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JOINT STANDING COMMITTEE ON TREATIES

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JOINT STANDING COMMITTEE ON

TREATIES

Monday, 7 November 2005

Members: Mrs May *(Acting Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Bartlett, Carol Brown, Mason, Santoro, Sterle, Trood and Wortley and Mr Adams, Mr Johnson, Mr Keenan, Ms Panopoulos, Mr Ripoll, Mr Bruce Scott and Dr Southcott

Members in attendance: Senators Carol Brown, Mason, Sterle, Trood and Wortley and Mr Adams, Mr Keenan, Mrs May and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 13 September and 11 October 2005.

WITNESSES

Committee met at 10.08 am

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

SLOCUM, Ms Gillian Louise, Senior Policy Adviser, Australian Antarctic Division, 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

ACTING CHAIR (Mrs May)—Good morning, ladies and gentlemen. 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 review three treaties tabled in parliament on 13 September and 11 October 2005. I understand that witnesses from various departments will be joining us for discussion on the specific treaties for which they are responsible.

Amendments done at Ulsan, Republic of Korea on 24 June 2005, to the Schedule to the International Convention for the Regulation of Whaling

ACTING CHAIR—I thank witnesses for being available for this hearing this morning. I should also remind witnesses that these proceedings are being televised and broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if any issues could be raised at this time. Do we have any issues? No. We will take evidence on the amendments, done at Ulsan, Republic of Korea on 24 June 2005, to the Schedule to the International Convention for the Regulation of Whaling. Do you have any comments on the capacity in which you appear?

Ms Slocum—I am also Australia's alternate commissioner to the International Whaling Commission.

ACTING CHAIR—I would like to acknowledge that the committee received a letter dated 26 August 2005 from Senator the Hon. Ian Campbell, Minister for the Environment and Heritage, advising that the amendments to the Schedule to the International Convention for the Regulation of Whaling come into force on 28 September 2005. I would like to thank the minister for his letter to the committee and the accompanying national interest analysis.

Although the committee does not require you to give evidence under oath, I should 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. I invite you to make some introductory remarks before we proceed to questions.

Mr Barrington—Firstly, I have an apology on behalf of my Deputy Director of the Australian Antarctic Division, who is unable to be with us today. She had a serious family medical emergency that has taken her time. I would also like to apologise on behalf of Australia's

commissioner to the International Whaling Commission, the IWC, who is in South America at the moment.

You have before you today an amendment to the schedule to the International Convention for the Regulation of Whaling. This convention provides for the conservation, development and optimum utilisation of whale resources. Originally, when this convention was formulated in the 1940s it had a focus on commercial whaling and has since progressed to a point where it is now a vehicle for taking forward conservation measures. In this regard, the members of the IWC agreed in the 1980s to a moratorium on commercial whaling. That moratorium continues today.

The amendments to the schedule that you have before you maintain this moratorium for a further 12 months. It is a matter for the commission that, at the conclusion of each meeting, if there has not been a decision to lift this moratorium on commercial whaling, that moratorium continues for a further 12 months and, as I say, these changes implement that. Australia has a higher standard of protection over whales and this change does not add an additional burden to our treaty obligations. It does not require additional measures for Australia and will not impose additional costs on Australia.

ACTING CHAIR—Are there any further comments? We will go to questions from the committee.

Senator WORTLEY—Has Australia ever lodged an objection to an IWC decision and, if so, to what did Australia object?

Mr Barrington—To my understanding, I do not believe we have lodged an objection to any of the measures put forward by the IWC.

Ms Slocum—That is my understanding as well.

ACTING CHAIR—I take up a point that I would particularly like some clarification on and whether there has been any further movement on it. At the public inquiry in 2004 concerns were raised about Japan, certainly about their whaling for scientific purposes. Could you tell the committee whether there have been any further developments in that regard?

Mr Barrington—Since the last meeting we had, Japan brought forward a proposal at this meeting to increase the level of its Antarctic scientific whaling from its prior level—which was 440 minke whales—under a new program, which is commonly known as JARPA II—Japan's Antarctic research program for scientific research. Under this program, Japan plans to increase its take of minke whales to 935. It plans to conduct it as part of a two-year feasibility study, and it will also take 10 fin whales during each of those two years. At the conclusion of that program, under the terms that Japan has prepared, it intends to then move to take up to 50 fin whales and 50 humpback whales from that period on, including the same number of minke whales.

ACTING CHAIR—So no decrease at all?

Mr Barrington—At this stage, Japan has not proposed to decrease it. The proposal was brought forward to the IWC meeting at Ulsan, at which point it received significant consideration by the scientific committee. Australian led a movement in that committee to raise

serious concerns over the scientific merit, scope and intention of the proposal. A large body of scientists at that meeting lodged a paper that raised those criticisms. In addition, Australia and other like-minded nations raised and proposed a resolution at the commission that asked Japan to defer from proceeding with this program, JARPA II, until such time as the scientific committee was able to assess the prior program, known as JARPA, which had been running for the previous 18 years, and the results of that program. Japan noted those things but we understand it still intends to proceed with JARPA II, which will commence this month.

ACTING CHAIR—Do we ever see the outcomes of this scientific research?

Mr Barrington—Yes.

ACTING CHAIR—We do?

Mr Barrington—Yes. Under its scientific research program, Japan provides the results on an annual basis to the International Whaling Commission's scientific committee.

ACTING CHAIR—Does the research demonstrate that they need to take so many whales for the research?

Mr Barrington—Japan would argue that its research requires lethal activity. We would argue strongly to the contrary. We and a number of other pro-conservation countries would argue that there is no basis for scientific whaling of this scale or for the nature and scope of the scientific whaling that Japan proposes to conduct, and we would certainly argue that the lethal aspects of that scientific whaling are not necessary. We have developed a range of non-lethal methods by which you can conduct and acquire the same data on whales in the areas that Japan is interested in. We have been promoting those methods to Japan, but at this stage Japan will still proceed with a lethal whaling program. It is not something Australia would support.

ACTING CHAIR—Are the scientific studies undertaken by Japan in some particular area of science? Are they focused on any one particular area?

Mr Barrington—The JARPA II program will focus on a number of different areas. There is the normal population dynamics and the biology of the whales concerned. This program extends to look at ecosystem considerations. Japan postulates in the scientific whaling program in the Antarctic that there are a number of relationships between the minke whale populations and the recovery of other whale populations, and that they need to better understand the relationship of that predator with other predators in the system, hence the movement towards studying fin whales and humpback whales. Japan prepared a very detailed proposal and, as I have said, the scientific committee itself was not satisfied with that proposal. A large number of those scientists were highly critical of that proposal.

Senator WORTLEY—What is the response of the Japanese scientists in relation to the arguments put forward by those concerned with conservation, and the Australian position as well?

Ms Slocum—Japan see scientific whaling as an inherent right that they have under the convention—under article VIII they are allowed to. So I do not think that they necessarily make

rebuttals of what we say can be done in terms of using non-lethal research techniques. As far as they are concerned, a lot of information can only be collected using lethal methodologies at the moment. They see it as their inherent right and that is essentially where it stops for them.

Senator WORTLEY—So they do not take on board what you have suggested—that there are non-lethal ways that you can gain that information and carry out the research that is required?

