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JOINT STANDING COMMITTEE ON

TREATIES

Monday, 5 December 2005

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

Members in attendance: Mrs May, Mr Wilkie and Senators Sterle, Trood and Wortley

Terms of reference for the inquiry:

Treaties tabled on 29 November 2005

WITNESSES

Committee met at 10.08 am

ACTING CHAIR (Ms May)—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, today the committee will review five treaties tabled in parliament on 29 November 2005. I understand that witnesses from various departments will be joining us for discussion on these treaties and I thank the witnesses for making themselves available for this hearing. 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 such issues were raised at this time.

[10.09 am]

Agreement between the government of Australia and the government of the Hong Kong Special Administrative Region of the People's Republic of China concerning transfer of sentenced persons

APLIN, Mrs Sally Melissa, Acting Senior Legal Officer, Offender Justice and Management Section, National Law Enforcement Policy Branch, Criminal Justice Division, Attorney-General's Department

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

ZANKER, Mr Mark Andrew, Senior Counsel, Office of International Law, Attorney-General's Department

COURTNEY, Mr Charles John Hodgson, Director, Hong Kong Macau Taiwan Section, East Asia Branch, North Asia Division, Department of Foreign Affairs and Trade

PURTELL, Mr Nicholas, International Law and Transnational Crime Section, Legal Branch, 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

ACTING CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Zanker—I am also an assistant secretary in the Office of International Law.

ACTING CHAIR—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. Do you wish to make some introductory remarks before we proceed to questions?

Ms Blackburn—With the committee's leave, I will make a short opening statement.

ACTING CHAIR—Thank you.

Ms Blackburn—A bilateral treaty for the international transfer of prisoners with the Hong Kong Special Administrative Region has a wide range of potential benefits. Australia recognises that cooperation between countries to repatriate prisoners to their home countries is designed to assist prisoners to reintegrate successfully into society. The aim of the scheme is to allow prisoners to serve out their sentences without language and cultural barriers, which may reduce

their prospects for rehabilitation. The agreement with Hong Kong which is before the committee this morning will enable all Hong Kong permanent residents imprisoned in Australia and Australians imprisoned in Hong Kong to apply for transfer during the term of their sentence.

The ITP scheme is voluntary and requires the consent of the transferring country, the receiving country and the prisoner to the terms of the transfer. As at 1 December 2005, the Australian government was aware of three Australians who had been sentenced to imprisonment in Hong Kong. According to ABS statistics from the 2004 National Prisoner Census, 0.3 per cent of the Australian prisoner population self-reports as being born in Hong Kong and our records show that at least 27 federal offenders self-report as being Hong Kong nationals.

Australia has signed only two ITP bilateral treaties, one with Thailand and now this one with Hong Kong. Both of these treaties with Asian countries are sending a strong signal about Australia's commitment to law enforcement cooperation in the region. Hong Kong is a party to seven other bilateral transfer of sentenced persons treaties, but it is not a signatory to the Council of Europe Convention on the Transfer of Sentenced Persons. Ratifying this agreement will complement Australia's other ITP initiatives.

To date, Australia has transferred three prisoners from Thailand to Australia under the agreement with Thailand and has transferred 16 prisoners from Australia to five other jurisdictions under the Council of Europe convention. Currently we are processing 102 applications for transfer: 85 prisoners have applied for transfer out of Australia to 17 different jurisdictions; and 17 prisoners in foreign jurisdictions have applied for repatriation to Australia.

This particular agreement with Hong Kong is expected to reduce the emotional and financial burden on Australians who have family members imprisoned in Hong Kong, assist prisoners and their relatives to retain family contact during the period of incarceration and reduce the consular assistance burden on the staff of the Hong Kong Consulate General. Prisoners' repatriation to home countries will enable them also, potentially, to undertake more extensive vocational and educational programs. Foreign prisoners in Australian jails are often ineligible for short-release programs, such as work release, because they are considered a flight risk. Foreign prisoners with limited English skills are also often unable to participate in educational rehabilitation and work courses. Transfer to their home country will enable them to avail themselves of effective rehabilitation programs.

Illegal noncitizens imprisoned in Australia are generally released at the end of their non-parole period and then are deported from Australia; there is thus no opportunity to supervise such offenders during a parole period and they do not have the benefit of gradual supervised reintegration into society. One of the substantial benefits from the ITP scheme is that it enables the transfer of prisoners who can then be released, under supervised release and according to their parole terms and conditions, into the community.

