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JOINT STANDING COMMITTEE ON TREATIES

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JOINT STANDING COMMITTEE ON

TREATIES

Monday, 14 March 2005

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

Members in attendance: Senators Mackay, Santoro, Stephens and Tchen and Mr Johnson, Mrs May, Dr Southcott, Mr Turnbull and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled 8 February 2005

WITNESSES

Committee met at 10.04 a.m.

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will today, firstly, review the Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries. This hearing was scheduled for last week but, owing to time constraints, had to be deferred until today. We will then consider three treaties tabled in parliament on 8 February, 2005. Finally, we will return to the committee's review of the International Treaty on Plant Genetic Resources for Food and Agriculture. 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 and industry representatives joining us for discussion of the specific treaties for which they are responsible or have an interest in. I should remind witnesses that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if they would raise this issue now. To begin our hearing we will take 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, done at Adelaide on 25 July 2004.

[10.06 a.m.]

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

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

LARSEN, Mr James Martin, Assistant Secretary and Legal Adviser, Legal Branch, Department of Agriculture, Fisheries and Forestry

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

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

TSIRBAS, Ms Marina, Director, Sea Law, Environmental Law and Antarctic Policy Section, Legal Branch, 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 (Adelaide, 25 July 2004)

CHAIR—Welcome. 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. At the conclusion of your evidence, would you please ensure that Hansard has had the opportunity to clarify any matters with you. Thank you very much for coming this morning. The committee has received a letter from the Department of Agriculture, Fisheries and Forestry informing us that the text before the committee is subject to rectification of the coordinates of five turning points of the Macquarie Island and Campbell and Auckland islands boundary set out in article 3 of the treaty. It is moved by Mr Wilkie and seconded by Mrs May that this committee accepts as evidence and authorises publication of the letter dated 8 March 2005 from the Department of Agriculture, Fisheries and Forestry. Would you now like to make some introductory remarks before we proceed to questions?

Mr Larsen—Marina Tsirbas did not introduce herself earlier, but she is available both to identify the various parts of the boundary as per the map before you and to answer questions on the substance of the treaty. With respect to the letter which the committee has received, thank you, Chairman, for accepting that as evidence. I would point out that the amount of territory actually affected by the rectification process is extremely small—some 100 square metres. Accordingly, it is of a very minor nature. An exchange of notes has taken place between the Australian and New Zealand governments in relation to that. We have New Zealand's acceptance to that rectification.

By way of broader background, the idea of a maritime delimitation treaty between Australia and New Zealand was first suggested in 1978. In essence, the treaty delimits the maritime boundary in six areas, and I will invite Marina to identify those areas as I go through them: firstly, the EEZ between Norfolk Island and Three Kings Island; the EEZ between Macquarie Island and Campbell and Auckland islands; the small area of extended continental shelf north of Macquarie Island and west of Auckland Island; another small area of extended continental shelf south-east of Macquarie Island and south-west of Auckland island; the extended continental shelf between Lord Howe Island and New Zealand, including the area of extended shelf associated with West Norfolk Ridge to the south of Norfolk Island; and the extended continental shelf on Three Kings Ridge east of Norfolk Island.

The 1982 United Nations Convention on the Law of the Sea, UNCLOS, provides the legal framework for this treaty. Under UNCLOS, coastal states are entitled to a continental shelf and exclusive economic zone extending up to 200 nautical miles from the baselines from which the breadth of their territorial sea is measured. Where the natural prolongation of a coastal state's landmass in the form of a continental shelf extends beyond 200 nautical miles, that state may assert sovereign rights over the extended area of continental shelf within limits established by UNCLOS.

Under UNCLOS, a coastal state exercises certain sovereign rights, but not full sovereignty, over the continental shelf and EEZ. This includes the right to explore, exploit, conserve and manage the natural resources. A coastal state also has jurisdiction to protect and preserve the marine environment and to undertake marine scientific research. Where the entitlements of opposite states overlap, it becomes necessary to delimit maritime boundaries. This can occur either because their baselines are less than 400 miles apart—and Marina can show that this is the case between some Australian and New Zealand islands, Campbell and Macquarie—or because the same area of seabed is more than 200 miles from either state and forms part of the continental shelf of both under the UNCLOS rules. This is the case in relation to the Lord Howe Rise, the Three Kings Ridge and the Macquarie Ridge, as identified on the map.

Under articles 74 and 83 of UNCLOS, delimitation shall be effected by agreement on the basis of international law in order to achieve an equitable solution. This is what this treaty has achieved. The overlap of water column entitlements of Australia and New Zealand dates from 1979 when Australia declared the Australian fishing zone with an outer limit of 200 nautical miles from the baseline, New Zealand having declared a 200-nautical mile EEZ in 1977.

It is rather more difficult to pinpoint when exactly the overlap of continental shelf entitlements arose because of the change in the basis of that entitlement at international law, from depth and exploitability in the 1958 Convention on the Continental Shelf to distance and geomorphology

as reflected in the formula in article 76 of UNCLOS. But at the latest, by the time New Zealand ratified UNCLOS in 1996, the Lord Howe Rise and Challenger Plateau, a prominent elevation in the Tasman Sea, became a continental shelf common to both countries, with a consequent need to delimit it.

As the national interest analysis says, maritime boundary delimitation was required in several areas but, in effect, it was possible to do this by just two lines, which you can see on the map before you. These are maritime boundaries dividing both the EEZ and the continental shelf of the two countries. Because the boundary runs no closer than 200 nautical miles to any Australian island, Lord Howe Island will continue to enjoy its full EEZ, as demonstrated on the map, as do Norfolk Island and Macquarie Island, except where they are within 400 miles of the nearest New Zealand islands.

Not all of the boundary in its application to the continental shelf beyond 200 nautical miles runs along the line of equidistance between the nearest points of Australian and New Zealand land territory. In this respect it is consistent with international law and practice for isolated islands that lie between the mainland coastlines of the countries involved in a delimitation to be given reduced effect. This reduction of effect in relation to isolated islands came into play in relation to the continental shelf adjacent to Lord Howe and Norfolk islands and, as the maps annexed to the treaty show, Norfolk Island lies closer to New Zealand than to the Australian mainland.

In a nutshell, the EEZ boundaries are delimited along the line of equidistance. The small area of extended continental shelf north of Macquarie Island is placed under New Zealand jurisdiction. This is an area of no known resource potential. The extended continental shelf between Lord Howe Island and New Zealand is divided in such a way as to give some weight to Lord Howe Island, although less than the full weight the line of equidistance between the nearest points of Australian and New Zealand territory would have represented. Even so, this is an equitable result for Australia, given that the international law on maritime delimitation gives less weight to small isolated islands than to mainland territory.

Finally, the extended continental shelf boundary on Three Kings Ridge, east of Norfolk Island, is drawn so as to leave most of the physical feature of that name under New Zealand jurisdiction, as demonstrated on the map, given that there was a more straightforward technical case for seeing it as the natural prolongation of New Zealand's North Island than of Norfolk Island. At New Zealand's request, this treaty does not delimit the territorial sea and EEZ between the Australian Antarctic territory and New Zealand's Ross Dependency, which remains a task for another day, but it does comprehensively settle the remainder of the overlapping entitlements shared between Australia and New Zealand.

In summary, the treaty settles Australia's longest remaining undelimited maritime boundary. It is evidence of the good relations that we have with one of our most important neighbours and highlights the importance the government attaches to its relations with New Zealand. It also exemplifies the way in which we can work together. It demonstrates that complex maritime boundaries can be delimited by negotiation. The boundaries in the treaty were negotiated as a package and, in our view, represent a good outcome for Australia. The various resources industries and the relevant state and territory governments, which had interests at stake, have expressed satisfaction with the outcome as set out in the National Interest Analysis. The treaty

brings certainty of jurisdiction over the area between Australia and New Zealand—a certainty that is crucial to promoting development.

My last point relates to the question of how the principles of this delimitation relate to those in the one we are negotiating with East Timor. In addressing this issue, I am conscious that the negotiations with East Timor are ongoing and am therefore not in a position to canvass in any detail the matters being discussed in those negotiations. I can say, however, that it is well recognised that each delimitation has its own unique circumstances so that what is agreed in one will not necessarily apply in the other. That said, the principles underpinning our New Zealand boundaries and those we are advancing vis-a-vis East Timor are consistent. The position of much of the agreed continental shelf boundary with New Zealand has regard to principles of the natural prolongation of the continental shelf, the effect of isolated islands and the length of facing coastlines. For a combination of these reasons, the position of the boundary departs from the line of equidistance for much of its length. That brings me to the end of my prepared remarks. Thank you.

CHAIR—Thank you very much. When did discussions begin with Australia and New Zealand on the delimitation of the maritime boundary?

Mr Campbell—I think they began in 1999 in earnest.

CHAIR—I think you mentioned that New Zealand had ratified only in 1996?

Mr Larsen—UNCLOS? Yes, that is correct.

CHAIR—And it is a 1982 convention?

Mr Larsen—Yes.

CHAIR—Was there any reason for the 14 years that they took to ratify it?

Mr Larsen—I am not aware of the reason. Perhaps Mr Campbell might know.

Mr Campbell—I do not think there was any reason behind it. The 1982 Convention on the Law of the Sea did not come into force until 1994.

CHAIR—Could I also ask you for some more information about the discussions and the consultations with the petroleum and fisheries industries. What matters did they raise with the delegation? In the NIA it says the delegation took due account of the matters that they had raised. What sort of things did they raise?

Ms Tsirbas—In maritime boundary negotiations it is not usual for persons outside government to participate in the negotiations themselves. The various resources industries and the relevant state and territory governments, which had interests at stake, have all expressed satisfaction with the outcome through the relevant departments as set out in the NIA. So, in a sense, the stakeholder interests were taken into account through our consultations with the relevant departments such as the Department of Agriculture, Fisheries and Forestry and the Department of Industry, Tourism and Resources as well.

CHAIR—What matters did they raise?

Mr Campbell—In relation to petroleum I think it is fair to say that it is an area of fairly low petroleum potential, so I am not sure that there was a great deal of concern about that particular industry.

CHAIR—I am just reading from the NIA, which says:

> The Department of Industry, Tourism and Resources and the Department of Agriculture, Fisheries and Forestry brought to the delegation's attention matters relating to the petroleum and fisheries industries that arose in the negotiations, of which the delegation took due account.

Mr Symonds—I would like to make a brief comment on that one. I think the types of things that are being referred to there are matters of general interest with respect to Lord Howe Rise in particular, which is the big underwater feature you saw on the map before, where there is no current exploration for petroleum but which has always been felt to have some long-term petroleum potential. I think the industry interest would be more from the point of view of gaining certainty of jurisdiction, if you like, by having a boundary between Australia and New Zealand over this area so that in the future leases and petroleum exploration could occur through that region. It would be very much a general interest in this region because there is no current exploration. We do not know a great deal about the petroleum potential of Lord Howe Rise, but what we do know suggests that it does have some potential but it is not high. So it would be based on a general consideration by companies to the Department of Industry, Tourism and Resources.