Ms Slocum—There is no indication at this stage that they are. A lot of these methodologies are still being developed and we are working very hard to develop as many non-lethal techniques as we can. On the other hand, as far as we are aware the Japanese are not spending the time and energy to look into those non-lethal research techniques because they know that they can collect it by the methods that they have been using for many years now.

Senator TROOD—On this question of Japan and its interest in pursuing this line, how much support do you judge that it has within the commission? Obviously not enough to overturn the arrangements, but is support growing? What do you think the trend is in terms of Japan's desire to start commercial whaling again?

Ms Slocum—Unfortunately for Australia, I believe that the trend is moving away from us and towards a more pro-whaling stance within the commission. There are currently 66 members of the commission and we believe that about 34 of those countries are aligned within the pro-whaling bloc. We essentially divide the members into pro-conservation and pro-whaling blocs. Japan and other pro-whaling countries are actively recruiting and we are tending to see more countries aligned with the pro-whaling group joining the IWC than countries aligned with conservation. For the entire period that the moratorium has been in place we have been able to maintain a conservation majority within the commission. However, I believe there is a serious threat to that majority in the next year or so.

Senator TROOD—It seems to be becoming an increasingly near-run thing. Obviously the Japanese have been very successful in recruiting additional members to their side. Is there any counter diplomacy that the anti-whaling forces are mounting in this matter?

Ms Slocum—Absolutely. I have just come back from a trip to Europe where I was with our commissioner and the minister. We are working with a lot of the other conservation-minded countries to actively recruit other countries to the IWC who we know are supportive of conservation of whales. We are working as hard as we can on that issue to get more pro-conservation countries into the IWC.

Senator TROOD—Are you hopeful that those efforts will bear fruit before the next commission meeting?

Ms Slocum—I am hopeful that we will be able to get at least a couple of countries on board.

Mr Barrington—But we are not so hopeful that we would not expect Japan to also make diligent efforts on its behalf to recruit members to the pro-whaling side of the equation as well. It is finely balanced at this time.

Senator TROOD—Is there any course of action to try to persuade the Japanese of the error of their ways? That time is probably long past, isn't it? Is there any possibility of doing that?

Mr Barrington—We continue to make representations to Japan and we will continue to do so into the future as we have in the past. We do so directly at very high levels. Indeed, the Prime Minister undertook to write to his counterpart. Our high-level direct actions with Japan and also direct action by other like-minded countries with an interest in conservation continue to bring pressure on Japan that we would wish them to desist from scientific whaling and to not undertake these practices—and in particular to not undertake these practices in the Antarctic.

Senator TROOD—We may get to a situation where the Japanese are able to secure a majority for the return to commercial whaling. It is too horrible to contemplate, perhaps, but have you turned your mind to that possibility and which species might conceivably be able to be commercially—

Mr Barrington—At the moment, a change to a simple majority in the commission is not sufficient to overturn the current moratorium that is before you today. A three-fourths majority of the members present and voting at a commission meeting would be required. At this stage, Australia remains committed to the protection of whales. It is national policy and has been so for the past 26 years, and we intend to pursue that policy—within the IWC, primarily. A change in the balance of the commission may be occurring. There are a range of things that we take into account in order to make sure that the strategies that we take forward to the commission can best adapt to changing circumstances. But, at this stage, a return to commercial whaling is not yet envisaged.

Senator TROOD—I encourage you to keep at it enthusiastically and see whether it bears fruit.

Senator MASON—My question carries on from Senator Trood's line of questioning. Perhaps I should know this. How does a country become a member of the International Whaling Commission? Can Switzerland, for instance, a landlocked country, become a member?

Ms Slocum—Absolutely.

Senator MASON—It can. So the trick is to sign up people. And any nation can be a member?

Ms Slocum—Absolutely. All you have to do is deposit an instrument of accession to the convention with the depository government, which is the United States. We do have many landlocked countries that are members of the IWC.

Senator MASON—And some of these nations have never been involved in whaling?

Ms Slocum—No. Many of them are aligned with the pro-conservation bloc within the IWC; they generally just have a desire to protect and conserve whales.

Senator MASON—But does the opposite also apply—that Japan can apply diplomatic pressure for countries to join and adopt their view?

Ms Slocum—Absolutely.

Senator WORTLEY—There have been a considerable number of reports in the media regarding some of the non-member countries who have moved towards not supporting the pro-conservation line, and the reasons they did not support it. I understand Australia was involved in discussions regarding allegations that persuasion was being put onto those countries to take that particular line. Could you clarify that for us?

Mr Barrington—There is certainly vigorous activity on the pro-whaling side and on the pro-conservation side to recruit new members to the commission, in order to bolster numbers. We are aware of the allegations that have been made in media reports. Those are scrutinised each time they arise. Our approach has been to work actively with the members of the IWC to bring to them very clearly our perspective and the perspectives of like-minded countries and, through our arguments and our diplomatic action, to convince them of the merits of whale conservation. That is the way we tackle that problem. We have an active campaign with other pro-conservation countries throughout the world.

Senator WORTLEY—Is there anything in the rules or regulations that disallows that?

Mr Barrington—The International Convention for the Regulation of Whaling was originally set in place in the 1940s; therefore it is now about 60 years old. It is a very short convention and, by today's standards, the arrangements under it are quite limited in that regard. There is nothing in the convention that would point to this, and how you would deal with this sort of issue and those sorts of allegations.

ACTING CHAIR—There being no further questions, I thank you for appearing before the committee this morning. We appreciate your time.

[10.30 am]

KNOTT, Ms Annabel, Legal Officer, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

LEON, Ms Renee, First Assistant Secretary, Office of International Law, Attorney-General's Department

McDONALD, Mr Geoffrey Angus, Assistant Secretary, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

HILL, Mr Paul, Director, Law Enforcement Policy, Law Enforcement Strategy and Security Branch, Australian Customs Service

HAYWARD, Mr Wayne Michael, Director, Non-Guided Explosive Ordnance System Program Office, Department of Defence

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

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch/ILD, Department of Foreign Affairs and Trade

Convention on the Marking of Plastic Explosives for the Purpose of Detection

ACTING CHAIR—We will now take evidence on the Convention on the Marking of Plastic Explosives for the Purpose of Detection done at Montreal on 1 March 1991. I welcome representatives from the Attorney-General's Department, the Department of Defence, the Department of Foreign Affairs and Trade and the Australian Customs Service. Although the committee does not require you to give evidence under oath I should 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 contempt of parliament. I invite you to make some introductory remarks before we proceed to questions.

Mr McDonald—It is appropriate in the current security environment that this convention be considered by the committee. The United Nations Security Council, and particularly its resolution 1373 of 28 September 2001, calls upon all states to become parties to the UN counter-terrorism instruments, and this is one of them. The convention is the last of 13 United Nations counter-terrorism conventions which Australia has not acceded to. Australia was pleased to be one of the first countries to sign a new convention for the suppression of acts of nuclear terrorism in September this year. Accession to this convention will signify Australia's commitment to the United Nations and its counter-terrorism instruments and its ongoing commitment to overcoming international terrorism.

In October 2004 the government announced in its national security policy its intention to accede to the convention. The convention has 120 parties, including Australia's international close partners: the United States, the United Kingdom, Canada and New Zealand. The convention was drafted and is administered by the International Civil Aviation Organisation following the December 1988 bombing of Pan Am flight 103 over Lockerbie in Scotland, which claimed the lives of 270 people. The bomb which caused the disaster was located in a portable radio cassette player and contained plastic explosives set with a detonator. The bomb had passed undetected through the customs system.