The starting point in negotiating this agreement with Hong Kong was the existing agreement with Thailand. That has been supplemented by three years of experience of Australia's administering both the Australian domestic legislation and the transfers effected under the bilateral treaty with Thailand and the Council of Europe convention.

I draw your attention briefly to some of the key features of the agreement. The treaty specifies that sentences will be enforced using the continued method of sentence enforcement, although the sentence may be adapted to make it compatible with the law of the receiving country. Any adapted sentence must not be harsher than the original sentence in terms of either the type or the duration of the incarceration imposed. Prisoners will be eligible for repatriation to Australia if they are Australian citizens or are permitted to travel to, enter and remain in Australia indefinitely and have community ties to a state or territory.

There is also a provision in the treaty that allows for the waiver, at the discretion of the government, of the dual criminality requirement for prisoners seeking to return to Australia. The Australian government has never had to use such a discretion to date, but it believes that it is appropriate to have it for use in the extraordinary circumstances that an Australian should seek repatriation after being imprisoned in Hong Kong for an action that is not a crime in Australia.

Under the terms of this treaty, the prisoner making an application for transfer must have one year of their sentence left to serve. This one-year period requirement reflects the general length of time that it can take to process an application; however, the requirement may be waived by the agreement of both parties. Every transfer will require the consent of the prisoner, the Hong Kong government and the Australian government. State and territory government consent will also be required for every incoming prisoner and for any state or territory prisoner being transferred out of Australia.

The agreement further specifies that the prisoner's judgment must be final, with all appeals finalised, and that the prisoner is not required for any other legal proceedings in the transferring country. The treaty also specifies that the country to which the prisoner will be transferred will pay the costs of the transfer. That country may seek to recover some or all of the costs of transfer from the prisoner, provided that the prisoner is informed in advance and consents to the transfer on the basis that there will be specified cost recovery. In practice, the receiving state or territory in Australia meets the costs of transfer.

Under this agreement, the transferring country retains jurisdiction to review, revise, modify or cancel convictions and sentences imposed by its courts. In practice, a receiving country is not equipped to review a sentence imposed by an overseas jurisdiction, which means that a transferred prisoner needs to rely upon the retention of jurisdiction clause as their only means of seeking pardon after transfer. However, the receiving country also has the right to grant pardon, amnesty or commutation of a transferred prisoner's sentence where it is done in accordance with its laws. In conclusion, we present the treaty to the committee for its consideration. We are here to take any further questions you may have on the content of the treaty.

ACTING CHAIR—Thank you for your opening comments. Regarding consultation with the states and territories, I notice that the paper says that a draft arrangement is being negotiated at the moment with South Australia. Has that been completed?

Ms Blackburn—No, it is still under negotiation with the South Australian government.

ACTING CHAIR—Is there a problem with it?

Ms Blackburn—We have administrative arrangements in place with all states except South Australia. We are in continuing negotiations with the South Australian government, but I am not able to disclose to you any particular details of the issues that remain part of those negotiations.

ACTING CHAIR—Do you think those negotiations will be completed shortly?

Ms Blackburn—I cannot put a timetable on the completion of those negotiations.

ACTING CHAIR—If they are not completed, will the process be held up?

Ms Blackburn—The absence of an administrative arrangement with South Australia does not prevent the transfer of prisoners to South Australia. Indeed, presently the South Australian government is working with us on processing several applications for transfer. The administrative arrangements are provided for in the act. For a transfer to be effected, it is not essential to have an administrative arrangement in place; however, all other jurisdictions have one in place and we are continuing to negotiate the terms of the one with South Australia.

ACTING CHAIR—Would an Australian detainee in Hong Kong make application to become part of this process to be brought back to Australia, or would we instigate such an application at a consular level?

Ms Blackburn—No. In all cases, the request for transfer would be initiated by the prisoner. However, this treaty is quite flexible in the way it can be initiated—and, again, that reflects our experience over the last few years. The prisoner can make application either to the Hong Kong government or to the Australian government. The governments then can take that application forward from that point.

Senator WORTLEY—On the South Australian issue, with which department and with whom are you having discussions? Is it the minister?