CHAIR—It would just be my guess, but I would have thought, given what you said, that they would have preferred the line to have been a little bit more to the south-east than it is on the Lord Howe Rise.

Mr Symonds—I have not heard that, and I think the issue with companies would be to have a certainty of jurisdiction.

CHAIR—Certainty.

Mr Symonds—That is the big issue for exploration companies. They want to know that, when they explore there, the leases they get access to in the future will be certain. I think that is the main concern in this case, because there is no detailed understanding of where the areas of highest potential are. If there are any, they will likely be on Lord Howe Rise. It is ambiguous.

CHAIR—And fisheries industries?

Mr Larsen—My understanding is that the fisheries industries are satisfied. We relied on advice from the Department of Agriculture, Fisheries and Forestry and we are not aware of any concerns expressed by those industries.

Senator TCHEN—Mr Larsen, in point 13 of your NIA you stated that the Australia-New Zealand maritime boundary treaty will potentially assist Australia in setting a precedence for future negotiations for other treaties. I do not have any real problem with the presentation you

made earlier, but as I look at this map of the boundaries, one of the things that jump out at me is the way the distance of offshore islands carries less weight than the distance of the continental coastal boundaries. In the case of Lord Howe Island or Norfolk Island, but particularly in the case of Macquarie Island, it seems that, whenever there is a common boundary drawn between two exclusive economic zones which do not actually intercept, the boundaries are drawn along the Australian EEZ. We tend not to go beyond that 200 nautical miles, whereas the other treaty nations extend outward. Would that set a precedent for Australia in our negotiation with other countries—the fact that we always seem to pull back to our boundary of 200 nautical miles? It weakens our position, doesn't it?

Mr Campbell—We are dealing here with two different sorts of zones that are covered in this treaty. One is the exclusive economic zone, which cannot go beyond 200 nautical miles. In the case of this particular treaty, that zone was delimited on the basis of equidistance between the two countries. But there is another zone: the coastline, where there is a delimitation of area beyond 200 nautical miles from the continental shelf. That is mainly where the principles that we referred to earlier come into play. Under international law, if there is an isolated island that lies between two countries, there is something that is sometimes referred to as 'discounting' of the effect of those islands, and that has occurred in this particular case.

There is another principle of international law which also applies, and that is to do with the relative length of the facing coastlines. The relative lengths of the facing coastlines here are those of Norfolk Island, Lord Howe Island and New Zealand. So there is some disparity in length there as well. But there are cases, particularly on the Lord Howe Rise and also around the Three Kings Ridge, where areas beyond 200 nautical miles are attributed to Australia.

Senator TCHEN—Yes, I appreciate the point about Norfolk and Lord Howe islands. Lord Howe and Norfolk islands are both distant offshore islands. I suppose the comparison is between Macquarie Island, Campbell Island and Auckland Island. All three islands are offshore islands. Macquarie Island is Australian. Campbell Island and Auckland Island are New Zealand's. Yet, if you look at the actual treaty boundaries, once you go past where the EEZs intercept, the agreed treaty boundary is pulled back along Australia's EEZ.

Mr Campbell—You will see that, in relation to New Zealand, as you go down to the bottom of the South Island there is a large area of shelf that actually extends out from New Zealand. It does not actually extend out from Macquarie Island. This is where the issue of natural prolongation of the continental shelf comes in. It would be very difficult in that circumstance—and I do not have the map here—

Senator TCHEN—I can see it here.

Mr Campbell—That larger area is obviously an extension of New Zealand or a natural prolongation. It would be very difficult for Australia to argue—in fact, it cannot argue—that it is the natural prolongation of Macquarie Island, because it does not actually have any connection with it. That is the reason why Australia would not get a larger part of that area. I suppose the other point I would make, and I think this was mentioned earlier, is that there are two small areas of extended continental shelf with a connection to Macquarie Island that were the subject of delimitation under that treaty. One was in the corner where the EEZs meet to the north of Macquarie Island. There is a very small pocket of continental shelf in there without, as I

understand it, any petroleum potential. It is very small. That was attributed to New Zealand. There is one down the bottom where the line kicks out from the exclusive economic zone boundary below Macquarie Island. There is a very small area of extended shelf in there which does have a connection with Australia. That has been divided equally. I would make one further point. There is quite a large area of extended continental shelf that belongs to Australia—you can see it on the map, but there is no line drawn around it—and it is divided under this treaty. That is below the exclusive economic zone near Macquarie Island. You will see quite a large area of continental shelf extending out below the exclusive economic zone. That is attributed to Australia under this treaty.

Senator TCHEN—Thank you, Mr Campbell. I am reassured that there are good reasons for where the treaty boundaries are drawn—they are not just simply pulling back along Australia's zones.

Mr Campbell—No.

Mr WILKIE—My question is really along similar lines. It has been argued that, given that median line resolutions have been applied in these cases for Macquarie Island and Norfolk Island and there were these overlapping claims of exclusive economic zones, we are actually applying double standards here. We are saying that we will use this method to determine boundaries in the case of New Zealand—and I alluded to this last week—but in the case of East Timor we have refused to even consider a median line as the starting point for negotiations. Why is that?

Mr Campbell—As mentioned by my colleague, I hesitate to get into the detail of the negotiations with Timor Leste. That is because those negotiations are ongoing. In fact, the last round of those negotiations commenced last Monday afternoon and went for two days after that. The parties are discussing the relevant issues in some detail and it is likely there will be another negotiation quite soon.

Mr WILKIE—I can appreciate—

Mr Campbell—I can answer—

Mr WILKIE—This committee considered in detail the Timor Sea Treaty, where the boundaries were of some issue. We were told that we were not going to apply that particular method because of certain reasons which were outlined at the time. Now we are being told that, in the case of New Zealand, we have applied those same sorts of conditions in determining those boundaries. What I am saying is that you cannot have it both ways. Why have we been able to do it in one case and yet have ongoing debates with East Timor about using that method for them?

Mr Campbell—If I can answer the question generally, Australia does have a claim to an extended continental shelf as a natural prolongation of its land territory in the area between Timor Leste and Australia. The other significant difference—and I am starting to get into a bit of detail here—is that in that case there is, of course, the so-called Timor Trough, which in our view divides the continental shelf. In other words, there are two continental shelves. That is not the case in relation to the boundary between New Zealand and Australia. So there is that difference

as well. These considerations of natural prolongation of land territory were taken into account in the New Zealand treaty.

Mr TURNBULL—I have a question about the map, Mr Campbell. Can you give a rough indication of the depths suggested by this colour coding?

Mr Campbell—I will have to defer to my college from Geoscience Australia.

Mr Symonds—I can give you a rough idea. The blue areas are mainly deeper than, say, 4,000 metres. The yellowy-orange area would usually range from between about 3,500 to just less than 1,000 metres. Obviously in the area around the island of New Zealand it goes right up to zero, so basically it means shallower than 3,500 metres.

Mr TURNBULL—And orange is more shallow than yellow.

Mr Symonds—That is right: it goes orange, yellow, lime green and blue. In the Lord Howe Rise itself, the area of continental shelf beyond 200 miles that has been delimited by this treaty ranges in depth from about 3,500 to about 1,000 metres or slightly less.

Mr TURNBULL—Then there are the outcrops at Middleton Reef and Elizabeth Reef.

Mr Symonds—That is right.

Mr TURNBULL—Middleton Reef is the one the Americans blasted a hole in, isn't it?

Mr Symonds—I am not sure about that.

Mr TURNBULL—I think one of those reefs was used to shelter shipping during the war—I may be wrong—and there was a hole blasted in it to enable them to pass through.

Mr Symonds—There was certainly shipping there, but it was there for unfortunate reasons. I am not sure that there has been any blasting there, but perhaps there was.

CHAIR—We have one last question from Mr Wilkie.

Mr WILKIE—Going back to those two islands—Norfolk and Macquarie—were the geographical factors taken into consideration or was it purely the equidistance factor in terms of trenches and continental shelves?

Mr Campbell—In Australia's view, both Lord Howe and Norfolk islands lie on a common continental shelf with New Zealand.

Mr WILKIE—What about Macquarie?

Mr Campbell—As you will see, there is a ridge called the Macquarie Ridge which extends down from New Zealand to Macquarie Island, and we would say that they are part of a common feature.

CHAIR—So you are saying that all three islands—Norfolk, Lord Howe, and Macquarie—are on the New Zealand continental shelf?

Mr Campbell—No, we would say they are on a common continental shelf and that they in fact emanate from both—the shelf between New Zealand and Lord Howe Island is the natural prolongation of both Lord Howe Island and New Zealand. Likewise with Norfolk Island, both the Norfolk Ridge and the Three Kings Ridge are natural prolongations of Norfolk Island and New Zealand, though it must be said in relation to the Three Kings Ridge that there is a much greater prolongation from New Zealand than from Norfolk Island.

Mr WILKIE—You mentioned the Timor Trough, but many would argue that that trough does not mark the boundary for the continental shelf—it is merely a feature of the shelf—and that we share the same continental shelf. Have there been any rulings on that?

Mr Campbell—I think we are getting into the realm of negotiations; but, if you are talking about rulings, my understanding is that the International Court of Justice, for example, has not considered a discontinuity—or, as we would say, a break in the shelf—of the same order as we are looking at in the relation to the Timor Trough.

Senator MACKAY—Chair, I am a new member of this committee and I am unsure why we cannot ask questions that go to matters that are subject to negotiation.

Mr WILKIE—I think we can.

Senator MACKAY—Chair, perhaps you could clarify that.

CHAIR—We are considering the treaty that is before us at the moment. Mr Wilkie has asked some questions, and they have been answered in a general nature. But it has not been the practice to diverge from that. Given that we have been advised that there are ongoing negotiations, I do not see any need to push the point.

Senator MACKAY—Please do not. This is an ingenue question. Mr Wilkie referred last week and again this week to the Timor Gap negotiations and was given an adequate response. But the response was essentially that this matter is under consideration and negotiation, and therefore it would be improper et cetera. How can we get answers if this is the type of response that is given? I am not having a go at anybody—it is just that I am new to the committee.

CHAIR—I think this is a discussion we should have after the public hearing.

Mr Campbell—I would just like to make the point that bilateral negotiations are generally regarded as being confidential to the parties while the negotiations are going ahead. In other words, there is an obligation of confidentiality not to reveal the content of the negotiations while they are going on. That is on the international level.

Senator MACKAY—So at what point does the parliament get to ask questions about why certain aspects of treaties have been negotiated?