The convention's purpose is to restrict the manufacture and place controls over the use by each state party of plastic explosives which have not been marked with a specific chemical agent called an odorant. The most effective and widely used marker is the chemical agent DMNB, as advised in the NIA attached to the convention. ICAO has adopted a resolution to amend the technical annex for an increase in the minimal concentration of the detection agent DMNB from 0.1 per cent to 1 per cent by mass. This change, which is mentioned there, will come into effect on 19 December.

The rationale for the convention is that prohibiting the manufacture and possession of unmarked plastic explosives would make plastic explosives more detectable through airport screening and act as a deterrent to terrorists. It will also make plastic explosives more difficult to obtain and use as an unmarked explosive. The convention does oblige state parties to implement specific offences in relation to plastic explosives.

The convention has two principal objectives. It obliges each state party to take necessary and effective measures to prohibit and prevent manufacture in its territory of unmarked plastic explosive, which is covered in article III paragraph 1. It also obliges each state party to exercise strict and effective control over possession and transfer of unmarked plastic explosives which have been manufactured or brought into the country before the convention's entry into force.

The convention provides for transition periods with respect to defence and police authorities. The technical annex to the convention, in paragraph 2, provides for further exemptions to allow the use of unmarked plastic explosives in the case of plastic explosive manufactured or held in limited quantities solely for use in duly authorised research, training in plastic explosive detection and forensic science purposes and where it is an integral part of a duly authorised military device, within three years of the convention coming into force. We understand that the process of marking the plastic explosive occurs during the manufacturing process and once the plastic explosive is marked the amount of chemical marker is added and incorporated into it.

As I mentioned, the government is preparing legislation—in fact, we have prepared a draft bill which will be available for the committee to look at in the very near future. Ongoing consultation has been held with government and industry considering the accession to the convention. We will be consulting with the states and territories and other bodies on the draft legislation

The convention's obligations will have their main impact on the Department of Defence and the manufacturer of plastic explosives in Australia, which is called ADI Ltd. There will be costs impacting upon them associated with adding the chemical marker to the manufacturing process. The convention will also have an impact on the Customs Service, particularly with respect to

regulation and enforcement of the obligations as part of the wider border security protection. As indicated in the national interest analysis, it will be necessary for Customs to obtain equipment that will be able to detect the vapours that come from marking of the plastic explosives.

Legislation has been drafted and we will be consulting with the states on some of the specific clauses, but that is fairly close. There is already state regulation in relation to plastic explosives so we do not expect there will need to be state provisions. Finally, I would just say that this is part of an international initiative to counter terrorism and it is quite clearly part of our efforts to contain the threat of terrorism.

ACTING CHAIR—If no-one else would like to make an opening statement we will proceed to questions.

Mr WILKIE—I am always keen on implementing measures that prevent or help to prevent acts of terror, but there is a question that has to be asked. Lockerbie was a long time ago and this convention has been around since 1991 and has basically been in force since about 1998. Why, then, has it taken a UN convention to drag the government, kicking and screaming, to a point where it actually signs up and implements the treaty?

Mr McDonald—I guess the only comment I can make about that is that in the last four years there has been urgent terrorism related legislation which has caused a focus of legislative attention and that this particular initiative just simply has not gained the same level of priority. But in terms of all our international obligations it has been an issue that has been pursued solidly.

Mr WILKIE—It shows me they have been pretty tardy in relation to this. The other question I have is: why is legislation necessary to implement this? I would have thought it could be done by regulation.

Mr McDonald—To require people to comply with these requirements, it needs offences which have significant penalties attached to them. Those penalties will be in the vicinity of five years imprisonment and, of course, it is inappropriate to be providing for offences with such significant penalties in regulations.

Mr WILKIE—Wouldn't there be current penalties that would apply to people with unauthorised explosives?

Mr McDonald—These offences focus on the actual marking of the plastic explosives; they enforce that. You are right: if a person were caught with explosives there would be penalties that would apply to them. But the big focus here is to make sure that all the people involved in the process mark the explosives appropriately—and, in that way, you clearly indirectly affect the outcome. If the manufacturers and those possessing these explosives have quite stiff requirements to oblige them to ensure that the explosives are marked then that will underpin all the counter-terrorism efforts that we are hoping to get out of this.

Mr WILKIE—What compulsion is there on the manufacturers now to comply, given that the convention has generally been in force since 1998?

Mr McDonald—At the moment, there is nothing that specifically requires them to comply with this standard.

Mr WILKIE—They are complying anyway. Why do you need to have legislation to give them a big stick if they do not comply, given that they already do?

Mr McDonald—I am not certain whether you can say that they comply with it.

Mr WILKIE—Have you any instances where people have not complied? And, if that has been the case, what has been done?

Mr Hayward—Defence imports and procures locally a range of plastic explosives for its purposes. The PE or plastic explosive that we import is mostly from America and it is compliant with MARPLEX, given that the USA has signed up to that convention. The plastic explosive manufactured locally in Australia does not include the marker and has never been required to include the marker.

Mr WILKIE—Has that been a problem?

Mr Hayward—It is not a problem from Defence's point of view in terms of the performance or acquisition of it. From that point of view, Defence is, I suppose, benign on the current situation with the legislation. Defence has no objections to, or difficulties with, the marker being incorporated.

Mr WILKIE—Would the plastic explosives that Defence use have the marker in them? The convention says that there are exemptions for military use.

Mr Hayward—Some of the explosives that we import from overseas already incorporate the marker. But, as I say, the PE made locally at Mulwala is made to a defence specification that is of long standing and, at this point in time, there has not been anything to require Defence to change that specification.

Mr WILKIE—I might ask some other questions later. I am concerned that introducing legislation that does not necessarily appear to be needed is keeping people alarmed and not alert.

Mr McDonald—I can tell you that if a situation arises where there is an incident and it includes unmarked plastic explosives, whether within this country or somewhere else, there would be considerable interest in it. So there would appear to be a good basis for ensuring that we do not have that situation arise.

ACTING CHAIR—Can I clarify something. The imported explosives have the tracer but the locally manufactured ones do not?

Mr McDonald—I think what was being said is that there are so many countries around the world that do include the marker that much of what is imported includes it. The difficulty is that, because the obligations do not apply here, the stuff that is produced here does not have it.

Mr Hayward—I think it is worth while stating that the plastic explosive we import tends to be sheet explosive. It looks almost like puff pastry sheets. These forms of plastic explosive have different applications. Sheet explosive simply is not made here by ADI and never has been, which is why we import it. The locally produced plastic explosive comes in 600 gram and 1,000 gram blocks, and it is moulded to shape by hand, depending on the application.

ACTING CHAIR—That is a very big block, a very heavy block.

Mr McDonald—I wanted to bring some examples along.

Mr KEENAN—How many local producers are there—just the one?

Mr Hayward—Just the one. Orica are also a large producer, but they tend to produce more mining explosives. They tend to produce slurry type explosives that are pumped into blast holes. Given ADI's historical origins and the fact that the Mulwala factory is a Commonwealth owned explosive facility, they have always been our preferred supplier.

Mr KEENAN—What sorts of costs are associated with marking the explosives? Is it a relatively easy process?

Mr Hayward—The manufacturing process is a bit like mixing bread dough. It almost looks like bread dough. The marker, as I understand it, is added as a liquid during the process. Estimates at the moment are that the amount of DMNB that will be required will add about $5.50 per kilo to the manufacturing cost.

