thailand—TAFTA being one and this agreement being the other.

Both sides agreed to conclude a treaty level document rather than an instrument of less than treaty status mainly to underline the significance of the undertaking on both sides—so to establish the seriousness with which both sides were looking at the bilateral relationship. One formal negotiation session was held in Bangkok in April 2004 and the negotiations themselves were finalised in May of that year. The agreement, as I said, was taken forward in parallel with the Thailand-Australia Free Trade Agreement and was signed during a successful visit to Australia of the Thai Prime Minister and nine of his cabinet ministers in July 2004.

If approved, the agreement will create a new mechanism for bilateral discussions. I guess that is the central additional structure that we are talking about under this agreement. It will establish a joint commission on bilateral cooperation which will be tasked with reviewing progress in the areas of cooperation identified in the agreement and to make further policy recommendations on ways to further strengthen and deepen bilateral cooperation. The joint commission should meet at ministerial level at least every two years. I mention also that Australia has a large number of

other bilateral agreements and arrangements with Thailand and we see this treaty as forming an umbrella over those separate, less than treaty level arrangements.

Going to the agreement itself and what it is, this is the first agreement of its kind to be proposed to Australia by a South-East Asian country. It is intended to deepen and expand areas of cooperation between the two countries. Like the Thailand-Australia Free Trade Agreement, the agreement reflects the depth and maturity of our bilateral arrangements with Thailand and should serve Australia well in continuing to enhance cooperation with the second largest and one of the fastest growing economies in South-East Asia.

The agreement, which you will have seen, covers cooperation in a broad range of areas, from security and law enforcement through to economic investment and technical areas not covered by TAFTA. It covers environment and heritage, science and technology, energy, information technology and telecommunications, civil aviation, public administration and public sector reform—which is an important area—immigration, education, culture and natural resource management.

The projects which will be undertaken under the agreement will be developed jointly by the two countries and they will depend on the priorities of the two countries. The agreement places no obligation on Australia to amend any of its laws or any of its regulations. It will, though, serve as a mechanism, particularly through the joint ministerial commission, to deepen understanding and practical cooperation. It will also help us—and this is important for us—to get access more directly to many areas of Thai government with which we have had some but not a great deal of cooperation in the past. That we see as being one of the key opportunities presented by this agreement. It should also help to promote Australia as a preferred partner with Thailand in many cooperative areas in both the public and the private sector spheres.

I have spoken about the joint commission and am happy to elaborate on that if necessary. I note that Australia has an agreement similar to this one in place with Japan. That is an agreement that entered into force back in 1977. That is one that really has been successful in that umbrella way in bringing the ancillary parts of bilateral cooperation to a higher level. We have had a great deal of success through the mechanism, and we thought we should welcome the Thai proposal to conclude such a treaty.

CHAIR—Thank you very much. You have stolen my thunder a bit because I wanted to ask you about that. In annexure 5, it says we have agreements like this with Japan and Jordan. The one with Japan is almost 30 years old and it has been very significant in our relations. In fact, next year the Australian Japanese governments are marking the 30th anniversary of the original signing of that by Prime Minister Fraser and Prime Minister Miki of Japan. Would you anticipate that this will be something along the lines of the agreement we have with Japan?

Ms Klugman—Indeed. We hope that it will have a similar long life and impact.

CHAIR—I noticed that all federal cabinet departments, along with justice, customs and veteran's affairs, were involved. But do we have anything in the provisions in the area of health? There has been, especially in areas like HIV-AIDS, quite a bit of cooperation between Australia and Thailand. Thailand is an example of a country where through good leadership they have

developed quite a good response to the challenges posed by HIV-AIDS. Was health not included?

Ms Klugman—Health is not included specifically. There is a focus on science and technology as well, which we see as an entry into that area. You are right about HIV-AIDS and other health issues. That is an important part of our blossoming cooperation with Thailand. It is also part of the new chapter of the development cooperation relationship that we are opening with Thailand where Thailand sees itself now as not so much a receiver of aid as a donor. We are looking at some quite interesting ways where we can work with Thailand in third countries on regional programs, often in the smaller countries of Indochina, which need a lot of help. HIV-AIDS and SARS and other transboundary health issues are certainly in that category.

CHAIR—So we are already doing that through the AusAID side of things?

Ms Klugman—That is right.

Senator MACKAY—I have a couple of questions. How do you determine what goes in an FTA and what does not go in an FTA? For example, there are economic development issues that are not in the FTA but are in this. Why weren't they included in the original FTA?

Ms Klugman—What normally happens is that a free trade agreement is about liberalisation and the facilitation of two-way trade and investment. In a free trade agreement you would cover tariff levels and mechanisms for simplifying access for companies to each other's markets. The leftovers that would fall into an agreement like this are likely to be along the lines of assistance, for example, that Australia might provide Thailand in developing the capacity of its trade officials to deal with the WTO agenda in Geneva. It is those sorts of ancillary areas that do not go to the nuts and bolts of how the two countries trade with each other and place investments in each other's countries but have to do with the broader economic relationship—the economic reform issues and those sorts of structures.

