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Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled 7 December 2004

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**JOINT STANDING COMMITTEE ON
TREATIES**

Tuesday, 31 May 2005

Members: Dr Southcott (*Chair*), Mr Wilkie (*Deputy 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 and Mr Turnbull

Members in attendance: Senator Tchen and Mr Adams, Ms Panopoulos and Dr Southcott

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 8 February 2005.

WITNESSES

**CAMPBELL, Mr William McFadyen, General Counsel, International Law, Attorney-General’s
Department 1**

**SERDY, Mr Andrew Leslie, Executive Officer, Sea Law, Environmental Law and Antarctic
Policy Section, Legal Branch, Department of Foreign Affairs and Trade 1**

**THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Department of
Foreign Affairs and Trade..... 1**

**TSIRBAS, Ms Marina, Director, Sea Law, Environmental Law and Antarctic Policy Section,
International Organisations and Legal Division, Department of Foreign Affairs and Trade..... 1**

Committee met at 8.04 pm

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

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

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

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

CHAIR (Dr Southcott)—We have received the following submissions for treaties tabled on 8 February 2005: submission No. 5 from the South Australian government, submission No. 6 from the Australian Capital Territory government. For treaties tabled on 15 March, we have received submission No. 2 from the Australian Capital Territory government and submission No. 3 from the South Australian government. I require a committee member to move that the submissions received be authorised for publication. That has been moved by Mr Adams and seconded Ms Panopoulos. There being no objection, it is so ordered.

The committee has decided to conduct a further hearing on the proposed treaty between the government of Australia and the government of New Zealand establishing certain exclusive economic zone boundaries and continental shelf boundaries. This hearing follows on from the hearing held on 14 March 2005 and it is specifically intended to address issues concerning government consultation with jurisdictions that may be affected by the proposed treaty action, including Norfolk Island and Tasmania.

I would like to thank witnesses from the Department of Foreign Affairs and Trade and the Attorney-General's Department for being available at short notice for this evening's hearing. I remind witnesses that this evening'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. Although the committee does not require you to give evidence under oath, I advise you that this hearing is a legal proceeding of the parliament and warrants 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. Would anyone like to make an opening statement or are you happy for us to just go to questions?

Ms PANOPOULOS—Thank you, Chair, for convening this special meeting. My particular concern arises from one of the paragraphs in the draft NIA—at the very broad statement that there have been regular negotiations with the states likely to be affected. A particular concern is the negotiations that took place with Norfolk Island. My particular concern in that regard is because it has a unique constitutional status as opposed to the other areas affected. I was wanting to know what the exact consultation was with Norfolk Island and whether there is any documentation relating to their agreement with these boundaries.

Ms Tsirbas—I will just outline the types of consultations that were undertaken from the commencement of essentially the substantive negotiations in late 2000. In late 2000 one of my predecessors, David Mason, who was the director of the sea law area of the Department of Foreign Affairs and Trade, travelled to Norfolk Island to brief the Norfolk Island government on the limitation process. On his way back from the first round held in Wellington, New Zealand he gave a presentation to the entire legislative assembly, which lasted an hour, and took questions for another two hours.

Ms PANOPOULOS—Was that the Legislative Assembly of Norfolk Island?

Ms Tsirbas—Of Norfolk Island, that is right. The reaction anecdotally at the time was that he had been helpful, respectful and responsive to their concerns. Following that, in advance of the second round of talks in Canberra in December 2001, a letter was sent to the affected jurisdictions, including Norfolk Island's Chief Minister, inviting them to nominate a representative to represent their collective interests on the delegation. New South Wales attended that particular round of negotiations. In advance of the third round in Wellington in July 2002, letters again were sent to the Norfolk Island Chief Minister and the Tasmanian Solicitor-General inviting both of them to be part of the delegation. Both accepted. Similar letters were sent in advance of all the subsequent rounds of negotiations.