Ms Blackburn—Because the negotiations concern the administration of prisoner schemes, they are being undertaken with the South Australian Corrective Services administration.

Senator WORTLEY—The minister?

Ms Blackburn—I am sorry, I need to correct that. Our negotiations are being conducted with officials in the South Australian government.

Mr WILKIE—I see that we have this arrangement, through the Council of Europe convention, with 56 other countries. Could you provide us with a list of those countries? I did not see one attached to the notes. It does not have to be provided to us now but, if you have a copy, perhaps we could be forwarded one.

Ms Blackburn—I am quite sure that we have a copy; we carry it with us everywhere. We can provide that for you today.

Mr WILKIE—Thank you. You have mentioned that a prisoner has to have a year of their sentence remaining. Do you mean that there must be at least a year of that sentence left?

Ms Blackburn—Yes. The treaty provides that you can apply for transfer if you have more than one year remaining to serve on your sentence. However, as I mentioned, that provision can be waived by both governments to the agreement if they consider it appropriate to process an application for a person who has less than one year to serve on their sentence.

Mr WILKIE—I imagine that the sorts of prisoners we are talking about would be primarily those who are being held in overseas or Hong Kong maximum security facilities. Would that generally be the case?

Ms Blackburn—No. I have no expectation that this would apply only to high-security prisoners. The treaty and the Australian legislation are available to any person who is imprisoned overseas. The Hong Kong treaty specifically covers all offences.

Mr WILKIE—A number of prisoners are listed—I think there are about five—as being there at the moment, awaiting possible transfer. What sort of category would they be in?

Ms Blackburn—I am sorry. I do not have with me today details of the particular prisoners.

Mr WILKIE—In the documents we have, the approximate cost of maintaining a prisoner in Australia for a year is around $50,000. I used to be a prison officer and I remember that, in 1988, a juvenile offender cost $80,000; an adult was considerably less than that, but certainly they would cost more than $50,000. Could I get a working of where the $50,000 a year has come from?

Ms Blackburn—Certainly. That number comes from a variety of sources. I will review the number and provide you with any variation to it. As you would probably be aware, there is considerable dispute between jurisdictions as to what it costs to house a prisoner.

Mr WILKIE—Absolutely, and a prisoner in a very open security prison costs a lot less than one being held in a maximum security facility. I imagine that it is an average, but I would not mind seeing those costings.

Ms Blackburn—Yes.

Mr WILKIE—Suppose a Hong Kong national were sent from Australia back to China. Obviously, in many instances, the penalties that apply to offences in China would be a lot greater than those that apply in Australia. If, under this treaty, we were to send someone back to Hong Kong, would they receive any other penalties on top of those they had received in Australia, or does the agreement ensure that no additional penalties are given?

Ms Blackburn—A fundamental underpinning of this system is that the parties to the transfer—that is, the prisoner and both governments—negotiate the terms and conditions of the transfer, which includes agreement upon the sentence to be enforced. In this treaty, there is provision for the enforcement of the sentence to be continued. That is a policy position that the Australian government fully endorses—that prisoner transfer is not about reduction of sentences. However, the actual sentence to be served, even down to issues such as parole dates, will be part of negotiation on an individual transfer. Part of the reason that transfers take a little time to effect is that those matters need to be discussed both between the governments and with the prisoner. A

condition of the transfer—and this is part of the agreement—is that the person, when they are transferred back, cannot be subjected to a harsher punishment than that imposed by the country in which they were originally sentenced.

Mr WILKIE—Does it also apply to juveniles?

Ms Blackburn—The transfer scheme? Yes, it is available to any person who is convicted of an offence.

Senator TROOD—This is a treaty with Hong Kong. Are we thinking of negotiating a similar treaty with the People's Republic of China? Is that in progress? Can you perhaps outline the status of any thoughts on that matter?

Ms Blackburn—The Minister for Justice and Customs, Senator Ellison, visited China earlier this year. During the course of that visit, it is my recollection that he made a public statement to the effect that he had engaged in discussions with his counterpart minister in China about the possibility of negotiating arrangements with China on an international transfer of prisoner agreement. I cannot provide you with any further details about the progress of those negotiations, but it is public knowledge that Australia is interested in negotiating a treaty with China.

Senator TROOD—Do I take it from your remarks that the Chinese have committed themselves to those negotiations?