Senator MACKAY—Okay. So what can or cannot be encompassed within an FTA is fairly restricted, in fact.

Ms Klugman—I am certainly not an FTA expert; far from it. But different countries have different approaches to free trade agreements. Our approach is one of comprehensiveness, so our free trade agreements tend to cover a broad range of issues, as I said, that have got to do with facilitation—actually making business easier to do in each other's markets—as well as literal liberalisation. But they would not normally cover technical assistance to, as I said, Thai trade officials to assist them in taking forward the multilateral trade agendas and multilateral trade interests that we have in common, for example, in the WTO.

Senator MACKAY—So in this instance is it fair to say that Thailand was more restrictive in its perception of what ought to be included in the original FTA?

Ms Klugman—No. As I said, the FTA we have with Thailand is the sort of FTA that Australia concludes, which is a comprehensive one. Thailand's approach to trade and investment is relatively sophisticated. They were also keen on having a comprehensive free trade agreement with Australia.

Senator MACKAY—Was this drafted in conjunction with the Thai FTA?

Ms Klugman—Yes. The Department of Foreign Affairs and Trade had primary carriage of the drafting of both. As you can imagine, in the case of the free trade agreement the work was done through a special task force established for those negotiations.

Senator MACKAY—I am curious as to why it was, if not part of the free trade agreement, not produced at the same time as the free trade agreement.

Ms Klugman—They were both developed in a similar time frame. The free trade agreement, being more detailed and obviously having at its heart a number of obligations for things like the reduction of tariffs, took a longer time. This, being a framework agreement and a best endeavours treaty, was relatively simple to conclude.

Senator MACKAY—We have talked about the potential for new initiatives in areas of mutual interest et cetera. Can you identify what potential initiatives there may be as a result of this, other than, say, the training of trade staff?

Ms Klugman—I can give you a couple of examples. We have nothing ticked off. We do not know yet. As the treaty has not yet entered into force, that would be getting ahead of ourselves. However, we know that the Victorian government is interested in promoting biotechnology related exchanges and greater research links with the Walter and Eliza Hall institute in Melbourne and some counterpart organisations in Thailand. That seems to us to be quite prospective and something that the two sides might wish to take forward if there are good proposals associated with it. Similarly, the Queensland government is keen to promote education, tourism and cooperation in developing and integrating public transport systems and encouraging the use of ethanol. You can probably recall from a visit to Bangkok that public transport and congestion is a serious issue for Thailand, as is the pollution associated with mass transit. They are two examples.

Senator MACKAY—Do you think this may be the precursor to others? We obviously have good relations with other ASEAN nations, and I think you said that this would be the first of this type.

Ms Klugman—It is the first time that a South-East Asian government has proposed to us a treaty of this kind. As we were saying, we have some quite similar things, including a longstanding treaty with Japan and a similarly longstanding treaty with Jordan which goes back to 1978. Prospectively, it might be something down the track that we might want to enter into with other governments, but I think the circumstances of each bilateral relationship are quite different, and also the way that our partner governments in the region go about treaty making is very different. As I said, Thailand is a very sophisticated partner for us in South-East Asia.

CHAIR—Thank you very much for your evidence today.

[12.24 p.m.]

CAMPBELL, Mr William McFadyen, General Counsel, International Law, Attorney-General's Department

MANNING, Mr Greg, Principal Legal Officer, Advisings Section, Public International Law Branch, Office of International Law, Attorney-General's Department

HOLMES, Ms Patricia Ann, Director, New Zealand Section, Department of Foreign Affairs and Trade

LARSEN, Mr James Martin, Assistant Secretary and Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

SERDY, Mr Andrew Leslie, Executive Officer, Sea Law, Environment Law and Antarctic Policy Section, Legal Branch, Department of Foreign Affairs and Trade

TSIRBAS, Ms Marina, Director, Sea Law, Environment Law and Antarctic Policy Section, International Organisations and Legal Division, Department of Foreign Affairs and Trade

HIRST, Mr William Gordon, Project Manager, Maritime Boundaries and Advice, Geoscience Australia

SYMONDS, Mr Philip Alexander, Senior Adviser, Law of the Sea, Petroleum and Marine Division, Geoscience Australia

Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries

CHAIR—The committee will now hear evidence on the Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries (Adelaide, 25 July 2004). I now call representatives from the Department of Foreign Affairs and Trade. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Larsen—Yes, thank you. We have a map here which is similar to the maps attached to the treaty, and that might be useful for the committee to look at as we describe the various areas which have been delimited.

CHAIR—Before you proceed, I should notify you that we are going to have to conclude at 12.30, so we may have you back next week.

Mr Larsen—I understand.

CHAIR—We have looked at the maps; you have better maps than we have. I am sorry if this is inconvenient for you but we will not be able to do this treaty in the remaining time. We will ask you back. We will have you first at 10.00 next Monday; we will do it then and we will be able to give it proper scrutiny. I am sorry about this. The committee next meets privately tomorrow night at 8.00, and then there is a public hearing next Monday. I now close today's hearing.

Committee adjourned at 12.27 p.m.