ACTING CHAIR—Is DMNB readily available here in Australia?

Mr Hayward—I do not believe so. I believe it will need to be imported.

ACTING CHAIR—So it will need to be imported to be included as a tracer?

Mr Hayward—Yes.

Senator CAROL BROWN—How is the marked plastic explosive detected through normal X-ray machines?

Mr McDonald—I will leave that to the technician.

Mr Hayward—DMNB is a volatile substance. It vaporises and so it is sniffed, if I can put it that way. The technical data on the rate of that volatile burn-off is not comprehensive at the moment, so we will need to do surveillance programs. It is supposed to be homogenous throughout the material—and it certainly is at the time of manufacture—but obviously there will be a gradient created within the material over time as the volatile substance burns off from the outside and inwards. The technical data is not yet comprehensive enough to tell us how quickly that will occur.

Mr McDonald—Moving away from the technical language, they have equipment that, as Mr Hayward mentioned, sniffs it up. The equipment can detect the vapours.

Senator CAROL BROWN—What sort of equipment is that?

Mr McDonald—The equipment is used at the border. Customs might be able to tell you more.

Mr Hill—Customs has sniffing capability at the cargo X-ray facilities that we have around the country. That is the basic way in which we would detect it. Basically, as has been said, it is an ionised compound that is sniffed and analysed. The signature of the particular item is detected and therefore identified.

Senator CAROL BROWN—What if someone is carrying it in hand luggage and carrying it on to an aeroplane?

Mr Hill—If you have a portable ionising device sniffing luggage then, provided that the concentration of the marker is sufficient for the ioniser and the ioniser's signature is adequate for the equipment—in other words, the equipment can use it—then you should be able to detect it.

Senator CAROL BROWN—Provided that you have that equipment.

Mr Hill—There are ifs there, but it depends on the technology.

Senator CAROL BROWN—I am trying to understand how the explosives will be detected if you are carrying it onto the plane. When I go through the airport security, will they have one of these machines there?

Mr Hill—At the moment that depends on the resources that are provided to Customs to make sure that all the necessary equipment is in place at the airports.

Mr WILKIE—That sounds like a no. Have they got any equipment at any of the airports now?

Mr McDonald—The situation is that there is a lead-up time for the implementation of this, during which the government will be looking at what equipment purchases it needs to make. So the detection side of it is important, and when this legislation is in force it will be necessary to enforce the legislation.

ACTING CHAIR—To clarify, in the Lockerbie disaster, how much plastic explosive are we talking about? Are we talking about people carrying this through in their hand luggage or having it in a bag that goes in the hold? What size was it?

Mr McDonald—The Lockerbie explosive was just in a transistor radio.

ACTING CHAIR—Very small.

Mr McDonald—It was 12 ounces. It was not much.

ACTING CHAIR—That was being carried by someone on their person, so we would expect that this would be picked up in the hand luggage by some sort of machine at the airport?

Mr McDonald—That particular luggage was in the cargo hold, so it was put in a suitcase that was loaded on the plane as cargo hold luggage. The situation at that time was such that there was inadequate capacity to detect it. This is a move towards providing a capacity to detect this more easily.

ACTING CHAIR—Is the technology 100 per cent accurate?

Mr McDonald—No technology is ever 100 per cent.

ACTING CHAIR—I knew you would say that.

Mr McDonald—That is true of all screening, really.

ACTING CHAIR—Would the technology we have today have found the explosive in the Lockerbie disaster luggage if there were a tracer on it?

Mr McDonald—With what is being proposed here, if it had this odorant in it, if we had the equipment applied to it and if it had been diverted from the 120-odd countries that put the odorant in it, clearly it would have been detected. Of course, at that time there was not that sort of level of compliance. But it all depends. This focuses on the diversion of explosives from the various sources of manufacture. You will always have some situations where there is a black market or where people devise ways of getting around it. But it would be of enormous concern if plastic explosives that were manufactured by a legitimate outfit were to be put on a plane in that way.

ACTING CHAIR—How easy is it for an individual in this country to obtain plastic explosives?

Mr McDonald—I do not know whether we have anyone here who can answer that.

ACTING CHAIR—It is unlawful, but how easy is it?

Mr Hayward—All I can say from Defence's point of view is that it is not uncommon for EOD, explosive ordnance disposal, teams to be called to properties and things where granddad has put something in the back shed and it has been there for a long time. Finally somebody finds it and does not quite know what to do with it. I must confess that I am not across what the contemporary arrangements are for buying this stuff commercially but certainly in the past it has been readily obtainable.

Mr McDonald—It is used in the mining industry and so on. There are various sources.

ACTING CHAIR—But there would be very tight controls, I would imagine. You would know who had what, how much and what they were using it for.

Mr McDonald—Yes. Under state legislation there is the regulation of explosives in labelling and all sorts of issues like that, but, as there are with drugs—

ACTING CHAIR—There is a black market.

Senator TROOD—I assume the inclusion of this material in explosives does not render it unstable or shortens it shelf life, or whatever one calls it, does it?

Mr Hayward—It certainly does not render it unstable. It does not make it inherently dangerous. Plastic explosive is quite stable. It is readily handled and requires a fairly substantial whack to detonate it. In terms of its shelf life, again, the technical data is not comprehensive on that matter. Certainly from Defence's point of view, we would be looking to turn our stocks over more readily because there is this question about the surveillance requirement and how long the marker stays absolutely effective. That surveillance program will better inform us over time.

Senator TROOD—So the explosive could remain useful for a longer period than the marker?

Mr Hayward—Correct.

Senator TROOD—Are we talking months, years, weeks?

Mr Hayward—I would be speculating.

Senator TROOD—So are we are doing some research on that to try to find out the difference between these two?

Mr Hayward—There is certainly some research being done through the Defence Science and Technology Organisation. That will be ongoing, particularly once we start to manufacture it locally.

Mr McDonald—The increase in the percentage that I mentioned in my opening statement is clearly designed to make sure that the marker can continue to be detected.

Senator TROOD—Putting more of it in is not going to affect the length of the potency, is it? You need it to have a capacity to last longer in the explosive. It does not matter how much you put in.

Mr Hayward—It is a function of a number of variables that we are looking at at the moment. When the plastic explosive is manufactured, it is wrapped in a waxed paper for ease of access in operational use. Twenty blocks go into a metal container, which is an airtight container, which has tamper-proof seals et cetera. In that packaging configuration, where obviously it is sealed and is in long-term storage, the volatile would not escape. Only minimal amounts would escape. Once the container is open, we are not sure at this point in time whether the current form of wax paper packaging is going to be the right configuration or whether we might need to go for something like a heat-sealed bag.

Senator TROOD—This is for detection purposes while the material is being moved around the place but, in the sad circumstances where it might actually be used, is this marker useful for detecting the source of manufacture of the explosive, or is it destroyed by the explosion?

Mr McDonald—Forensically there are a lot of issues quite apart from the marker. From my understanding from discussions we have had, that is not the main purpose of the marker. The main purpose of the marker is to detect the presence of plastic explosives.

Mr Hayward—Anecdotally, I understand that some of the European countries have a marker which, after detonation, seeks to establish where it was manufactured.

Senator TROOD—Why wouldn't we do that too? It may not be an obligation under this treaty but, on the face of it, that seems to be a good thing to do.