Ms Blackburn—Perhaps the best thing I can do is to take that on notice and refer you to the press release, which was put out during Senator Ellison's visit. That made statements about the outcomes of his conversation with his counterpart minister in China. I am sorry, but I just do not recall exactly what that press release said.

ACTING CHAIR—Could you confirm for me the eligibility of prisoners to come back to Australia? With those detained in Hong Kong, we are talking about Australian citizens. But I think in your statement you also referred to those who have strong ties or community ties or who are eligible to travel to Australia. Are we talking about someone with permanent resident status who may not have Australian citizenship?

Ms Blackburn—That is correct: Australian citizens and people who have the right to travel to and remain indefinitely in Australia and who have community ties.

ACTING CHAIR—Could you also clarify 'an early parole or release for a prisoner'? You were talking before about how governments discuss the prisoner's detained time—their prison time. If there were to be an early parole by our government when that prisoner came home, whether it was for good behaviour or whatever, is that negotiated at the time of release or when it has been negotiated for that prisoner to return home, or is that something we undertake once the prisoner is home serving their sentence? Is it up to our authorities then to decide whether that prisoner has early parole or early release?

Ms Blackburn—Under the domestic ITP legislation, once a person is returned to Australia, they are treated as federal prisoners. That means that their sentence is administered in

accordance with part IB of the Crimes Act. A prisoner who was returned to Australia to serve a sentence could make an application for early release, which would be considered under the terms and conditions of part IB. Obviously, the fact that they were a transferred prisoner with a transferred sentence would be a relevant consideration for the decision maker in considering an early release application and their parole dates would be set in terms of the transfer agreement. But if, under state arrangements, there were remissions on their parole dates—a couple of states have strike day remissions, as I recollect—all those provisions would apply to them, as they would apply to any other prisoner in Australia.

Senator WORTLEY—Just going back to South Australia again, you have said that you are not able to comment on why South Australia has not agreed to the administrative arrangements—and I imagine that is your decision. Why have you come to the decision that you are not able to comment on why they have not signed off on those arrangements?

Ms Blackburn—The position that we take in all parliamentary forums is that it is not appropriate for us to disclose the details of negotiations on intergovernmental agreements, whether they are international or domestic. I am sorry, but I do not believe it is appropriate for me at all in this forum to disclose the details of the issues that remain at issue between the Australian government and the South Australian government in finalising the terms of this arrangement.

Senator WORTLEY—What is the basis for your thinking that it is not appropriate for us to pursue that or to be provided with that information in this hearing?

Ms Blackburn—I believe that the negotiations at this stage are between the Australian government and the South Australian government and are confidential to those governments.

Mr WILKIE—Often when we deal with international treaties—albeit the states are not international parties—where there are disputes, we are provided with information about those disputes for our consideration.

Ms Blackburn—Disputes under the treaties?

Mr WILKIE—No. In negotiating treaties, if there are issues that have been dealt with or that are being dealt with on an ongoing basis, usually the committee is provided with that information. I suppose what Senator Wortley is putting is: on what basis is the committee not able to be provided with the reasons for there being problems with the agreement with South Australia? I suppose it would be nice to know why we cannot be provided with that information or on what basis it is not being given to us.

Ms Blackburn—At this stage, I think all I can do is take that on notice. The existence or non-existence of an administrative arrangement with South Australia is not relevant to consideration of the treaty with Hong Kong. As I indicated earlier, at the moment it is not a barrier nor do we expect it to be a barrier to the continued processing of prisoner applications that we presently have and about which we are presently dealing with the South Australian government. Costs are the key or main issue dealt with in the administrative arrangements that exist between the other states and territories with which we have agreements. The remainder of those agreements with the other states, which are public documents, essentially deal with administrative matters that

reflect arrangements included in the Commonwealth legislation and the complementary state and territory legislation.

Senator WORTLEY—If it is not important in relation to the treaty, why are the states required to sign off on it?

Ms Blackburn—They are not required to sign off on it. The ITP Act provides for administrative arrangements to be entered into.

Senator WORTLEY—So it is not important. You have received signatures from the other states, but South Australia has refused to sign at this stage and we cannot be provided with the details as to why that is the case.

Ms Blackburn—Perhaps I could just clarify that. I did not say that South Australia has refused to sign an agreement. It is a matter of fact that South Australia has not concluded an agreement at this point in time.