Mr Campbell—I think that is when the treaty is presented to the parliament.

Senator MACKAY—That comes back to Mr Wilkie's point.

Mr WILKIE—I ask my question on what has been happening with regard to Timor Leste because the Timor Sea Treaty came before this committee and the maritime boundary was one of the key components of that treaty. We were told certain things about how the maritime boundary could or could not be negotiated and what would be negotiated in the future. I am trying to point out that there appears to be an anomaly between what was negotiated on our maritime boundary with New Zealand and what we were told would be negotiated on our maritime boundary with Timor Leste. That is why I seek clarification that, in dealing with both countries, we are dealing with apples and oranges and not apples and pears. I think the same rules need to apply to the one as are applied to the other, and I would be very disappointed to think that that is not happening.

Mr Campbell—I suppose what I am saying—and I think it has been mentioned before—is that the circumstances of each maritime delimitation are unique for a number of reasons—geographical and geomorphological considerations are one aspect of it. Under international law we are required to come to an equitable solution by agreement, taking into account certain considerations—and there are some well established considerations, which have been mentioned today. Without going into the detail of it, we do not see a distinction between the considerations of a general nature that apply to maritime delimitations. We do not see a distinction between what we have done in relation to New Zealand and the way we are negotiating the treaty with Timor Leste.

CHAIR—Thank you very much for your evidence. That concludes the discussion on this treaty.

[10.41 a.m.]

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

COLOMER, Mr Julien, Senior Policy Officer, Migratory and Marine Species Section, Marine Division, Department of the Environment and Heritage

ELLIS, Mr Neil, Acting Assistant Secretary, Wildlife Trade and Sustainable Fisheries Branch, Approvals and Wildlife Division, Department of the Environment and Heritage

ROBINSON, Ms Carey Ellen, Assistant Director, Sustainable Wildlife Industries, Department of the Environment and Heritage

SMART, Mr Anthony, Assistant Director, International Wildlife Trade, Department of the Environment and Heritage

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

Amendments, agreed at Bangkok, in October 2004, to Appendices I and II of the Convention of International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973

CHAIR—Welcome. We will now hear evidence on amendments, agreed at Bangkok in October 2004, to appendices I and II of the Convention of International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973. 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. At the conclusion of your evidence, would you please ensure that Hansard has had the opportunity to clarify any matters with you. Do you wish to make some introductory remarks before we proceed to questions?

Mr Ellis—The Convention of International Trade in Endangered Species of Wild Fauna and Flora—or CITES, as it is referred to—is essentially about the conservation of species that are threatened by overexploitation in international trade. The level of protection that CITES provides to species depends on where they are listed in the appendices to the treaty. Appendix I to the treaty has the highest level of protection for species most threatened. Species that are listed under appendix I are generally prohibited from commercial trade. Trade in them is limited to conservation and scientific types of purposes. Appendix II listed species are those that are vulnerable to international trade. Commercial trade is allowed but it is closely monitored. The main mechanism of monitoring is a permit system. That permit system and the obligations under CITES are given effect through the Environment Protection and Biodiversity Conservation Act. The appendices are amended from time to time. The purpose of that is to reflect the changing

conservation status of a species. In October last year a conference of the parties to CITES was held and the appendices were amended. They are the subject of the NIA. The NIA also sets out the consultation process that we went through on the amendments, including discussions with industry, environmental NGO groups and the states and territories.

CHAIR—Thank you very much, Mr Ellis. We have the great white shark listed as being a species that would be found in Australian waters. Is the lesser sulfur-crested cockatoo an Australian species as well?

Mr Ellis—No, that is an Indonesian species.

CHAIR—Are any of those other listed species of wildlife found in Australia?

Mr Ellis—The hump-headed wrasse would be one of them and the Irrawaddy dolphin another.

CHAIR—That is found here, too?

Mr Ellis—Yes.

CHAIR—Okay. Could you outline what the reasons for including the great white shark on appendix 2 were?

Mr Ellis—Generally, the great white shark has been protected in Australian waters for some time under national as well as state legislation. Because the species is a migratory species I suppose it was felt that the national regulatory system probably was not giving it the protection that it deserved and international cooperation was sought to extend the range of protection and to at least monitor the trade that may be occurring on a global scale.

CHAIR—Has the list of CITES species been gazetted?

Mr Ellis—Yes, it has. Under the convention there is an automatic entry into force of 90 days. Under the legislation, we are required to gazette the CITES list. That gazettal was done and the list became effective from 12 January.

CHAIR—So the gazettal was done before it was even tabled in the parliament.

Mr Ellis—That is correct. Due to the automatic entry into force, the minister wrote to the committee in the middle of last year to outline the fact that the conference of the parties was coming up in October and that various amendments to the appendices were being proposed. The full list of those proposed amendments was provided. Because of the way the convention is set up, the 90 day entry into force meant that the normal timetabling for this committee could not be achieved.

CHAIR—Thank you for that.

Mr WILKIE—I am sure if Mr Adams were here he would love to talk about Tasmanian salmon, but that is another issue. I am sure that the 'Great White Shark' should be protected on

Australian golf courses as well! But, just looking at the hump-headed wrasse, I notice there is one operator that trades in that particular fish. Has the operator indicated he will have any difficulties in getting an export permit to continue doing that?

Mr Ellis—We have had various discussions with that operator and the operator is quite comfortable with the CITES listing. The Queensland government department that is responsible for the management of the fisheries up there is supportive of the listing. The operator is yet to put in an application for a permit at this stage.

Mrs MAY—I am a new member of the committee, so excuse my ignorance. I do not understand how this process works but I wondered what triggers the removal of a species. We have in here that the peach-faced lovebird has been removed. What sort of trigger is needed for that to happen?

Ms Robinson—There is a process. Every two to three years the parties to the convention meet, and that is what happened in October last year. Parties can make proposals for amending the lists. If they feel that a species has improved its population status and it is not threatened to the degree it was when it was listed, parties can put up a case which other parties then consider. If they agree that a scientifically robust case has been made for down-listing that species or removing it from the lists then they can vote or agree by consensus to do that.

Mrs MAY—So has the peach-faced lovebird been removed altogether or has it just been downgraded in some way?

Ms Robinson—That was removed from appendix 2, so it is no longer listed.

Mrs MAY—So it is not longer listed at all?

Ms Robinson—That is right.

Mr WILKIE—To your knowledge, is Australia involved in any black market activity or trade in any species mentioned in the amendments?

Mr Smart—No.

CHAIR—Thank you very much for your evidence today.

[10.49 a.m.]

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

HUTCHINSON, Mr Peter Anthony, Acting Branch Manager, International Branch, Department of Family and Community Services

MURRAY, Mrs Peta Anne, Acting Director, Agreements Section, International Branch, Department of Family and Community Services

ANDERSON, Ms Annabel, Assistant Secretary, Northern, Southern and Eastern Europe Branch, Department of Foreign Affairs and Trade

BLANDA, Miss Lucy, Executive Officer, Southern Europe Section, Northern, Southern and Eastern Europe Branch, Americas and Europe Division, Department of Foreign Affairs and Trade

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

Agreement on Social Security between the Government of Australia and the Government of Malta (Valetta, 16 June 2004)

CHAIR—We will now hear evidence on the Agreement on Social Security between the Government of Australia and the Government of Malta, done at Valletta on 16 June 2004. I welcome the witnesses. 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 Hutchinson—Yes, I will make a brief statement. The International Branch of the Department of Family and Community Services looks after all Australia's international social security agreements. The treaty action proposed today is that Australia and the government of Malta enter into a new agreement on social security to replace the current one, which was signed in 1990. As you will note from the national interest analysis, the proposed agreement was signed on 16 June 2004. Social security agreements provide a number of benefits. Agreements address gaps in coverage for people who move between countries. Agreements help people to maximise their income and they allow people greater choice of where to retire. Agreements also contribute to the overall bilateral relationship.

Agreement countries currently pay approximately $540 million in pensions into Australia, and Australia pays approximately $130 million into those countries. In recent years the Department of Family and Community Services has been engaged in reviewing a number of its social

security agreements, and the documents under consideration today are part of that process. As I alluded to earlier, Australia already has a social security agreement with Malta; it was signed in 1990 and implemented in 1991. This agreement is working well and provides benefits for approximately 2,500 former Maltese residents in Australia and over 3,000 former Australian residents now living in Malta.

The agreement with Malta is a shared responsibility agreement, as are all of Australia's other social security agreements. From Australia's perspective, the new agreement will cover age pension, disability support pension for severely disabled persons and pensions payable to widows. Life pension is also covered under the agreement, but Australia ceased to grant new payments of life pension in 1995. Malta will reciprocate with benefits under its contributory and non-contributory schemes.

Consistent with the current agreement with Malta and Australia's other shared responsibility agreements, the new agreement with Malta will allow people to lodge claims in either country and it will help people meet minimum qualifying requirements for benefits. It does this by allowing periods of working-life residence in Australia to be counted by Malta as periods of contributions to the Maltese social security scheme and periods of contributions to the Maltese social security scheme to be counted as though they were periods of residence in Australia. The agreement also helps to overcome restrictions on portability of payments between the two countries and it provides avenues for mutual administrative assistance to facilitate the determination of correct entitlements. The new agreement is substantially the same as the old 1990 agreement.

Very briefly, the first major change in the new agreement is that we are restricting payment of disability support pension to people who are severely disabled. People who are severely disabled are classified as people having no capacity to work or no prospects of rehabilitation within the next two years. We have done this because the focus in Australia for some time now has been on rehabilitation of people with disabilities and, to the extent possible, encouraging and supporting them to re-enter the work force rather than relying passively on income support. The change will not affect people already getting disability support pension under the current agreement.

The other main change to the agreement provides that the rate of pension that people get will remain the same for the first 26 weeks of a visit to or from Australia or to or from Malta. The current agreement provides for a different method of calculation of a person's rate depending on whether the person is in Australia or Malta. We found that those provisions have been a bit difficult to apply and have caused difficulties for customers because, when they come to Australia for a short visit, it means a change in their rate of payment. It is difficult for them to budget and it is difficult for Centrelink to administer. So we have put in provisions, as we have done in a number of our other new agreements, which provide that the rate of payment will remain the same for the first 26 weeks of an absence from or visit to Australia.

The Maltese community in Australia and Malta has been kept informed about progress with the implementation of this agreement. In November 2004 the text of the new agreement and an information paper were sent to Maltese community groups throughout Australia, a range of other welfare organisations, state and territory governments and the Southern Cross Group. I presume the committee would be aware that the Southern Cross Group represents expatriate Australians.

As noted in the national interest analysis, the consultation process did not bring to light any concerns about the new agreement.