Mr McDonald—If it were regarded as being of definitive aid in that way then the treaty would be changed to reflect it. As I mentioned, forensically there are many factors that come into detecting where explosives have come from. The standard has just been increased from 0.1 to 1, so it has been increased by a large amount—starting from December this year. So the level of odorant in the explosive has been carefully considered at the national level, in any case.

Senator TROOD—I cannot agree more with the comments made earlier—we are signing this treaty rather belatedly, in my view. But the countries that are major manufacturers are not signatories to the treaty or have not ratified it—for example, Belgium. Correct me if I am wrong, but I thought a lot of explosives were made in Belgium. I see that Russia has signed but not ratified the treaty. Are there are other countries in that category or ones that we should be concerned about?

Mr McDonald—I would not like to say we are concerned about specific countries, particularly given that we are in a position where we are just about to implement this ourselves. Clearly, we have a role here in ensuring that the international trend is in the direction of signing these. The United States would be a massive manufacturer of this stuff and the United States has been a strong supporter of this for some time. I guess that the United Kingdom would be a big manufacturer. There are some big manufacturers that have signed up to this and consider it a worthwhile measure.

Senator TROOD—Perhaps some concerted international diplomacy directed to these countries—even though you are reluctant to name them—might be a worthwhile thing for at least DFAT to consider.

Mr McDonald—I think we will be in a much better position to do that once this is in place.

Senator TROOD—Clearly, I agree with that.

Senator CAROL BROWN—Do you have any idea of how much the equipment that puts a marker on explosives would cost?

Mr WILKIE—There is information in the brief that talks about $1 million per unit.

Mr McDonald—There are issues about how many we need and the like. We cannot give any further information on that at this time. You would appreciate that, at that sort of cost, this is not an inexpensive thing. On the other hand, the cost in lives and property damage in the event of something going wrong in this area would be very considerable.

Mr WILKIE—But I think that for you to say that and then not be able to tell us how many of these units we need in order to save those lives, how much it is going to cost and who is going to pay for it is unacceptable. You are saying that we had a serious threat and people may be killed if

we do not do this, and this is all about you being able to detect it, but we are not putting any measures in place to find it.

Mr McDonald—That is not correct at all. The government has indicated very clearly in the NIA that it is going to get this equipment. So it is not a case of the government not getting equipment to detect this; it is just that I cannot give you an exact figure on the amount of equipment.

ACTING CHAIR—Do we manufacture that technology here in this country or would we be importing it?

Mr McDonald—My understanding is that it is available overseas and that we would probably have to import it.

Mr Hill—As far as I am aware, we would be seeking the equipment overseas, but I am not clear on the details of what kind of equipment we would be—

ACTING CHAIR—Would we be looking at each of our airports and ports? What sort of coverage are we looking at?

Mr McDonald—You would expect it to be coverage of that nature. As you know, the government has been stepping up the scanning of cargo, bags and the like at the airports over recent years, and this would no doubt fit in with that strategy.

Mr WILKIE—If that is the case, why were airports and ports not consulted in relation to the treaty?

Mr McDonald—We have consulted the Department of Transport and Regional Services.

Mr WILKIE—They are not listed.

Mr McDonald—We would have certainly taken the view that the primary people that we needed to consult were the people that were handling and manufacturing these explosives.

Mr WILKIE—But Transport and Regional Services are not even listed as one of the organisations consulted.

ACTING CHAIR—They are—transport and regional security and the Australian Customs Service are listed.

Mr ADAMS—At present, one gets tested going through airports for a sensitivity on one's clothing and one's briefcase. Is this to do with what we are talking about here—plastic explosives? Some people think it is about drugs, but I think it is about also identifying explosives, isn't it?

Mr McDonald—Yes. My understanding, and I will get verification of this, is that that is focused on detecting the explosives rather than this odorant.

Mr Hayward—I do not know the status of it, because we are not central to it, but some further research is being conducted on equipment by CSIRO and other authorities. The only reason I am aware of it is that we were asked to provide plastic explosives as samples for that research.

Mr ADAMS—That is a different issue. Can we come back to the issue I raised? You are telling me that the present testing that goes on in the airports is for plastic explosives, but this treaty deals with a different issue. It deals with putting some sort of odour into the manufacturing of plastic explosives so that there is another mechanical process which can identify that an explosive is present.

Mr McDonald—Yes. I will provide you with some more specific briefing on the equipment that they have out at the airports, which both of us have no doubt been tested on. My understanding is that my original answer is correct—its focus is on detecting explosives but not specifically this odorant. I really should take the exact specifications on notice.

Mr ADAMS—I think it says $1 million a unit. Is that your submission to us?

Mr McDonald—This is the estimate that has been provided to us through the Customs service.

Mr ADAMS—From Customs?

Mr Hill—Yes.

Mr ADAMS—Customs have given you that estimate of $1 million.

Mr McDonald—Yes. The truth of it is that there are budget processes. That always makes it more difficult for me to talk about the global coverage of this. Also, in relation to equipment, there is often quite a deal of discussion between our various departments and the department of finance about the most economical way to go.

ACTING CHAIR—Is that to work out which department is responsible for the ongoing costs?

Mr McDonald—No, we are not having those sorts of concerns. Ultimately, I am simply referring to our normal budget processes in terms of how much we can spend and also getting the most effective and economical outcomes. That estimate of $1 million may well go down; it may well go up too.

Mr ADAMS—How much plastic explosives do you manufacture in Australia per year?

Mr Hayward—I do not have those figures to hand.

Mr ADAMS—How is most of that transported.

Mr Hayward—It is transported by road.

Mr ADAMS—Which outlets is it generally sold through?

Mr Hayward—I can only speak for Defence. We purchase it directly from ADI Munitions, who manufacture at the Mulwala plant on the New South Wales/Victoria border.

Mr ADAMS—How many manufacturers of plastic explosives are there in the world? Plastic explosives are now used for most explosives. Does the mining industry use plastics, or do they use something else?

Mr Hayward—They tend to use slurries. It is usually a mixture of nitropril or ANFO with diesel oil.

Mr ADAMS—That is not a plastic?

Mr Hayward—No, it is a slurry, like wet cement.

Mr ADAMS—Does the quarry industry use the same? What do you use for blowing up a stump these days?

Mr Hayward—I am not sure what farmers use these days, but ANFO was typically used in the past.

Mr ADAMS—They do not use plastics? I am trying to get to what the application for plastic explosives is. Who uses plastic explosives legitimately?

Mr Hayward—The name 'plastic explosives' by definition means that it is mouldable to shape by hand. There is nothing unique in a chemical sense.

Mr ADAMS—It is just the adaptability of it in that sense.

Mr WILKIE—It is usually quite expensive compared to other forms of explosives. Is that the case?

Mr Hayward—It is difficult to say, because Defence tends not to buy explosives in their raw form; we buy finished products, such as ammunition with explosives in them.

Mr ADAMS—Do we import plastic explosives into Australia?

Mr Hayward—Yes, we do buy some from the US from a company called Ensign-Bickford.

Mr ADAMS—Who imports plastic explosives into Australia?

Mr Hayward—Again, I can only speak for Defence. We do import some of our plastic explosives.

Mr ADAMS—Is that because there is a market operation? You buy some from the local manufacturer and some from overseas?

Mr Hayward—It is because of the particular form of sheet explosive that we buy that is not made locally.