Senator WORTLEY—And you are not sure when they are going to—

Ms Blackburn—No, I cannot put a timetable on that, because it requires two parties to enter into an agreement.

Senator WORTLEY—Is it likely that they will sign off on it?

Ms Blackburn—I cannot answer that question; that is speculation.

ACTING CHAIR—But, as you indicated earlier, that does not hold up the treaty.

Ms Blackburn—It has no impact at all on the implementation of the treaty with Hong Kong. The treaty with Thailand is operating effectively. The Council of Europe convention treaty is operating effectively. The absence of an administrative arrangement with South Australia does not prevent the effective operation of the treaty, the Australian law or the South Australian law.

Mr WILKIE—I do not know whether you answered this before, although you possibly did: how many people are there in Australian prisons who might be eligible for return to Hong Kong?

Ms Blackburn—In my opening statement I mentioned a number, which relies purely on ABS statistics. ABS statistics of the prisoner population say that 0.3 per cent of Australian prisoners self-report as Hong Kong nationals and we think we have 27 federal offenders who are Hong Kong nationals. With the federal offenders, I think we are fairly certain that they self-report as having been born in Hong Kong. I think we have had this conversation in other forums: with prisoners in Australia, the method of collecting nationality information varies across the states and quite a lot of the time it is information about the country the person was born in rather than the country of the person's present citizenship. So, at this stage, we are working on the basis that we have approximately 27 federal offenders and an otherwise small percentage of the overall prison population.

Mr WILKIE—So would we be looking at that 27 to find out whether they comply?

Ms Blackburn—No, we would not take that action. Once the treaty comes into force, we are obliged to ensure that all foreign prisoners in Australian prisons are aware of arrangements. We have quite good arrangements in place with state corrective service institutions to ensure that prisoners will be advised that the treaty with Hong Kong, once it comes into force, has come into force. Then the prisoners will self-identify as being interested in transferring back to Hong Kong. We take no direct action to identify the prisoners or personally notify them.

Mr WILKIE—I can imagine that you would be right here; some of these 27 persons would have been born in Hong Kong but are probably Australian citizens.

Ms Blackburn—Potentially, yes.

Mr WILKIE—It may be that they are dual citizens.

Ms Blackburn—Potentially, that is correct.

ACTING CHAIR—As there are no further questions, we thank you very much for attending today.

[10.37 am]

Amendments to the Statute of the Hague Conference on Private International Law of 31 October 1951 (The Hague, 30 June 2005)

DAVIES, Ms Amanda Margaret, Assistant Secretary, Administrative Law and Civil Procedure Branch, Attorney-General's Department

FITCH, Ms Catherine Anne, Principal Legal Officer, Private International Law Section, Administrative Law and Civil Procedure Branch, Attorney-General's Department

ACTING CHAIR—Welcome. 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?

Ms Davies—I will make some opening comments, which will be fairly brief. I will begin by providing a brief overview of the Hague Conference on Private International Law and, following that, will discuss briefly the proposed amendments to the statute. Australia is currently one of 65 member states to the Hague Conference on Private International Law. The first session of the Hague conference was held in 1893. The present statute establishing the conference as a permanent organisation entered into force on 15 July 1955. Australia became a member of the conference on 1 November 1973. The most recent state to join was Paraguay, on 28 June this year.

The Hague conference was established to work for the progressive unification of the rules of private international law. By working cooperatively, member states of the Hague conference seek to reduce uncertainty, costs and delays in international private legal matters. The conference's activities are organised by a secretariat, the permanent bureau, which is based in The Hague. The officials of the permanent bureau work tirelessly to coordinate and support the work of the conference. The Attorney-General's Department would like to place on record its appreciation for the extremely high quality of assistance, information and technical expertise that those officials provide.

In keeping with the Hague conference's objective of the progressive unification of private international law rules, non-member states are also able to accede to conventions developed by the conference. For example, Thailand, a non-member state, has ratified the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption. The promotion, support and effective implementation in the Asia-Pacific region of the Hague conventions on child abduction and adoption and on the judicial assistance conventions are of particular significance to Australia. Cooperation on these matters would assist Australians involved in international family, commercial and other civil disputes in the Asia-Pacific region.

The work of the Hague conference falls into three main areas: international legal cooperation and litigation; international protection of children, family law and property relations; and

international commercial and finance law. The work of the Administrative Law and Civil Procedure Branch is mainly concerned with the first of these areas.