The government considers that the new agreement with Malta will continue to bring benefits to individuals and to Australia as the current agreement does. The new agreement retains all of the major features of the current agreement and, when implemented, will bring into effect long overdue changes. The Maltese authorities advise that all necessary legal and administrative processes for implementation of the new agreement have been completed in Malta. Subject to the views of the committee and the timely completion of necessary action in Australia, the Department of Family and Community Services and Centrelink aim to implement the new agreement from 1 July 2005.

CHAIR—What was the result of the consultations with the Maltese community?

Mr Hutchinson—As I said, there were no concerns, problems or issues raised in terms of further changes to the agreement that anybody wanted. The current agreement has been operating for 14 years and I think the community generally is very happy with the way it operates.

Mr WILKIE—How does this differ from other negotiations of this type of treaty—for example, those with Austria and I think Canada and Spain et cetera?

Mr Hutchinson—It is broadly exactly the same. We have brought those revised agreements to the committee in the last few years. Again, the major change in those agreements was also the limiting of payment of disability support pension to people who are severely disabled. Some of the agreements that we have brought to the committee in the last few years have included provisions to avoid double coverage affecting the Superannuation Guarantee Scheme in Australia. Those provisions are important for businesses operating in both countries. When they send an employee to work in the other country without such provisions in the social security agreement, the employer and the employee sometimes have to pay contributions into both countries' social security systems. So there is an added burden to business there. We did broach the possibility of including double coverage provisions in this new agreement with Malta, but they were not interested at the moment.

Mr TURNBULL—We have a number of agreements of this kind with other countries, as you said in the national interest analysis. I occasionally get complaints from constituents that some agreements are more favourable than others. I recently had a meeting with a woman who was originally from New Zealand. She felt that the arrangements were less favourable to New Zealanders than they were to people who were the beneficiaries of pensions from other countries similarly situated. I do not know whether other members of the committee have had similar queries raised. Would you be able to provide the committee with a table if there is one available or would you be able to prepare a table which sets out the various arrangements of treaties of this kind that we have to enable one to readily compare them? Perhaps you could put some commentary on that to show where they differ. If there are plans to upgrade or renovate treaties as this one has been upgraded or improved, you could identify those as well.

Mr Hutchinson—We could certainly look at that. The general answer to your question though is that of all the differences between all our agreements, our agreement with New Zealand is the

most different. All the other agreements are very similar in the way they operate, and the reason the agreement with New Zealand is fundamentally different is because both Australia and New Zealand have non-contributory systems. We have had a superannuation guarantee system since 1992 but, in terms of our social security systems, individuals do not have to work, pay taxes or contribute to be eligible for a pension.

Because of the free and easy movement for Australians and New Zealanders between each other's countries—citizens of both countries have the right to move freely and work in each other's country—and the fact that individuals in both countries do not have to contribute to their social security pensions, the agreement specifically needs to limit the total entitlement a person can get to the equivalent of one pension. Otherwise, as you might understand, somebody who had lived in New Zealand for a number of years would be better off than a person who has lived in Australia all their life because they would be able to get a part-pension from New Zealand and a means tested pension from Australia. That is essentially the fundamental reason why people do not get the same advantage of being able to maximise their income that they can do with our other agreements, because of the nature of the two systems. It would be problematic to do anything different while we both have non-contributory systems.

Mr TURNBULL—That is a very good explanation and I thank you for it. If it were possible to get some more detail on that, it would be very helpful.

Mr Hutchinson—We could certainly supply that to the committee.

Senator MACKAY—I want to expand on a question that the chair asked with respect to the responses from consultations with welfare groups and the Maltese community. Were they aware of this change to the disability support pension?

Mr Hutchinson—We certainly made specific mention of that in the information that we sent out to those groups.

Senator MACKAY—Did the welfare groups indicate any concern with respect to that?

Mr Hutchinson—No. To reinforce the point I made before, the legislative change in Australia is to restrict portability of disability support pensions. The way in which it is done in this agreement was in fact done back in 1991 and, because of the nature of agreements and the fact that you have to negotiate with another country, in many cases it takes several years to bring these changes into effect. Malta and Ireland are the only agreements that we still have that do not similarly restrict this disability support pension payment. We are in the process of finalising our renegotiated agreement with Ireland as well.

Mrs MAY—The NIA has suggested that there will be savings for the Australian government through this process. We are not going to be affecting those already in receipt of a pension. Where are those savings being made?

Mr Hutchinson—When we looked at the figures in the growth of numbers over the years, as people get older and leave Australia and claim pensions in Malta, we noticed there was an increase in disability support pension numbers in Malta of about 100 per year. We estimated that

of those, about 30 per year would not be severely disabled and, therefore, the new agreement would mean approximately 30 fewer grants of the pension to new claimants in the future.

CHAIR—As there are no further questions, I thank you very much for your appearance before the committee today and for your evidence. We will now hear evidence on the Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Beijing in November 1999.

[11.05 a.m.]

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

BURNETT, Mr Peter, Assistant Secretary, Environment Standards Branch, Department of the Environment and Heritage

DOWLING, Dr Lesley, Assistant Director, Ozone and Synthetic Gas Team, Department of the Environment and Heritage

McINERNEY, Mr Patrick, Director, Ozone and Synthetic Gas Team, Department of the Environment and Heritage

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Beijing in November 1999

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 as such warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. At the conclusion of your evidence, would you please ensure that Hansard has had the opportunity to clarify any matters with you. Do you wish to make some introductory remarks before we proceed to questions?

Mr Burnett—Yes, if it would be of assistance, I will make a short opening statement. Since it became a party in 1989, Australia has been a leading participant in the advancement of measures to phase out ozone depleting substances under the Montreal Protocol on Substances that Deplete the Ozone Layer. Australia has accepted each of the previous amendments to the protocol. The Australian government is now proposing to bring into force the fourth amendment to the protocol, known as the Beijing amendment, which entered into force generally on 25 February 2002. I will briefly address Australia's commitments under the treaty. Notwithstanding the success of the Montreal protocol, in 1999 at the 11th meeting of the parties to the protocol, they noted that ozone depletion was still at its peak and recovery would take a minimum of 20 years. The meeting of parties identified a number of areas where the protocol could be strengthened to contribute further to ozone protection to ensure the timely recovery of the ozone layer.

The Beijing amendment covers four areas. Firstly, it sets out a series of control measures for what was then a newly identified ozone depleting substance known as bromochloromethane or BCM. This is principally a chemical catalyst. Secondly, the Beijing amendment contains an internationally binding cap on the manufacture of hydrochlorofluorocarbons or HCFCs. These are principally used as refrigerants and to blow foams. Thirdly, the amendment contains

restrictions on trade in HCFCs with non-parties. This is designed to prevent the further proliferation of HCFCs. Finally, the Beijing amendment contains mandatory annual reporting to the protocol secretariat on volumes of methyl bromide, which is an agricultural fumigant used for quarantine and preshipment purposes. The treaty is proposed to be implemented within the framework of Australia's existing laws and policies.

Regulatory measures to implement Australia's obligations under the amendment were included in amendments to the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989. These amendments commenced operation on 3 December, 2003. No action is required on the part of states or territories to implement the amendment.

The Australian government has conducted considerable and ongoing consultation with government, industry and interest groups concerning the negotiation of the Montreal protocol generally and specifically on this amendment. The consultation process relating to the Beijing amendment was initially undertaken while formulating Australia's position at the meeting of parties in Beijing in 1999. Further consultation was undertaken as part of a review of the Commonwealth's ozone protection legislation conducted in 2000 and this included all state and territory governments, industry, affected Commonwealth departments and the community. All parties consulted then and subsequently either supported or did not register any objection to acceptance of the Beijing amendment by the Australian government.

Apart from reducing the depletion of the ozone layer, acceptance of the Beijing amendment would enhance Australia's capacity to influence international efforts to address ozone depletion and demonstrate Australia's commitment to supporting effective and balanced approaches to global cooperation on the environment. Acceptance of the amendment would not significantly alter the current or expected structure of the Australian market for ozone depleting substances but would ensure that Australia has access to the sources of HCFCs necessary for Australian industries through to the planned final phase-out of these substances in 2030. Acceptance would involve very small costs to government. These costs are more than accounted for by the considerable indirect benefits that stand to be gained by Australia through effective maintenance of the international ozone framework. In conclusion, the government has taken the view that Australia should proceed to accept this amendment to the Montreal protocol in the national interest.

CHAIR—The Australian Fluorocarbon Council supports the Beijing amendment entering into force?

Mr Burnett—That is correct. Originally their position was not to oppose it. Subsequently that position has been strengthened, and the Fluorocarbon Council now supports it.

CHAIR—So, in a nutshell, they import these ozone depleting substances and already have a phase-out plan, and if we are not a party to this agreement there will be disruption and that will affect subsequent re-exports to regional countries?

Mr Burnett—That is right. As well as the direct benefits of accepting the amendment, because most of the international community have accepted it—and, in particular, all of Australia's overseas suppliers of HCFCs except China have accepted it—if Australia did not accept the amendment the effect would be that, after this coming November, we would lose

access to our international supplies of HCFCs which, as I mentioned, is principally used as a refrigerant, other than from China. If China were subsequently to accept the amendment and if Australia had not also accepted the amendment, it would operate to totally cut off our international supplies of HCFCs. Australia does not manufacture this substance; we are totally reliant on overseas sources. So it would have a significant impact and cost to industry.

CHAIR—What is the status of China and India?

Dr Dowling—India has accepted the Beijing amendment. To date, China has not, but it is quite possible that it could do so.

Mr WILKIE—Would the non-ratification of the treaty by China mean that they could not trade in HCFCs, given that they are a developing nation and developing nations are exempt?

Mr Burnett—Developing nations are exempt for a period. But if any country, whether a developing nation or not, did not accept the amendment then they could presumably continue to trade because it would not be illegal under their own domestic law. But they may be denied supplies from their international partners. In other words, a country that does not accept the amendment, whether it be China or anybody else, would lose their source of supply from countries they import from. But it would just be a different timetable for a developing country. For a developed country, like Australia, the deadline for acceptance or non-acceptance is the end of this year.

Mr McInerney—The year 2016 is the deadline for developing countries to sign on to the Beijing amendment.

Mr WILKIE—So China would fit into that category?

Mr McInerney—Yes.

Mr WILKIE—Do we know the volume of the products they are using at the moment?

Mr McInerney—No, I do not have that information with me. We can take that on notice and come back to you very shortly.

Mr WILKIE—I am just curious. It is interesting that we see these agreements signed in Beijing but they will not ratify them themselves.

Mr Burnett—They may ratify the agreement in the near future. It is just that, as a developing country, the obligations would fall on them at a later time.

Mr WILKIE—Given the size of their growing economy, if they are pouring a lot of these products into the atmosphere you would think they would want to get on board as quickly as possible.

Mr Burnett—That is true.