Mr ADAMS—I have one more question which may have already been asked. This is a treaty that was established in 1991. Why are we now signing it or ratifying it?

ACTING CHAIR—The Deputy Chair has already asked that question.

Mr ADAMS—I will not pursue that then. Thank you.

ACTING CHAIR—Going back to the units, it states in paragraph 37 of the briefing paper that multiple units would be needed in ports around Australia. Can you qualify for me what you mean by 'ports'? Are we talking about airports? What sorts of ports are we talking about?

Mr Hill—We are talking about international points of entry.

ACTING CHAIR—So they are international points of entry?

Mr Hill—Which means seaports and airports.

ACTING CHAIR—So we are not talking about regional airports?

Mr Hill—No.

ACTING CHAIR—Thank you for that clarification.

Senator WORTLEY—What sort of time frame would we be looking at for the equipment to be in place, given that this all goes through as proposed?

Mr McDonald—The legislation has a 12-month lead period, so that is the period we need to gear up for this.

Senator WORTLEY—And the equipment would be in the ports at the end of that 12 months?

Mr McDonald—It would certainly be desirable. The processes for the approval and obtaining of the equipment would still be for—

Mr Hill—We would certainly have to ensure that any equipment that was obtained was suitable for the purpose. If the equipment was used in the x-ray container areas then it would have to be consistent there. Different kinds of equipment would have to be portable. The other issue is that of training staff to use the equipment and the circumstances of its use. In relation to any detection of particular plastic explosive, Customs would tend to refer the matter to Defence to handle the substances in the correct manner, so there is an occupational health issue plus a border public safety issue associated with the material. The expenditure will depend on the nature of the equipment and the circumstances in which the equipment will be used. So the equipment will have to be appropriate to the place, not just simply appropriate to the function that it is to carry out.

Senator WORTLEY—Would you expect the equipment to be in place in the ports by the beginning of 2007?

Mr McDonald—The legislation commences 12 months after the legislation gets royal assent, and we would expect that the legislation would be passed in the first half of next year. It is never easy to predict with legislation exactly when it will commence but we are working through the budget process in anticipation of the legislation passing.

Senator WORTLEY—So once the legislation is passed then the budget will allow for the equipment to be purchased, built or whatever and put in place.

Mr McDonald—I would expect so, without pre-empting the budget. The government has decided that this legislation will be enforced in that sort of time.

Senator WORTLEY—And you do not have any idea of the cost that we will be looking at?

Mr McDonald—Not at this stage. I cannot give you figures on that at this stage. We have indicated everything that we possibly can in terms of expected costs but you can appreciate that if the $1 million per unit figure stands up then the cost could be quite a deal of money.

Senator WORTLEY—And that does not take into consideration training staff and appropriate staffing and so on.

Mr McDonald—That is true.

Senator CAROL BROWN—Has the decision been made to just supply international points of entry and not regional airports?

Mr Hill—Unfortunately, I cannot comment on domestic arrangements. I guess that would be a matter for the Department of Transport and Regional Services.

Senator CAROL BROWN—They have been consulted though, haven't they?

Mr McDonald—Yes, we have consulted that department, but clearly the process is only part heard, so we would have some difficulty providing much more detail than we have.

Senator CAROL BROWN—I know you have mentioned parts of it, and I know the legislation will go through some time next year and will be enforced 12 months later—in 2007—but can you explain to me what will happen once we sign up to this convention?

Mr McDonald—It would be implemented at the manufacturing level, which we heard about earlier with ADI, but anyone that wishes to manufacture explosives in Australia without this odorant in it would be subject to quite severe penalties. For example, if someone was trying to manufacture explosives illicitly without this odorant in it, then they would, right from the word go, be in breach of this legislation. There is the issue of detecting it at our ports—

Senator CAROL BROWN—But what is happening with deciding where these machines will go and other sorts of consultations?

Mr McDonald—It is in the budget process, as I indicated, so I would expect that some parameters would be set in that context. Then there would be announcements and discussions about the location of equipment.

Senator CAROL BROWN—But, if the departments are to be making submissions to the budget process, there will have to be decisions made prior to that as to where you believe the equipment should be going.

Mr McDonald—We will be working with Customs, the department of transport and other departments.

Senator CAROL BROWN—Will you be consulting with other states in that process?

Mr McDonald—I expect there to be consultation with the states, but it will be in the manner in which the Department of Transport and Regional Services deals with aviation import security issues at the state level. I cannot give you specifics of that. Clearly, the state aspect of the jurisdiction is more significant with ports than with, say, aviation, where the federal aspects—the major airports et cetera—are more significant. The reality is that, in both our airports and our ports, there is a lot of cooperation with the states. If you wish, I can look at getting you some more information about that.

Senator CAROL BROWN—That would be good; thank you.

Mr WILKIE—Mr McDonald, firstly, Transport and Regional Services are mentioned there; I missed that earlier. Going back to what I was talking about before, again we are talking about it being a Customs issue. Transport and Regional Services look like they have been consulted in that regard because we are talking about import and export of this product into and out of Australia. I am concerned that the reason you say that we need to have this in place is so that we can detect this explosive if it is put in hand luggage or carried on to domestic airlines, for example; but it does not look like there has been any consultation about the implementation of the longer term aspects of this, which are about trying to protect people and equipment from acts of terror. We are looking at trying to find it when it comes in, and we are making sure that when we send it out we can detect it, but there does not seem to be any consultation about what we are going to do down the track to actually find it when it is being used for an illegal purpose.

Mr McDonald—Much of your strategy in enforcement and detection depends on the legislation that is passed. Clearly we are focusing at this stage on trying to get the legislative framework in place. Clearly there is another process, a budget process, an equipment obtaining process, which is happening in parallel to this. But I can assure you that legislative adjustment, a legislative change, can actually impact on the new equipment purchasing side of things as well. There is not much more I can add to it than that, but I would not want to give the impression that nothing is being done to deal with the enforcement side of this legislation. Careful thought is being given to that and there is a process for determining that.

Mr WILKIE—What is the process?

Mr McDonald—There is the budget process, which occurs over the coming months.

Mr WILKIE—But we are talking about Customs, who will have to allocate resources to purchase this equipment. Right now, Customs are telling us that they have not allocated any resources and have not even looked at how much it will cost them—fair enough, because the budget is not until next year—but who has consulted with the airport operators to find out how many of these units we will need at airports, both domestic and international, to detect this product being used in an improper way and who has looked at how much that will cost and who will pay for it, for example?

Mr McDonald—Certainly, we have indicated in our paperwork here that the government has in hand the purchase side and appreciates the need to purchase this equipment. I think there is some implication in what you are saying that suggests that someone other than the government might be paying for this. There is nothing that I am aware of which would suggest that that would be the case.

Mr WILKIE—At domestic airports you have Qantas and airport corporations paying for this surveillance equipment. It is not necessarily paid for by government.

Mr McDonald—Security is a highly expensive industry, and a highly profitable industry in some cases. There is a contribution from both industry and government in many areas. I suppose what I am saying is that I am not aware of any suggestions of that in relation to this, although we have yet to go through a very comprehensive process, which normally happens with these large purchases.

ACTING CHAIR—Thank you for your time this morning.