In the area of international legal cooperation, the work of the conference involves finding internationally agreed approaches to determine, for example, how litigation with a transnational dimension should proceed and to facilitate procedural aspects of that litigation. For example, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters was negotiated by the conference in 1970. Australia acceded to this convention in 1992. The Hague evidence convention establishes methods for the taking of evidence abroad in civil or commercial matters and provides an effective means of overcoming the differences between civil law and common-law systems with respect to the taking of evidence. Under the convention, the Australian Attorney-General's Department is designated as the central authority for facilitating requests for evidence to be taken.

The statute of the Hague conference, which in essence is its constitution, has not been amended since it came into force 50 years ago. Two main groups of amendments to the statute are now proposed. The amendments were adopted on 30 June 2005 at the 20th session of the Hague Conference on Private International Law held at The Hague. Australia was represented at this session by the Commonwealth Solicitor-General, Mr David Bennett, and me. The amendments were then sent to member states for their consideration and approval. The Secretary-General of the Hague conference has requested that member states notify the permanent bureau whether they approve of the amendments before 1 April 2006. The approval of two-thirds of the present member states—that is at least 44 member states—is required before the amendments can enter into force. After 31 March 2006 and once 44 approvals have been received, the Secretary-General will draw up a proces verbal, specifying the members that have signified their approval and declaring that the amendments have entered into force.

The first group of proposed amendments would allow certain regional economic integration organisations to become members of the Hague conference. Membership would only be allowed to those REIOs to which member states have transferred competence over matters of private international law and which are able to make decisions binding upon their members. The European Community, the EC, is the only REIO currently seeking membership of the Hague conference. The EC first requested admission to the Hague Conference on Private International Law in 2002 on the basis that external competence in relation to a number of private international law matters has been transferred by the individual EC member states to the EC by the 1999 Treaty of Amsterdam. Although it is now the EC, rather than individual member states, that has competence over certain private international law matters, the EC is currently not—and is not eligible to be—a member of the Hague conference directly. These amendments would ensure that the EC could participate, when appropriate, directly in the work of the conference.

The proposed amendments would also assist Australia and other members of the conference to obtain clarification on issues of competence. They will require a member organisation and its member states to provide information on issues of competence when information is sought by other members of the conference. Any changes regarding competence would be required to be brought to the attention of the conference.

This group of proposed amendments to the statute also ensures that the admission of REIOs will not result in any additional voting or procedural rights on matters within the REIOs'

competence. Any REIO admitted would share its membership rights on an alternative basis with its member states. The group of proposed amendments also introduces a presumption in favour of state competence for matters where transfers of competence to a REIO have not been specifically declared. In general, these amendments place responsibility for resolving any disputes and providing clarity relating to competence on the REIO and its member states. In considering the group of amendments to allow REIOs membership of the Hague conference, member states also took the opportunity to update and improve conference procedures so that the statute accurately reflects how the operation of the Hague conference has evolved since its inception.

The second group of amendments proposed is intended to improve procedures for amending the statute of the Hague conference, if necessary, in the future. Instead of simply requiring the approval of two-thirds of the members, future amendments would first be adopted by the consensus of members present at an annual general affairs meeting. The changes then would enter into force three months after approval by two-thirds of the members but not earlier than nine months from the date of the adoption of these changes. This guaranteed minimum nine-month period between adoption of amendments and the amendments coming into force would allow greater opportunity for members to consult domestically.

The opportunity has also been taken to clarify other minor procedural matters. For example, from the adoption of the amendments, the text of the Hague statute will be equally authentic in French and English. Currently, the French version is the official version of the statute. The statute will also reflect the way in which the Hague conference operates by stating that all sessions of the conference will operate as far as possible on a consensual basis.

In conclusion, I would emphasise that the amendments to the statute essentially are procedural in nature. No new obligations will result from Australia's acceptance of the amendments. The amendments would recognise changes in the distribution of responsibilities between the European Community and its members. They would also bring the letter of the statute into line with the current practice of the Hague conference, which involves the member states working cooperatively and the conference operating generally by consensus. The amendments would facilitate productive meetings of the Hague conference and provide more time for domestic treaty-making procedures to be completed as part of the process for making any future amendments to the statute. I would be happy to answer any questions that the committee might have.