Senator MACKAY—Are there any countries to which Australia re-exports hydrochlorofluorocarbons that have not ratified or do not intend to ratify?

Mr Burnett—Yes. We re-export to a number of smaller countries, mostly in the South Pacific. Some of those countries may not have accepted the Beijing amendment or may not accept it in future.

Senator MACKAY—Do you know which countries specifically?

Mr McInerney—We have a list of countries with their various forms of status regarding all of the amendments. Again, we can provide that list to the committee. It would probably be easier to do that rather than go through them country by country.

Mr Burnett—It is a rather long list.

Senator MACKAY—What impact will this have on us?

Mr Burnett—We assist a number of South Pacific countries in particular—it is not just South Pacific countries, but we do assist a number of South Pacific countries—with their commitments and obligations under the Montreal protocol. What if we were not to supply them with HCFCs, which is perfectly legal, that are on a phase-out schedule? It is something of a hypothetical question, but one concern that we would have is that, as developing countries, they might be forced back into using the now banned CFCs which are much more harmful to the ozone layer. But of course it is a bit hard to predict exactly what a particular country will do.

Senator MACKAY—I am curious as to how close we are to finding economically and environmentally acceptable alternatives, and I am referring to the regional impact statement here. Do you have any comment on that?

Mr Burnett—The overall time frame for the Montreal protocol is to phase out these substances by 2030. Specifically for HCFCs, it is 2020. But because there has been a high degree of cooperation from Australian industry we are actually on track to achieve phase-out in Australia by 2014. The general trend has been to move from CFCs to HCFCs. Now a lot of equipment is moving across to HFCs, which no longer harm the ozone layer, but these substances are harmful greenhouse gases. Nevertheless, they are less harmful to the environment overall than the ones that are being phased out. Beyond that there are ongoing research efforts to replace these gases with ones that would have no detriment to the environment at all, but it is hard to say exactly when those gases will become available. Unfortunately, some of them have other impacts. Refrigerants such as ammonia or hydrocarbons may not harm the environment but they are either flammable or toxic, or both, so they give rise to occupational health and safety and other issues. There is an ongoing battle being waged around the world to come up with these replacements and I am afraid I cannot give you a specific date as to when we will be in the clear.

Senator MACKAY—That was very useful; thank you.

Mrs MAY—My question is along the same lines. I refer to the economic impact on industries, particularly industries that rely very heavily on them. In my own corner of the world, the foam-

blowing agent is used in the production of surfboards. Was that industry consulted during this process? Is there an alternative that it can use?

Mr Burnett—I cannot answer specifically on the surfboard industry. Mr McInerney may be able to answer that question.

Mr McInerney—To be perfectly clear, by accepting the Beijing amendment—and it probably helps the surfboard industry—Australia will guarantee its future access to HCFCs until the time that we are due to phase them out. The acceptance of the amendment is actually a positive for foam-blowing industries such as the surfboard industry.

Mrs MAY—Okay, but we still need to find an alternative product that they can use for the continuation of that industry so that it survives. That is what I am saying.

Mr McInerney—Yes, that is correct. There are already quite a number of alternative products available, HFCs being one in particular that is increasingly being used in foam-blowing.

Mr Burnett—The other comment from the overall level rather than specifically the surfboard industry is that the international community, under the Montreal protocol, has not forced the phase-out of a substance where it is still essential for a particular use, whether it is essential for technical reasons or because there are alternatives but they are simply uneconomic.

Mrs MAY—So you would look at keeping a viable industry there if it were to have a heavy economic impact?

Mr Burnett—Yes, that would be a key consideration. In any future negotiations in developing Australia's position we would always be careful to consult with industry. If there were an industry where the cost of meeting a proposed phase-out was too high, it would be likely that the Australian position would be either to oppose the amendment, to have a phase-out over a longer period or to provide for exceptions. There are things called critical use exceptions for some of the existing gases which are invoked from time to time.

Mr JOHNSON—You have commented on the thrust of the question I wanted to ask, but it was along the lines of the extent of the consultations you have had with a range of businesses and industries. Can you perhaps—

Mr Burnett—Expand on that a little?

Mr JOHNSON—Yes. Instead of mentioning industry generally can we have a few more specifics on industries that have been consulted?

Mr Burnett—I might call again on Mr McInerney to assist me here but we do have a list of the industries that were consulted.

Mr JOHNSON—And maybe industry associations. I note that the position of the Pharmaceutical Manufacturers Association seems to be fine. It raises no objections but some other industry groups—

Mr Burnett—That would be specifically on bromochloromethane, BCM. The major distributors of that chemical were consulted—that is, Merck Pty Ltd, Sigma-Aldrich and Selby Biolab. They all indicated that they would not be significantly disadvantaged by acceptance of the amendment. The University of Melbourne was used as a representative of research organisations because that particular chemical is used in a number of laboratories. It has indicated that in general it would be able to accept the amendment. Also, it noted—this comes back to my point on critical use exemptions—that there is a mechanism. If it is absolutely essential to have the chemical—Australia has imported very small quantities of BCM from time to time—we have retained the mechanism to do that. It is authorised under both the protocol and now under Australian domestic law and it will be possible for us to issue a licence for that to happen. You mentioned the Pharmaceutical Manufacturers Association. It has also registered no objection. Mr McInerney, do you want to add anything in relation to BCM or any of the other amendments?

Mr McInerney—No, I think that covers it quite nicely, but I am happy to give more information if you need it.

Mr JOHNSON—In terms of the research organisations, I guess my question is more along the lines of commercialisation aspects of some of the larger businesses, as opposed to university opinions.

Mr Burnett—That is why we consulted the Pharmaceutical Manufacturers Association. As I understand it, there has been some potential for BCM to be used in manufacturing pharmaceutical products. I am afraid I do not know exactly how, but it was seen as having potential benefit. But, as I said, the industry came back and advised that they could accept it.

CHAIR—There being no further questions, thank you very much for appearing before the committee today and for giving evidence.

[11.26 a.m.]

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

MELHAM, Mr Christopher Samuel, Chief Executive Officer, Australian Seed Federation

WALKER, Mr Brett David, Commercial Manager (Legal), Division of Plant Industry, Commonwealth Scientific and Industrial Research Organisation

HERRMANN, Ms Kristiane, Manager, Market Access, Department of Agriculture, Fisheries and Forestry

MORRIS, Mr Paul Charles, Executive Manager, Market Access, Department of Agriculture, Fisheries and Forestry

ROBERTS, Dr William Philip, Executive Manager, Department of Agriculture, Fisheries and Forestry

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

MUNRO, Mr Mathew Carl, Policy Manager, Industry Sustainability, Grains Council of Australia

HARVEY, Mr John, Executive Manager, Varieties, Grains Research and Development Corporation

International Treaty on Plant Genetic Resources for Food and Agriculture (PGRFA) (Rome, 3 November 2001)

CHAIR—We will now hear evidence on the International Treaty on Plant Genetic Resources for Food and Agriculture, done in Rome on 3 November 2001. We have before us representatives from the Department of Agriculture, Fisheries and Forestry, the Commonwealth Scientific and Industrial Research Organisation, the Grains Council of Australia, the Grains Research and Development Corporation and the Australian Seed Federation. 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. Before we commence, I ask for a brief opening remark from each of the organisations that we have represented before us. We will start with the department.

Mr Morris—Thank you for giving us the opportunity to update the committee on the International Treaty on Plant Genetic Resources for Food and Agriculture. The treaty is

important for the international competitiveness of our food and agricultural sector. Ongoing improvements in plant breeding are essential to our future competitiveness. To deliver improvements, plant breeders need access to plant genetic material which, for virtually all of our commercial agriculture crops, is actually sourced from overseas. The treaty defines a multilateral system of exchange of plant genetic material critical for plant breeding. The treaty defines principles and key elements of this system but leaves operational considerations to future decisions of the treaty's governing body. This includes detail of the standard material transfer agreement which will underpin exchanges of material through the multilateral system. The arrangements for implementation of the system also cover agreements with major international institutions which hold plant genetic resources on which our industries rely—in particular, our grains industries. There have been a number of international developments since we last appeared before the committee.

The treaty entered into force on 29 June 2004, which means, under the treaty provisions, that the first meeting of its governing body must now be held before the end of June 2006. As of this morning there have been 66 ratifications of the treaty. A meeting was held last October of a regional representative group of experts which collected views on elements of and identified options related to the material transfer agreement. A meeting of the treaty's interim committee last November agreed arrangements for taking forward key operational issues involving the treaty, and that included establishment of a contact group to negotiate the material transfer agreement. Finally, the government of Spain has offered to host the first meeting of the treaty's governing body at a suitable date this year or early next year.

We are continuing to advance our interests in the treaty. Australian delegations are participating in preparatory activities, including participating in the expert group and interim committee. We will also participate in the contact group. Positions presented have been and will continue to be based on stakeholder consultations. Until such time as the treaty's governing body meets, Australia remains eligible to participate fully in all work undertaken through the treaty's interim committee. However, if we have not ratified 90 days before the first governing body meeting, we will have no rights to advance our interests in the treaty.

Let me now turn to concerns which have been raised by our seed and grains industries during earlier hearings. Committee members have before them a departmental submission from November 2003, which addresses specific questions raised by grains and seed groups. I would like to draw out very briefly a number of points from this submission. Firstly, nothing in the treaty requires derogation from our existing national interest in its implementation. The treaty does not require legislative change by the Australian government and can be implemented administratively. The treaty obligations do not change existing rights of industry, such as common law rights or to claim property under existing domestic laws—for example, intellectual property rights. Australian ratification of the treaty does not prevent bilateral arrangements or dealings with non-parties to the treaty. In respect of the specific concerns of industry on benefit-sharing obligations in contracts, I would note that these are limited. An obligation would only arise in those circumstances where commercialising new plant varieties incorporating material from the treaty's multilateral system and when that new commercial variety is not made available for ongoing research and development.

Let me conclude that Australia supports an open and fair system of exchange in plant genetic resources. Australia has also made clear, in that context, that to achieve its objectives the treaty

must encourage wide participation and that its multilateral system must be implemented in a commercially realistic manner. This concludes my opening remarks. I would be pleased to answer any questions.

CHAIR—Thank you very much. Perhaps if we now have a brief statement from Mr Walker from the CSIRO, then Mr Harvey, Mr Munro and Mr Melham. I think you can take as read the evidence the committee received two years ago. The committee is interested to know what changes there have been in the last two years and whether the concerns are still the same.

Mr Walker—CSIRO, through its Division of Plant Industry, has been involved as an expert adviser to the department, principally in relation to the terms of the material transfer agreement. The CSIRO's Division of Plant Industry has extensive experience in, obviously, plant breeding and also in material transfer agreements. On that basis, we are providing expert advice on the workability of the terms of the material transfer agreement and its impact on the commercialisation of plant varieties in Australia.