[11.30 am]

GRAY, Mr Geoffrey, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

MINOGUE, Mr Matt, Assistant Secretary, Human Rights Branch, Attorney-General's Department

THOMSON, Mr Peter Wright, Principal Legal Officer, Human Rights Branch, Attorney-General's Department

WILSON, Mr Scott Raymond, Senior Legal Officer, International Family Law Section, Family Law Branch, Attorney-General's Department

LEON, Ms Renee, First Assistant Secretary, Office of International Law, Attorney-General's Department

BRAITHWAITE, Ms Justine, Executive Officer, International Law and Transnational Crime Section, Legal Branch, International Organisations and Legal 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

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

ACTING CHAIR—Welcome. We will now take evidence on the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, done at New York on 25 May 2000. Although the committee does not require you to give evidence under oath, I should 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. Do you wish to make some introductory remarks before we proceed to questions?

Mr Minogue—I will make a few opening remarks. The optional protocol was signed by Australia on 18 December 2001. The protocol itself was developed to protect children from the worst forms of commercial sexual exploitation. As the national interest analysis notes, UNICEF has estimated that one million children, mainly girls but also a significant number of boys, enter the multibillion-dollar commercial sex trade every year. Importantly, the optional protocol spells out some of the important steps and actions that need to be taken in order to combat child abuse, consistent with some of the existing obligations under the Convention on the Rights of the Child. In particular, the protocol would oblige governments to take tangible action to ensure that those involved in the abuse or exploitation of children are punished. It requires extraterritorial measures in relation to nationals or permanent residents, and it specifies the type of international

cooperation or mutual assistance that needs to be undertaken and how extradition requests might be treated. There is more detail on those obligations and how they break down, in the national interest analysis, which we can go to if members wish.

In terms of the key reasons for ratification, at the outset, the protocol is a key document in the international effort to outlaw, and combine international action in combating, the sale of or trafficking in children, child prostitution and child pornography. Australia supports all of those activities and had largely complied with many of the requirements of the optional protocol even before it was signed by Australia, through a combination of existing Commonwealth and state and territory provisions, but there were areas where there was noncompliance. The point I make is that, because it reflects the position that Australia has already taken in many ways, ratifying the convention sends a strong signal about Australia's position on these matters, which has been a consistent position of some standing.

Ratification would also be consistent with our strong stance on people trafficking and child exploitation in our region. To date, Australia is one of 11 states that have signed but not yet ratified the optional protocol. Encouraging such measures by regional states would be in Australia's interest, as the protocol would be expected to limit the opportunities for trafficking in children and sexual exploitation of women from major source countries in the region. The government is aware that there has been an expectation of ratification for some time. The government and relevant ministers still receive correspondence from constituents raising the matter and urging ratification.

As I mentioned a little earlier, many of the obligations under the protocol are matters for state and territory governments. Implementation of Australia's obligations would rely on a cooperative federal, state and territory approach. To this end, consultation with the states and territories has been ongoing, primarily through the processes of the Standing Committee of Attorneys-General. To this end, the Attorney wrote to his state and territory counterparts in November 2003 seeking advice on the status of their laws compliance with the obligations under the protocol and the extent and timing of any amendments that might have been necessary. All state and territory attorneys-general responded at that stage indicating the status of their compliance and noting some areas where there was noncompliance.

The protocol was subsequently discussed with state and territory attorneys-general at the Standing Committee of Attorneys-General in March 2004. It was agreed by the standing committee at that time that all legislative amendments would be made in all jurisdictions to ensure compliance with the protocol and to facilitate ratification. On 10 August this year the Attorney further wrote to attorneys-general reminding them of the outcomes of the March 2004 SCAG decision and asking for confirmation from jurisdictions as soon as possible of any outstanding matters. Responses from all states and territories have been received which indicate that there are no outstanding issues. Those responses have come either from attorneys-general themselves or through officials in their jurisdictions.

In terms of what the protocol requires of Australia, at the Commonwealth level the main provisions and offences would be those relating to slavery, sexual servitude, international trafficking in children, child-sex tourism, child pornography, import and export offences in the Customs Act and internet pornography offences in the Criminal Code. There are also provisions in the Commonwealth Proceeds of Crime Act which pick up obligations under the optional

protocol to confiscate tainted property. In relation to state and territory offences, the main ones would be those dealing with child prostitution and child pornography, but states and territories have confiscation laws as well. There are also obligations relating to adoption. The optional protocol requires parties to criminalise the improper inducement of consent as an intermediary for the adoption of a child in violation of applicable international legal instruments. From our perspective, the relevant international legal instrument is the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions. The states and territories have all implemented that convention and the restrictions and obligations that that convention has. In addition, there are obligations under the Migration Act and regulations which prevent the issuing of a visa to a child under an adoption that has been procured improperly or under some duress.

The only other comment that I would make at this time would be simply to note that the protocol, if ratified, would sit alongside a suite of other international treaties to which Australia is already a party and would be consistent with their objectives. The primary one would be the Convention on the Rights of the Child, which currently has obligations to protect children from sexual abuse, which includes prostitution and pornography, and to stop the transfer and nonreturn of children and trafficking.

In addition, there is the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions as well as the Hague Convention on the Civil Aspects of International Child Abduction. There is also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the UN Convention against Transnational Organized Crime. So those are the reasons and background to the government's signature of the optional protocol and why it has progressed in conjunction with the states and territories to be in a position to implement the obligations of the protocol if a decision is taken as to ratification.

ACTING CHAIR—Does the optional protocol contain provisions relating to advertising which depicts a person or persons who appear to be under the age of 18 in a sexual context or activity?

Mr Minogue—It does not seem to. I apologise—I am looking through the text as we speak. It does not seem to contain a specific prohibition on advertising in that way.

ACTING CHAIR—Would you be able to clarify whether or not Australia's legislation covers that?

Mr Minogue—I cannot personally clarify that. I do not know whether my colleagues from the criminal law area might.

Ms Leon—I am not sure whether this answers your question: I would just note that child pornography is very widely defined in the convention. It does not expressly refer to advertising, but it does refer to any—

ACTING CHAIR—Using underage children for advertising?

Ms Leon—It refers to any representation by whatever means of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for

primarily sexual purposes. So were there to be advertising that involved children in real or simulated explicit sexual activities or the display of the sexual parts of a child, that would be caught by the definition of child pornography in the convention even though advertising per se is not explicitly referred to.

Mr ADAMS—Who is the expert in the section or article dealing with child labour and the age of children in the workplace?

Ms Leon—I did not hear the question.

Mr ADAMS—My question deals with the age of child labour. What does the article say about that? I understand there are some articles dealing with child labour in this treaty.

Mr Minogue—In the context of the sale of children, that includes the engagement of a child in forced labour. The relevant Commonwealth offences there would be the slavery offences. In terms of at what age a child is no longer a child, if that is the import of the question, I might again defer to Ms Leon.

Ms Leon—The convention does not deal with the engagement of children in labour generally. It only relates to the sale of a child for the purposes of forced labour. There would be other conventions in the ILO context that deal with minimum age and so on of children for the ordinary purposes of employment, but they are not the matters that are dealt with by this convention.

Mr ADAMS—In the provision on the adoption of children—the fees and costs—we get into this issue of the selling of children through overseas adoptions. Can you clarify that for us?

Mr Minogue—Because Australia is a party to the Hague convention on adoption, which I mentioned earlier, all states and territories have legislated to prohibit the improper inducement of consent by the making of payments unless those payments fall within one of the exemptions outlined in article 32 of the Hague convention, which provides that:

Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

So things outside what might be considered reasonable costs or professional fees would be not consistent with the existing obligations under the Hague convention that the states and territories have picked up nor with the obligations under the proposed protocol.