The Norfolk Island Chief Minister—by this time it was Geoff Gardner—attended the third round, the fourth round in Canberra in March 2003, the fifth round on Norfolk Island in December 2003, where he was the host, and the informal round at Hanmer Springs in New Zealand in April 2004, where ad referendum agreement on the course of the boundary on the text essentially was reached. I understand that former legal adviser Greg French, who was part of the negotiating team, advised that he spoke to the Chief Minister of Norfolk Island at least once after each round that he was involved in. The committee is at liberty to request the views of the Chief Minister as to whether that consultation was adequate. That is the nature of the consultation. So they were invited to and participated in various rounds.

Ms PANOPOULOS—You say they were invited; are there any notes of their particular concerns? Did they raise any concerns at all? Did the Chief Minister at those meetings raise any particular concerns?

Ms Tsirbas—I am informed that, following the briefing that David Mason gave in late 2000 to the legislative assembly, after the first round of talks, one qualification that the Chief Minister at the time, Ron Nobbs, made was that this should have occurred before the first round of negotiations rather than after the first round. The response to that from the territories minister was that no substantive negotiation in fact took place at that round. They were invited to participate at the subsequent substantive rounds.

Ms PANOPOULOS—So no other concerns at all were raised throughout the whole negotiation process over the last few years?

Mr Campbell—I attended all of the rounds of the negotiations and I was present at the rounds of the negotiations at which the Chief Minister of Norfolk Island was present as a member of the Australian delegation. He participated fully in the meetings of the Australian delegation. He also participated fully in the actual negotiations with New Zealand, except on some occasions there

would be meetings of small groups or delegation leaders, which is usual in negotiations, and he might not have been involved in those. It is not for me to speak for the Chief Minister, other than to give my impression that he was there to ensure the interests of Norfolk Island, but he also made it clear that he was there as a member of the Australian delegation and understood that and looked to the Australian interest as well. Again, I cannot speak for him but he did not express to me any major concern with the way the negotiations were going.

Ms PANOPOULOS—I would not expect you to speak for him; that would be quite inappropriate. But in terms of consultations, my understanding of negotiations is that when you negotiate you find out what people are concerned about, what their interests are, and somehow that would be recorded somewhere. Beyond the mere impressions of how they felt, is there any record of any concerns or particular priorities that Norfolk Island had, other than at that first meeting in 2000, where they said they felt they should have been consulted earlier?

Mr Campbell—All I can say is that I am not aware of any formal written record of concerns.

Ms PANOPOULOS—Who would be?

Mr Serdy—If there were such a record it would be on our files, but I went through our files this morning in anticipation of this hearing and I did not find anything to that effect.

Ms PANOPOULOS—That concerns me a bit, Chair. I am also a member of the external territories committee, which includes Norfolk Island, and I know from my work on that committee and elsewhere that there is a lot of discussion and excitement about the particular deposits off the coast and around Norfolk Island. I find it quite extraordinary that these would not have been raised in the last few years. That is one of the reasons why I asked the question.

Mr ADAMS—Norfolk Island is a territory of Australia.

Mr Campbell—It is a territory of Australia.

Mr ADAMS—It is sovereign Australian land.

Ms PANOPOULOS—The constitutionality of Norfolk is different and rather interesting.

Mr ADAMS—I know that.

Ms PANOPOULOS—But since we did say there was consultation, it seems incredible that there is nothing listed as a concern, when they are fiercely independent. I would have expected something.

Mr Campbell—Perhaps I could say something about that. Norfolk Island is one of the seven external territories of Australia and, as such, it forms part of Australia. It is an external territory, albeit an external territory that has been given a degree of self-government which most other external territories do not have, under the Norfolk Island Act. But the fact remains that it is still part of Australia. It has been the position of successive governments that the maritime zones surrounding Norfolk Island are the maritime zones of Australia and not the maritime zones of Norfolk Island. But that is not to say that they do not have an interest in the immediate

surrounding oceans. They have expressed that interest. I believe that, for example, there might be a special zone in relation to fisheries so that the domestic fisheries of Norfolk Island can fish. I think it is a 30 or 40 nautical mile square around Norfolk Island. But I would not myself describe Norfolk Island as being in a special constitutional position. It is part of Australia. It has been given self-government. That is the position it is in. On another issue: I think there have been, over the years, suggestions that there are deposits surrounding Norfolk Island. I think evidence might have been given on the last occasion about the prospectivity of the areas. Geoscience Australia referred to the prospectivity of the areas. I suppose that is what I can say on the particular issues raised by you.