Mr Harvey—Thanks for the opportunity to be able to present evidence today. The Grains Research and Development Corporation is responsible for planning, investing and overseeing research development and delivering improvements in production, sustainability and profitability across the Australian grains industry. GRDC is a statutory corporation under the PIERD Act. Currently, GRDC's research portfolio covers about 25 leviable crops—industries that are worth about $8 billion across Australia. Funding is provided through a grower levy, which is currently set at one per cent. The Commonwealth matches funding on a formula basis up to a ceiling. In 2005-06, the corporation plans to invest around $130 million in R&D. About half of this is aimed at developing and commercialising new superior crop varieties with significantly enhanced production characteristics and market performance.

The GRDC has raised a number of issues associated with Australia ratifying the International Treaty on Plant Genetic Resources for Food and Agriculture and these are being documented, firstly, in the GRDC written submission to the committee back in February 2003, an oral submission that was made by Dr Ross Gilmour on 3 March 2003, and a written response to the department's response to industry stakeholder questions which was provided to the committee on 19 December 2003. We also provided to the committee a report by Professor Don Marshall which was titled 'Potential impacts on Australia'. You should have copies of all those submissions.

Given GRDC's concerns about the treaty up until the end of 2003, the GRDC was encouraging the Australian government to continue its current approach of participating in the activities surrounding the treaty but without actually becoming a contracting party. Following a meeting between GRDC chairman Mr Terry Enright and the then secretary of DAFF, Mr Mike Taylor, early in 2004, a representative from the department, Mr Craig Burns, General Manager, Trade and Policy, was invited to a GRDC consult meeting on 12 February 2004. Mr Burns was asked to clarify a number of issues surrounding the treaty and its likely impact on the Australian grains industry. Mr Burns subsequently wrote to the GRDC to follow up on the operational issues related to the treaty and this letter was dated 24 March.

In the letter Mr Burns gave an assurance that Australia's participation would be on the basis of whole-of-government positions developed in consultation with Australian stakeholders,

specifically industry interests. The GRDC board considered the matter at its board meeting on 29 March 2004. The board welcomed the assurances in Mr Burns's letter that Australian participation would be on the basis of full consultation with stakeholders, including the Australian grains industry.

Taking this into consideration and the department's preference for ratification, with a view to the Australian government working completely within the rights and obligations of the contracting parties, the GRDC board agreed in principle to support ratification on the expectation that the Australian government, through DAFF, would work with industry, including the GRDC, to clarify treaty obligations and ensure industry concerns were addressed in the position Australia took in negotiations on the governing body, including using its power of veto as required. This decision was communicated to the Minister for Agriculture, Fisheries and Forestry, the Hon. Warren Truss, and a copy of the letter was provided to your committee on 16 April 2004. That concludes my opening remarks.

Mr Munro—The Grains Council of Australia is the peak policy body representing the Australian grains industry. We represent over 30,000 Australian grain producers. We have been involved in the consultations since at least late 2002 on the treaty itself. The Grains Council believes that the treaty is a worthwhile initiative and that it encourages the conservation and sustainable use of plant genetic resources and, more importantly, facilitated access to these resources. The Australian grains industry is reliant on foreign genetic material to improve productivity and competitiveness and welcomes moves to enhance access to this resource. However, the GCA has held specific concerns about certain aspects of the treaty, as outlined in previous submissions and discussions with the Commonwealth government, and appreciates the opportunity to clarify the position of the council.

The Grains Council has made two previous submissions. The first was to the joint standing committee on 12 February 2003 in which we outlined a number of concerns, which I will not go over. We recommended that we continue to participate in the expert group and interim committee, identify the costs and benefits of ratification for Australian industries and that ratification not proceed until industry was satisfied that these issues had been addressed satisfactorily. That, to us, was the best course of action at that time. We subsequently supplied a letter to the Commonwealth minister for agriculture, Warren Truss, on 28 May 2004, in which we expressed concern that there were several unresolved issues at that time. However, we recognised that those issues needed to be resolved through the governing body and that we could give support for Australia's ratification of the treaty subject to the Commonwealth's agreement that the outstanding issues would be addressed by the Commonwealth government, with the aim of securing positive outcomes for Australian industries, including the Australian grains industry.

Since those submissions were made, the Grains Council has been involved in several stakeholder meetings, which have been outlined by the GRDC and which aimed to progress on these matters. The Grains Council has been satisfied with the answers that the Department of Agriculture, Fisheries and Forestry has provided in response to industry concerns and recognises that the outstanding concerns need to be progressed via participation in further treaty negotiations. The Grains Council holds the view that early ratification of the treaty and securing a seat on the governing body is the best means to influence the development of the multilateral system, which is likely to impact upon Australian plant breeders whether Australia is a contracting party or not. In essence, the Grains Council believes that Australia will be best

placed to ensure the treaty serves the interests of the Australian grains industry over the longer term through early ratification of the treaty and participation in the governing body.

As only sovereign nations may accede to the treaty, it is extremely important that the Commonwealth government continues to consult with the Australian grains industry when negotiating the development of the multilateral system and addresses issues such as sharing of monetary benefits arising from the treaty. Of particular importance to the Grains Council is ensuring that the treaty reflects commercial realities and that it not be extended to include private collections of material or materials subject to plant breeders rights. The Grains Council is pleased with the level of Commonwealth consultation thus far, and accepts the commitment of the Commonwealth to continue these important negotiations into the future.

In conclusion, the Grains Council believes there are net benefits for the Australian grain growers in Australia's early ratification of the treaty. Greater access to breeding material will facilitate the development and delivery of new crop varieties faster to Australian farmers. As the uptake of new varieties is a commercial decision for the farmer, Australian farmers will be required to pay into the monetary fund only when there are net benefits from doing so. Given the strong preference of the Commonwealth for ratification and the fact that the treaty is now in force and may impact upon Australian plant breeders whether Australia is a contracting party or not, the Grains Council supports early ratification of the treaty, subject to the Commonwealth's continuing commitment to consult with the Australian grains industry to secure outcomes on behalf of the Australian grains industry, including the use of veto power during negotiation of the multilateral system. That concludes my comments.

Mr Melham—The Australian Seed Federation also welcomes the opportunity to provide supplementary comments to this hearing. The Australian Seed Federation is the peak body representing private plant breeders in this country. There are some 30 major plant breeders who between them have roughly a billion dollars of investment tied up in both private and public breeding programs. Any decision to ratify will in fact impact directly upon those stakeholders. The Australian Seed Federation holds the opposite view to its industry colleagues and believes that the view that ratification is in the national interest is somewhat flawed because access to international germ plasm will be made available whether you are a ratifying party or not. Opening remarks from previous speakers indicated that ratification would help secure international access. I think that is a bit of a furphy and, as I said, whether or not you are ratifying you can still get access to both public and private collections.

In the last two years several issues are still outstanding and they certainly have not been resolved to our satisfaction. Some are beyond the control of the Commonwealth, and I specifically refer to the material transfer agreement, which in fact is the pinnacle of the treaty. The final outcome of that MTA will determine whether the treaty itself will provide a benefit as has been espoused. As we are all aware, recently an expert working group was convened and met to discuss how that MTA should look. It is our opinion, having read the brief and the notes from that meeting, that we are probably in a worse position than when we started. Every question that was raised of that expert working group produced a whole range of differing views from a wide range of countries—from developing through to the developed nations. A contact group, as we heard, has now been formed to sort out those responses.

On the home front, it is very important to understand that, if we do ratify, the other side of the coin also prevails and will mean that we have to open up our plant genetic resources to the international community. As I said, we have substantial investments and those investments have been based upon the resources within our state and Commonwealth collections. Continued investment and the continued ability to attract investment into our programs are reliant upon us securing and maintaining the germ plasms that we have authority over. Ratification means we have to open them up.

That brings me to my next point. One of the major issues remaining outstanding is the relationship between the Commonwealth and the state genetic resource centres. Over the past two years, it is correct, we have had excellent consultations between industry and the Commonwealth but, unfortunately, industry has been precluded from those consultations between the Commonwealth and states. I would certainly be interested to know whether the Commonwealth has signed an arrangement with the states to ensure that they are able to meet their obligations under the treaty. Professor Don Marshall's report, as alluded to earlier, highlights all the obligations that are required if, in fact, we ratify, and I will be interested to see if the states can meet those obligations.

Finally, on the question of the funding of the governing body, I believe that it has been established that that will be on a voluntary basis from contributions. It is struggling for money at this stage. Only one of the five expert working groups that have been established by the interim committee has actually met. The governing body will not meet until all those committees have concluded their work, because it sets the agenda for the first meeting. If I were a betting man I would say that the governing body will not meet at least until the latter half of 2006. Mr Chairman, I will conclude with those comments.

CHAIR—Thank you very much. For the benefit of members of the committee, is it true to say, Mr Munro, that the Grains Council of Australia had concerns, that it was not in favour of ratification, but that you are now in favour of ratification? Is it fair to say that?

Mr Munro—That is correct. We believe that our outstanding concerns can be best addressed by the governing body.

CHAIR—What has brought about the change?

Mr Munro—I believe that the answer to the question is provided by DAFFA and the consultations with the Commonwealth that have put our concerns at rest. A lot of our concerns really related to the fact that nobody really quite knew how something was going to work rather than there being a specific problem. I think that has been adequately addressed now. The outstanding concerns, as I say, which relate to the operation and cost of the material transfer agreement, as Mr Melham has outlined, benefit sharing, both the level of payments and the use of those funds, and the longer term implications for genetic material held by a private breeders and the material held under plant breeders rights, we believe can be best addressed via ratification of the treaty.

CHAIR—Mr Harvey, let me ask you about the position of your organisation. Were you saying two years ago to hold off?

Mr Harvey—That is correct. Our position is similar to the Grains Council of Australia. Our initial concern was that there is a lot of detail in the treaty that was unclear. There are really two options here, I think, for Australia. One option is to say that until all the operational issues are defined and clear, then stay out of the treaty. You are in a much better position then to know whether it is worth going into the treaty or not. That is the position, I believe, that the Australian government is taking with the biosafety protocols. They have said that they will wait until the detail is sorted out then they will sign up.

The other approach is to get in there boots and all. The argument that was put to us by the department was that, unless we are at that first governing board meeting and unless we are in there early when the key decisions about how it will operate are formed, then we will miss out. We will not have any influence or as much influence. So from our point of view our position changed. Firstly, there were the assurances given by the department that they would consult and, secondly, there was a strong preference for the department to be in there at the first governing board meeting to influence the way the operations of the treaty will happen.

CHAIR—Mr Melham, your concerns have not been met?

Mr Melham—No, Mr Chairman. Many still remain outstanding.