Mr ADAMS—Does this deal with organisations that advertise the adoption of children from overseas and that sort of thing? Is that a genuine cost?

Mr Wilson—Could I just clarify the question: agencies within Australia?

Mr ADAMS—It might be an agency from overseas that is advertising children for adoption. Is that illegal under Australian law or under this convention? Is that an illegal thing to do?

Mr Wilson—By and large, the regulation of those overseas bodies would be a matter for law in that country. However, I could say—hopefully usefully—that in Australia the only agencies that deal with intercountry adoption are government agencies at the state and territory level which are central authorities under the Hague convention and they act in accordance with those obligations. The Hague convention sets out a range of obligations and procedures which are geared towards safeguarding the interests of children.

Mr ADAMS—My concern is that somebody travelling overseas might see an organisation advertising children for adoption. Is that illegal? Of course it would go to the individual country, but is the convention trying to outlaw that sort of thing?

Mr Minogue—I do not think the convention itself is directed to the nature of the practice of arranging intercountry adoptions other than those procedures already under way and implemented under the Hague convention. What it does do is require criminalising things external to that and unreasonable fees or imposts. In terms of the specific question of whether advertising for adoption is illegal under Australian law as at today, I would have to take that on notice and get back to the committee. I do not have a specific answer to that.

Mr ADAMS—I am not overly worried about Australia so much, unless there was somebody in Australia trying to advertise children for adoption from overseas. I am not talking about a church group or someone genuinely putting this out, but people who are doing it for profit motives would be a concern to me. Under this convention, I take it that all child pornography is illegal in Australia under every state and territory. You had better do more than nod your head; Hansard does not pick up nods of heads.

Mr Minogue—I did say yes but perhaps I was not brave enough.

Mr Thomson—I might intervene here and point out that in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, article 32 talks about people deriving improper financial benefits from adoption but it does provide that:

... costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

So the question you have asked may be a little more complicated because some fees and charges will be authorised under the Hague convention but others, of an improper kind, would fall foul of the Hague convention. That is my understanding.

Mr ADAMS—I think it is an issue that will happen more in the future.

ACTING CHAIR—I will just take you back to the state legislation. I understand that, at a COAG meeting in June, COAG asked the Standing Committee of Attorneys-General in consultation with the Australasian Police Ministers Council to look at the consistency of child pornography laws at a state and federal level. Is there an update following on from that meeting on the progress of work? Are there inconsistencies between state and federal on child pornography laws that we need to have a look at or should be made aware of?

Mr Minogue—I am sorry; we do not have witnesses here who are familiar with that COAG decision and how it has been working through the bureaucracy. We are anecdotally aware that

there are inconsistencies; hence, the COAG concern and the action to follow it up. But I am not in a position to provide you with an update on that today.

ACTING CHAIR—Could you take that notice then and provide that update for us?

Mr Minogue—Certainly.

ACTING CHAIR—Thank you very much.

Senator TROOD—Just on this point about adoption, you are not troubled by the fact that article 2(a) has this very broad reach? It seems to be drafted very broadly and, on the face of it, would cover the matters that Mr Quick was talking to you about in relation to fees et cetera. Is it your position that we should not be troubled by that? Article 2(a) is very broadly drafted. It talks about any transaction, basically. But you are asking us to read that consistent with the Hague convention—is that right?

Mr Minogue—The Hague convention is relevant to the adoption. There is a specific reference to adoption in article 3(1)(a)(ii) about improperly inducing consent, as an intermediary, for the adoption of a child. That is the reference to adoption. But in terms of the definition of what is covered under the convention, article 2 does define sale, prostitution and pornography in broad terms.

Senator TROOD—I can see somebody saying: 'I'm paying a fee. It could be interpreted as a sale.' But of course we would not see it that way. There are certain transaction fees and things of that kind.

Ms Leon—The context in which the treaty was negotiated was never meant to suggest that adoption per se is a sale of a child. Adoption is the transfer of parental rights and responsibilities in relation to the child but it does not involve the ownership of the child in the sense that the word 'sale' is used. When we speak of the sale of children in this convention, as well as in the slavery provisions of domestic law, we are really talking about the transfer of ownership of the person, of the child, which, of course, is a significantly different matter.

An overlap between this convention and the situation in relation to adoption, is, as Mr Minogue has set out, really only at the periphery because the Hague convention is the principal instrument for regulating adoption internationally. This convention expressly defers to that convention in saying that states shall take effective measures to ensure that the applicable international instruments, which in this case refer to the Hague convention, are properly adhered to in the country, and then provides for some supporting measures, such as requiring the criminalisation of acts such as improperly inducing consent for adoption. But nothing in the convention suggests, and I hope that nothing we would say suggests, that anything about adoption is actually the sale of a child.

Senator TROOD—Thank you. That is helpful. There does not seem to be a definition of a child in the protocol. Is that right?

Ms Leon—Because the protocol is a subsidiary element to the Convention on the Rights of the Child, it takes the meaning of child from the head instrument, which is the convention. The

convention itself defines a child as being under 18 unless, according to the law of the state concerned, the age of majority is achieved earlier. So there is a certain amount of flexibility about where exactly childhood ends in relation to both to different states and different areas of law. We would be familiar with that in our law in that there are some acts one can undertake at 16 and some one can undertake at 18. So 18 is the maximum level at which childhood is left but, under applicable law, childhood can be departed from at a slightly earlier age.

Senator TROOD—I am very familiar with the problem of where children start and end. My question is really about ages of consent which in Australia—correct me if I am wrong—are generally lower than 18. Is that not true in state jurisdictions? Are we reading this protocol for children younger than 16 perhaps or all children below the age of 18?

Ms Leon—The age at which a person is considered a child does vary slightly under national law for various purposes and that is contemplated by the wording of the convention that the age of majority can be achieved earlier than 18 in some respects and in some countries. So the fact of ratifying the protocol as in ratifying the convention did not require Australia to adopt a uniform age of 18 for all acts of majority.

Senator TROOD—Is there a jurisdiction where the age of consent or the age of majority is 16?

Mr Gray—If you look through Australian law you will not find a consistent age. There are two examples of that in the material we have referred to. There are the child sex tourism offences in part IIIA of the Crimes Act which take 16 as the age at which those offences cut in. The internet child pornography offences, which were enacted fairly recently, take 18 years as the age at which a person ceases to be a child. So you do not find anything consistent. If you go through the states and territories law you will find both of those numbers—hopefully no other numbers, but certainly those numbers—at various points. I think the answer is that as long as we have taken one of those two figures then we can consider those laws comply with the requirements of the protocol.

Senator TROOD—From what you have said then, does it follow for the purposes of pornography that in Australia the age of majority for a child is generally regarded as being 18?

Mr Gray—That is difficult for me to answer. I am from the Commonwealth obviously and certainly the Commonwealth legislation on internet offences picks 18. I am not sure off the top of my head whether all of the states take the same number; in fact I think they probably do not. I suspect that the age of a child is one of the differences on which COAG is trying to achieve consistency. So I suspect the answer is no but I do not have that information specifically.

ACTING CHAIR—Thank you all for coming along this morning.

Resolved (on motion by **Mr Wilkie**):

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

Committee adjourned at 11.58 am