Ms PANOPOULOS—I am not a geologist or an expert. All I know—as well anecdotally—is that there has been a lot of discussion on the island about these sorts of things. I am just trying to get a clear answer about whether any concern or any issue was raised regarding the interests of Norfolk Island by their representatives over the last four of five years.

Ms Tsirbas—Could I just ask, on a point of clarification: do you mean any concerns or interests vis-a-vis New Zealand or vis-a-vis the Commonwealth of Australia?

Ms PANOPOULOS—It is proposed that there were consultations with all the affected territories. I am trying to get a clear picture of what those consultations actually resulted in. You have been kind enough to outline where they were and who was there. I am trying to ascertain if there was anything relevant that was made known to the Australian and New Zealand governments by the Norfolk Island administration.

CHAIR—There is a division in the House. We will have to suspend the hearing while we deal with the division.

Proceedings suspended from 8.18 pm to 8.32 pm

Ms PANOPOULOS—Is there any record of any issue raised by the administration of Norfolk Island in relation to this particular treaty?

Mr Campbell—I say this personally because I have had some connection with Norfolk Island for a while. I used to work there for a while. In the course of that, and over the years since then, there have been groups within the community in Norfolk Island who see the maritime zones adjacent to Norfolk Island—

Ms PANOPOULOS—I was not talking about that; I was talking about the government.

Mr Campbell—I understand that. I am getting to that. As I was saying, there are groups who see the maritime zones adjacent to Norfolk Island as belonging to Norfolk Island. In that context, they have raised claims about the amount of resources around Norfolk Island. Since we last spoke, I understand that in some early correspondence in relation to the treaty—that is, the letter from Mr Nobbs that was mentioned earlier—some issues were raised in relation to resources, although I do not know what all the issues were. That was the previous Chief Minister of Norfolk Island. In subsequent negotiations, we had the present Chief Minister of Norfolk Island there and he formed part of the Australian delegation. We, of course, had discussions in the

course of those delegation meetings, but I cannot recall issues like the sort of issues you mentioned earlier being raised, about resource issues—

Ms PANOPOULOS—I did not specify particular issues. I said that, for example, I knew that these discussions had gone on and that I was quite surprised that, in the last four years, in the course of these consultations, there had been no issues raised. That is all. I am just asking you to confirm whether there were or there were not.

Mr Campbell—The consultations, at least the ones that I have been at, have largely been in the form of intra-Australian delegation meetings at which there is discussion across the table and things like that. But it is not usual for those discussions to be documented in any formal way. What I can say is that, in the course of those discussions, I cannot recall issues being raised about major resources surrounding Norfolk Island.

Ms PANOPOULOS—I will ask the question again, perhaps more simply. That is not answering my question.

Mr Campbell—There is one other issue, though, and that is what was achieved around Norfolk Island, which was a full 200 nautical mile exclusive economic zone, excepting one very small part down at the bottom where it overlapped with New Zealand and a line of equidistance was used. What was also achieved was some establishment of continental shelf outside the exclusive economic zone.

Ms PANOPOULOS—Yes, I read all of that. My specific question related to the consultations. Putting aside, as you mentioned, your personal views and all of that—

Mr Campbell—It is not my—

Ms PANOPOULOS—You mentioned those particular issues. It is said that there were consultations. Did any particular issues or concerns arise out of those consultations with Norfolk Island? I do not know if I can put the question any more simply. Were there any other issues or concerns raised, other than the one in 2000 that was mentioned by Ms Tsirbas—or can you not answer that today?