CHAIR—We have got three organisations. Has the department gone any way to meeting your concerns?

Mr Melham—I think I stated during my opening remarks that the concerns fall into two categories. One concerns domestic issues, and many of those have been answered to our satisfaction, including whether or not legislation or administration would be used to administer the treaty. We were told administration. The real issues lie in the international arena. They will not be able to be addressed without the working groups meeting and addressing those issues. They include the material transfer agreement. They include compliance issues. What if a country is not meeting its obligations? How is the governing body going to react? What are the implications? We have bilateral arrangements at the moment that are working quite well. They are not under threat. So the issue becomes: bilateral versus multilateral. To us multilateral has a downside that the bilaterals do not.

So, yes, in summary, we are saying there are outstanding issues that preclude us from really determining whether or not it is in the national interest. Therefore we are saying we should continue to make a contribution through the working groups and the interim committee. We have several seats on those committees. Let us use them and then, over time, let us see if it is turning out to be truly in the national interest or otherwise.

CHAIR—Thank you. I would like to address a question to the department. Reviewing the evidence from two years ago and so on, it seems that a suggestion was being made by some of the groups to participate in the expert group and see how this body develops. The first meeting of the governing body has not been held, but is the department happy with the way it is developing?

Mr Morris—I think there are two parts to the question: one is whether we are happy with how it is proceeding and I guess the other is the importance of us being on the governing body.

The key issue regarding the governing body is that the first meeting of the governing body is going to be responsible for signing off on the material transfer agreement as well as on the benefit-sharing arrangements. Our view, therefore, is that it is critical for Australia to be involved in making the final decisions on those two points in order to ensure that our interests are being protected. If we are not on the governing body, then other countries will potentially make decisions on the MTA which will apply to our access to material of countries that have ratified the treaty and also to the international collections of material under the international agricultural research centres. So we feel it is important to be part of that decision-making process.

On the issue of whether we are happy with the progress, I think with any of these international bodies, where there are a large number of countries involved, there are going to be a lot of different views around the table, and that is certainly the case in respect of this. We are consulting with industry back here to ensure that our views represent an Australian view, and we are putting those views strongly during the various meetings that are being held. Two meetings have been held so far, which include the interim committee meeting and the meeting of experts, and one will be held in the future around the establishment of a contact group which will negotiate in much more detail the material transfer agreement. We will be actively involved in that group as well, as a key negotiator. However, that does not give us a right to then go to the governing body and make our views finally known at that meeting. So it is important that we ratify in time for that.

One final point: once we do ratify we are not officially a member of the treaty until 90 days after ratification. According to article 19.9 of the treaty, 'The Governing Body shall hold regular sessions at least once every two years.' Given that the treaty entered into force on 29 June 2004, that would mean that the governing body should meet by 29 June 2006. That is the ultimate deadline but, of course, they could meet before then.

CHAIR—If we do not ratify, do we lose our rights to be on the expert group of the interim committees?

Mr Morris—I guess it is a bit unclear at this stage. The governing body could make that decision, I would think, in the future. It is possible that we may still be able to participate, but we would not have a role in actually making the final decisions on what arrangements would be in place for the material transfer agreement and for the benefit-sharing arrangements.

Mr WILKIE—I am looking at the list that is supplied on who has ratified and who has not.

CHAIR—It might be an old list.

Mr WILKIE—I am sure it is an old list; that is why I am asking the question. Of the 80-odd countries that have signed, only seven had ratified at the point when this information was made available. How many have ratified now?

Mr Morris—We have a copy of that that we printed out this morning from the web site. They talk about three types of ratification. There is ratification which is a process that Australia and several other countries go through. Other countries accede to the treaty, which is equivalent to ratification, and there are other processes of acceptance or approval that countries may go

through. So when you print out the list of countries involved, in terms of whether they have ratified or not, it includes ratifications, acceptances, approvals and accessions.

Mr WILKIE—But that still only adds up to nine on my list.

Mr Morris—On our list, which was printed off this morning, there are 66 countries that have now ratified, as I mentioned in my opening statement. I am happy to table this.

Mr WILKIE—I would like a copy.

Mr Morris—That was downloaded from the FAO website this morning. In order for it to come into force there needed to be 40. That number was hit on 29 June 2004, which is when the treaty came into force.

Mr WILKIE—My other question is to Mr Melham. If we are still working on some of these issues through the working groups are we likely to resolve some of those issues before the first meeting of the governing body?

Mr Melham—Yes, the expectation is that the working groups will have completed their work prior to the first meeting of the governing body. They then set the agenda for the first meeting.

Mr WILKIE—Obviously, we need to ratify three months before their meeting, otherwise we cannot participate. Is it likely that they would meet well in advance of that meeting?

Mr Melham—At the second meeting of the interim committee the Secretary-General advised that only one-tenth of the funding required for those committees to meet had been forthcoming—and that is now exhausted. I think I stated earlier that I do not believe the governing body will meet until the end of 2006, and I believe the working groups will complete their work well in advance of the first meeting.

Dr Roberts—I would like to make a comment on that. There is no legal obligation that the working groups complete anything by the first governing body meeting. There is a legal obligation under the treaty that the first governing body meet by June 2006. The result of that is that if the work is not complete the governing body will have to meet anyway and the result of that could be that they make decisions irrespective of where the working groups are up to. The working groups are informal; they have no legal status. They are highly dependent on funding but at the moment the funding is available for the governing body's meeting. It has been provided by Spain and the belief is that other countries will chip in if Spain is a bit short. But it is very doubtful that all the working groups will meet and complete their work by June 2006. But the governing body will have to meet and it will have to make decisions on some things irrespective of the work of the working groups.

Mr WILKIE—I understand that there may not be a legal requirement. Is it likely that they may meet and may resolve some of the issues that we need or want dealt with through the Australian seed industry association before they get to that stage?

Dr Roberts—My guess is that by the time you get to the governing body there will have been work done on the MTA but that will appear probably as a draft agreement with lots of options

and possibilities within square brackets within it. So the real work of refining it to an actual NTA will be done in working groups around the governing body's meeting, but it will ultimately be decided by the governing body. So again I think that emphasises the importance of being there. If we do not get to the governing body that is where all the key decisions will be taken and that is where a lot of options will be thrown out. That is where the final options will be accepted on the NTA.

Mr WILKIE—How real is the concern that under the free exchange of plant genetic material provisions of the treaty that countries with a strong background investment in technology and research and development will lose the advantage of that investment because other countries will have access to it for nothing?

Mr Morris—I do not think that is a major concern because, as Mr Melham has indicated, there is already a system of exchange that takes place of plant genetic material around the world, which is reasonably well developed.

Mr WILKIE—I imagine that would be done on a fee basis, though?

Mr Morris—I do not believe so, not all the time. Maybe CSIRO could comment on that.

Mr Walker—A very limited cost recovery basis would be the norm. Most often it is freely available.

Mr Morris—It would be the same under this treaty, so there would not be a change in that regard. What this does do is establish an international standardised system for the transfer of that material, which provides a better guarantee of access for us but also a more uniform system of access to that material in the future so that we can have more reliable access. So there possibly will be improvements. But at the moment there is transfer already taking place in the system.

Mr WILKIE—Mr Melham, you mentioned that as a concern. Would you like to expand on the causes?

Mr Melham—It is a real concern. Firstly, the exchange of germ plasm at the moment is done under a contractual basis. I also need to point out that it is not only between public germ plasm centres. That belief is based on the assumption that a lot of our germ plasm comes from the plant genetic resource centres in the public domain. In fact, a lot of it now comes from private collections, not just the public domain. But I mentioned earlier that, if the states reached agreement with the Commonwealth and their genetic resource centres are now under the scope of the treaty, the germ plasm will have to be made available. At the moment they are not bound to make that available; it is done on a bilateral basis under contractual arrangements. Our plant breeders use that same germ plasm to develop new technologies. I find it interesting that, say in the case of the wheat industry, if we talk about the national interest, we are precluded from exporting wheat seed out of this country, for obvious reasons. So if you expand that analogy across all other species then you are really putting the national interest at risk if you open up the banks. It is a real concern, certainly to the breeders.

Mr WILKIE—I suppose then—to the department—it really follows on from the question Mr Turnbull asked last week about the implications of ratifying a treaty when you could impose

certain requirements on the states. How real is that view that the states would then be forced to comply with aspects of the treaty or could then be forced to comply with aspects of the treaty? Have the states been informed that that could be the case?

Mr Morris—The answer to that is that the obligations under the treaty are between the contracting parties. So the obligations on Australia, on the Commonwealth government, is with respect to material which is held in the public domain under our control. Basically the obligation is specifically with respect to material held by the Commonwealth government and not by the states.

Mr WILKIE—Is that specifically stated in the treaty? I would have thought that, under certain powers within the Constitution, the states may be required by the Commonwealth to release that information.

Mr Morris—Article 11.2 is the relevant article. We need to get our Attorney-General's person to answer this, apparently. Under article 11.2 of the treaty, it states:

... shall include all plant genetic resources for food and agriculture listed in Annex 1—

and there is a listing of the particular varieties—

that are under the management and control of the Contracting Parties and in the public domain.

The contracting party in this case is the Commonwealth government.

Mr WILKIE—Yes, but the states form part of the Commonwealth. I would not think you could say the Commonwealth would have to be the ones who are responsible for that when the Commonwealth is made up of states and territories. They would have to be part of that, I would think.

Mr Campbell—In the case of this particular treaty, we have advised that the reference to 'Contracting Parties' would be a reference to material held in Commonwealth collections and not to material held in state collections—as a matter of compulsory handing over of material. The second issue is whether the Commonwealth could use its power to legislate—I think that is the issue you were speaking of—to require the state collections to hand over material. I would not like to give an off-the-cuff view about that. There is no doubt that the external affairs power may be available to do that. But, again, just because a power exists to do something, it does not necessarily mean that that power will be used to do it. As I understand it in this case, it is intended to give effect to the treaty by administrative means. That, by definition, means there will be no legislation to require the states to do something.

Mr Morris—We have consulted with the states, to answer the second part of your question, and they support ratification of the treaty.

Mr WILKIE—The problem is that in the past when we have negotiated with the states we have not advised the states that they could be required to actually comply under the external powers of the Constitution. It might be better if Mr Turnbull asked some of these questions.

Mr TURNBULL—I think that everybody who has commented on this is probably quite right. I think your point, Mr Campbell, is that 11.2, when it refers to contractive parties, refers to the Commonwealth. But the point that Mr Wilkie makes must be right, I think. If you look at article 4, the general obligations, there is an obligation on the contracting party, that is, the Commonwealth, to promote an integrated approach. There are a lot of very general words there—and this is perhaps something that Attorney-General's could respond to—that would enable parliament, if it chose, to pass laws using the external affairs power that could cover this field. You are saying that you have no intention of doing so, but nonetheless this is the issue we talked about when we last met. Each of these treaties does have the potential of vesting considerable additional legislative authority in the Commonwealth because of the way the external affairs power operates consequent upon the Commonwealth entering into a treaty. So I guess, in summary, the possibility is there but I think that you are probably right in saying that the states are not within the definition of a contracting party.