Mr Campbell—I think we said that there was something mentioned in the letter from Mr Nobbs. That is one issue. All I can say is that from my recollection—and that is my personal recollection, because I was there—I do not recall other concerns being raised, although I do know the background of concerns being raised before that, in the seventies and eighties, about maritime zones and resources.

Ms PANOPOULOS—Chair, I am not particularly satisfied.

CHAIR—Okay. Do you have any other questions; otherwise we will go to Mr Adams?

Ms PANOPOULOS—I just want to make a comment with regard to a comment made by Mr Campbell. This is not relevant to my question, but since you raised it as a matter, Mr Campbell, I want to put it on the record. You made the statement that Norfolk was given degrees of self-government. If you look at the history of Norfolk Island from the beginning of its settlement, the

second wave of settlement was not given a degree of self-government; it has actually had self-government slowly taken away, and Australia has assumed it as part of its territory. So I would like to make that distinction, because I have given that particular study and consideration. But that is not my concern; I just wanted to put that straight on the record. Chair, I think it is totally gratuitous for us to include a statement referring to consultation. It means nothing if we do not know if there was anything serious out of that. But I will leave that for our discussion later on.

CHAIR—Mr Adams, you had some questions.

Mr ADAMS—In the course of comments to us, you mentioned the Solicitor-General from Tasmania. My concern was how Tasmania had been consulted. The Solicitor-General attended round 3, I think—is that correct?

Ms Tsirbas—I will just double-check my notes. A letter was sent to the Solicitor-General prior to the third round, inviting him to be part of the delegation. Yes, that is right, both accepted—that was in July 2002 in Wellington. Perhaps some of my colleagues who were there might remember.

Mr Serdy—I can confirm that Tasmania's Solicitor-General was then present at all subsequent formal rounds and also the informal round at Hanmer Springs.

Mr ADAMS—Just on that issue, if I was in Tasmania and something came out later on that I had not had representation on, I would think that I was neglecting my duty. I could not find in the stuff, although it is a long time ago, where the consultation took place or what the consultation was. But telling me that the Solicitor-General was there shows that they took an interest and that they know exactly what occurred. I am quite happy with that—thank you.

CHAIR—With respect to the boundary between Norfolk Island and Three Kings Islands, and in terms of negotiations, do we go there with a little more, does New Zealand go there with a little more and do we find the line, or is it fairly easy because of the formulas relating to the 200-nautical-mile limit, the continental shelf or whatever?

Mr Campbell—I suppose the very fact that there were more or less eight rounds of negotiations showed there was genuine negotiation. I cannot go into the detail of the substance of the negotiations but it is quite usual in maritime boundary negotiations for the countries to start off with quite extensive claims and then for a solution to arise out of that. But there can be quite extensive overlapping claims.

CHAIR—Obviously there were overlapping claims in these areas. Do we have anything from Norfolk Island on the line? Do we have something from the Chief Minister or the government?

Mr Serdy—That would be under the heading of the telephone consultations that the previous legal adviser of my department had with the Chief Minister after each round, and that would have included the round at which the course of the boundary was settled. Again, no concerns were expressed.

CHAIR—We know the Australian government are happy with putting forward the treaty, the NIA and so on. I am just asking whether the government of Norfolk Island were happy.

Mr ADAMS—Of course.

CHAIR—Have they expressed a view?

Ms PANOPOULOS—The department says they are, so of course. I am being sarcastic.

Mr Serdy—It really depends on what you mean by ‘happy’. I do not think anybody can ever be happy with a delimitation result because it is a zero-sum game. But to the extent that—

CHAIR—Can you help me then: what is their position?

Mr Serdy—Like us, they think it is a fair result.

Ms PANOPOULOS—You said you think they think it is a fair result but there is no documentation or letter that you can point to.

Mr Serdy—I am not aware of any documentation but certainly that was, if you like, the second-hand view that I got from the account of these telephone conversations.

CHAIR—Thank you for coming in at such late notice to clarify the matter. It is much appreciated.

Resolved (on motion by **Ms Panopoulos**, seconded by **Mr Adams**):

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

Committee adjourned at 8.43 pm