Mr Campbell—Could I made a response to what both you and Mr Wilkie have said? First, I can assure you that in my experience the states are well aware of the existence of the external affairs power—

Mr TURNBULL—Painfully aware perhaps.

Mr Campbell—Yes. Also, there is a process, as you may be aware, for consultation with the states on treaties generally. There is a body called the Standing Committee of Treaties—a meeting of officials under the agreed principles of consultation on treaties with the states. They do mention that there will be consultation with states during the course of negotiation and prior to entry into a treaty. But they are well aware of the external affairs power aspect.

On the issue of the external affairs power, I wonder whether it is worth while making a couple of general comments about it in view of what was said last week. The issue has risen again today. There is no doubt that becoming a party to a treaty with an obligation in it will generally give rise to legislative power under the external affairs power. But, as stated earlier, it does not necessarily mean—and in many cases it does not—that reliance will actually be placed on that power and that the power is actually utilised.

Another issue is that quite often—yes—the Commonwealth does gain power under the international obligation aspect of the external affairs power, but in any case there will be existing Commonwealth powers to enable effect to be given to a treaty already. The external affairs power will not in reality add much at all. For example, I think the United Nations Convention on the Law of the Sea was mentioned this morning. This is a very large convention with lots of obligations in it. It was gone through very carefully and it was decided that no new legislation was actually needed to give effect to that treaty.

However, that treaty could have been given effect through a whole range of other Commonwealth powers like the corporations power or another aspect of the external affairs power—which enables the Commonwealth to legislate with respect to anything which is actually physically external to Australia. There is a whole range of powers like that. Yes, it does give rise to Commonwealth power and the obligation aspect, but there are other powers available. I wanted to make that general comment in relation to all treaties, including this one. But, in the case of this treaty, as Mr Turnbull has said, it is not the Commonwealth's intention to utilise any

constitutional power under the external affairs power that might arise out of this treaty to legislate to do things. It is intended to do it by administrative means.

Senator TCHEN—Firstly, Mr Morris, regarding the countries which have ratified this agreement, I noticed that of the 80 countries that are signatory to the treaty China, Russia and Japan are not among them. Can you confirm that?

Mr Morris—According to the list on the FAO web site, those three countries do not appear, so it would appear that they have not signed it as yet. I would note, though, that some countries go straight to ratification or accession without having signed—for example, Algeria, the Congo, the Cook Islands and Korea. Quite a number of countries did not sign but subsequently ratified.

Senator TCHEN—What about the United States of America?

Mr Morris—They have signed, but as yet they have not ratified.

Senator TCHEN—Or approved it or gone through any other process?

Mr Morris—No, they have signed but they have not gone through any other process. The United States have a ratification process as well. So, once they eventually ratify, they will appear as ratification, not as accession or in one of the other categories.

Mr WILKIE—Do we have any idea why they have not ratified or what their concerns are?

Mr Morris—I am not sure how aware you are of the US system, but it takes a long time for any treaty to go through their system, unlike our system, which is very efficient!

Mr WILKIE—Some might agree or disagree on that! Have other countries that have not ratified expressed concerns and do we know what those concerns are?

Mr Morris—I will ask my colleague to comment on that.

Ms Herrmann—I think everybody recognises that the standard material transfer agreement is going to be an integral element of the operational aspects of the treaty and, for that reason, everyone is cooperating in getting the work for the contact group under way so that we can start to address that. Preparations are under way for a meeting of the contact group and draft material is being circulated. So it is an incremental process and that work is going forward. Last November the United States in fact made an offer to contribute a significant amount of money to help fund the meeting of the contact group.

Mr WILKIE—Were they concerned about that material transfer agreement?

Ms Herrmann—The material transfer agreement will essentially be a commercial contract, which includes a third-party provision. Through that third-party provision anybody who uses the material which has come from the multilateral system will be in some way captured through that third-party provision. That comes back to the reason why it is very important for us to be on the treaty's governing body: so we can influence how the shape of that will be developed over time.

Mr Melham—An interesting observation regarding the United States which I would share with the committee is that, in the last two years, they have moved to negotiate specific bilateral agreements with all the suppliers of germ plasm to the United States. So, regardless of how the treaty actually pans out, the United States are securing access through bilateral arrangements. That also gives them the freedom, through contractual arrangements, to distribute any benefits that arise straight back to the donors. This is an issue we have with the multilateral system: if any benefits arise through commercialisation from germ plasm used from the system, the benefits go into an international monetary fund; they do not actually end up back at the genetic resource centre. That is one of the downsides, whereas, under the status quo, we can ensure the benefits flow directly to those genetic resource centres supplying Australia with the germ plasm.

Mr WILKIE—I want to follow on with a question of the department and the stakeholders here. Does not ratifying the treaty but staying a member of the working group to try to resolve some of these issues work in our favour in that, in order to try to get us to ratify, other countries might be more attuned to what we believe is the way we should progress in the working group?

Mr Morris—I guess that assumes that we have some additional negotiating weight as a result of not being a member. I would argue the other way: other countries will always know that if we have not ratified as yet they can take the matters forward to the governing body and not have us present to argue our case, or at least not have us present to vote on the eventual outcome. In our view we would actually have a much stronger claim if we ratified the treaty and could use that leverage to say, 'If you don't accept our claims in the expert group or the contact group, we'll take these same issues forward in the governing body and put them on the table again, and they will have to be resolved there.' So in my view as a negotiator, and others may have different views, I feel that I would have a stronger ability to negotiate if we had ratified, because I would have that power of being able to raise it in the governing body.

Mr WILKIE—Of the major players in the world grain-producing countries that do research development and produce these sorts of materials, how many have ratified the treaty? Are we out in the cold if we do not, or are we in the main group of researchers who have not ratified? There is a whole range of countries that do not do a lot of research and development themselves but will benefit from our involvement; are we going to lose out? Have others seen that as a threat and decided not to ratify?

Mr Morris—There are a couple of points there. One is that the international agricultural research centres, which are part of the Consultative Group on International Agricultural Research, hold quite a bit of material. They are automatically picked up under the treaty because they are part of the FAO system, basically. In terms of the countries that have ratified, they include a number of the European countries. The United Kingdom has ratified, Sweden has ratified and Switzerland and Norway have ratified.

Mr WILKIE—But are they major players in research and development, not just major grain growers? I am talking about the people who do the research and development that everybody else uses.

Mr Morris—India and Canada would certainly be major players in the game. I will ask our CSIRO colleague if he can comment on that.

Mr Walker—India and Canada would certainly be players, and obviously the US has already been mentioned. A lot of the research and development is done in Europe. For example, the French have not ratified and they are pretty big in it.

Mr WILKIE—So that is France and the United States.

Mr Walker—A lot of the major work is probably done in Europe. Canada, both in the research and development and in the production of grains, is certainly a big player.

Mr WILKIE—You need to mention whether they have ratified, because I do not have an updated list.

Mr Walker—Canada—

CHAIR—How is it that the European Community have approved it? Does the European Community have status in this body?

Ms Herrmann—Yes, it does, as one of the organisations under the FAO statutes, because the treaty was established as an article 14 agreement under the FAO constitution. In clarifying the European countries, it is my understanding that their individual processes take different lengths of time. All of the European countries are proceeding to ratify the treaty. I have not counted the number of countries recently, but I think about 120 or 130 signed the treaty when it was open for signature. That means that they were supportive of the treaty's objectives. No countries indicated that they did not support the treaty.

CHAIR—I have a response from Mr Melham and then questions from Senator Tchen; then we will wrap it up.

Mr Melham—In terms of the question, I know the grains industry is represented very strongly today, but we need to understand that this is not solely about the grains industry. The scope of materials cuts across the horticulture sector as well. It is not just grains.

Senator TCHEN—In relation to my question, in some ways your answer to Mr Wilkie's question has anticipated it, Mr Morris, but I would still like to ask it because it is probably relevant to other evidence coming before this committee as well. In the NIA, paragraph 14 says:

> If Australia did not ratify the Treaty, the capacity of Australian plant breeders to access ... overseas sources... is likely to become more difficult and less cost effective. In addition, domestic plant breeding programs and the productivity and diversity in plant production ... would be at risk.

Given the time, you can take this on notice, but can you amplify these two assertions, particularly in light of the earlier evidence from Mr Melham? I think the whole thing should apply to other NIA statements coming before this committee as well. We often see assertions like this.

CHAIR—Thank you, we have the question.

Senator TCHEN—If you cannot do it now, you can take it on notice.

Mr Morris—Perhaps we can start, if that is all right, Mr Chairman, and if you want further detail we are happy to provide it later on. What we are getting at there is the fact that, under the treaty, there would be a material transfer agreement established which would be a standard agreement or contract which would replace the multitude of contracts which are currently in place or the multitude of bilateral agreements which might otherwise be in place to provide a standard mechanism for the transfer of materials. When a plant breeder in Australia was entering into an agreement with another country to obtain material, they would have a pretty good idea in terms of the contract that they would be signing with respect to that particular country or the institution in that country. In that way, it would be much more efficient than the process which currently exists, which might be on a case-by-case basis or under some sort of bilateral arrangement. That is what we were getting at in terms of possibly being more cost effective and less difficult than under the existing arrangement.

Senator TCHEN—That is on a fundamental assumption that multilateral agreements are more effective than bilateral agreements.

Mr Morris—The assumption is that a standard contract will be better than an array of ad hoc contracts or contracts done on a case-by-case basis. You are right; there is an assumption there that I am making.

Senator TCHEN—Thank you. Please continue.

Mr Morris—Ms Herrmann, do you want to add anything to that?

Senator TCHEN—What about the second part?

Ms Herrmann—I was just going to add that the current arrangements are in fact a multilateral system that is based on a common material transfer agreement. What the new system does is provide reciprocal rights of minimum rights of access and benefit sharing. The benefit sharing element has never been formally recognised. That is the side that is very important in the context of the standard material transfer agreement. There is already an existing material transfer agreement which underpins many exchanges in plant genetic resources at the moment.

CHAIR—Thank you very much. I thank you all for your evidence today. We thought this was a good way to do it, and it has worked very well, I think you will all agree, to check the evidence before us in a very quick and transparent way.

Resolved (on motion by **Mr Wilkie**, seconded by **Mr Turnbull**):

That this committee authorises the publication of the evidence given before it at public hearing this day, including publication on the parliamentary database of the transcript.

Committee adjourned at 12.24 p.m.