ACTING CHAIR—In the past, have meetings of the Hague conference been undertaken in French?

Ms Davies—They operate with simultaneous translation in French and English.

ACTING CHAIR—So it is just historic that French has always been the authentic version.

Ms Davies—Yes. All the conventions are issued in French and English but, at the time the statute was entered into, clearly French was the only language provided for the statute itself.

ACTING CHAIR—That is interesting. Just generally, could you advise the committee this morning of how far the Hague conference has progressed in the unification of private

international law? Obviously, there have been challenges. I wonder whether you could give us an update.

Ms Davies—Essentially, the conference does the majority of its work through the development of conventions dealing with particular aspects of private international law. Thirty-six conventions have been negotiated through the conference, some of which have a very wide uptake and some of which have not yet entered into force. A couple of very recent ones have not yet entered into force and a very small number have not been particularly successful in gaining acceptance from a range of countries.

If it would assist, I could provide you with a list of the conventions and the countries that have ratified or acceded to each of them. That would give you some indication on that. It is probably fair to say that there is a larger number of conventions in the area of family law and children's matters in particular that have very widespread acceptance. In the area of civil and commercial matters, it is probably more difficult to reach widespread agreement, across a range of legal systems, about how some of those matters are dealt with. For example, the convention on the taking of evidence has quite widespread acceptance. Work that was done recently in looking at choice of court agreements—a new convention was completed in June at the last diplomatic conference—also I think has quite widespread support from the member nations who were negotiating it.

ACTING CHAIR—Certainly, I would say that the conventions on children are probably the best known.

Ms Davies—Certainly.

ACTING CHAIR—They certainly get the most publicity. How is the agenda set? How does the conference decide on the sorts of conventions that should be looked at? How is agreement reached with those member countries?

Ms Davies—The conference has an annual meeting on general affairs and policy. That is the point at which the member states debate suggestions and ideas and reach agreement about priorities for the forward work program. A certain amount of the initiative for the ideas that are put forward for debate comes from the permanent bureau, through suggestions put forward either specifically by member states or sometimes by other international organisations that see a need for a particular area of work. It is at those annual meetings that there is discussion and agreement on the way forward. At the moment, under the statute, that is then put formally to a governing committee. With these amendments, it would be the council of member states.

ACTING CHAIR—Does Australia participate in that annual meeting?

Ms Davies—Yes, Australia has representatives at that meeting.

Senator WORTLEY—What was the reasoning that led to the adoption of the two-step process for the entry into force of future amendments?

Ms Davies—Essentially, it was aimed at giving individual member states time to come back and fulfil domestic consultation and treaty-making procedures. The alternative would be to have

one meeting where the final form of amendments was negotiated but then for it to come back to a further meeting. It was felt that it was not necessary to do that but rather to have the negotiations, agree on the form of the amendments and then give time for each of the member states to come home and have any necessary further consultations. Obviously, draft text is available before the meeting, but it often changes in one way or another during negotiations at the meeting.

Senator WORTLEY—Can you tell the committee more about the administrative arrangements that the government has concluded with the states and territories?

Ms Davies—They vary according to the individual conventions. With the conference itself, if there are particular matters in terms of agreeing the forward work program or something like that, states and territories are kept informed through the Standing Committee of Attorneys-General and/or the committee on treaties. But, primarily, administrative arrangements relate to the implementation of the individual conventions. For example, with the convention on the taking of evidence, the Australian Attorney-General's Department is the central authority for receiving requests from overseas and for transmitting them overseas. We then have arrangements with the individual states and territories whereby we forward those on for actioning, often through the courts. But each convention would have its own administrative procedures and agreements.

Senator WORTLEY—Members have to be present for amendments that require adoption by consensus. Under the amendment, it then goes to a further vote where they have to get a two-third majority. Is that what you said?

Ms Davies—Yes.

Senator WORTLEY—Must the members have been present at the original meeting to be able to vote in that, or is it open to all members?

Ms Davies—No, that is just a majority of the member states.

Mr WILKIE—You have talked about the states being consulted about the requirements. Did the states have any concerns whatsoever?

Ms Davies—They certainly did not express any.

ACTING CHAIR—As there are no further questions, I would like to thank you for giving evidence today.

[10.55 am]

Universal Postal Union: Seventh Additional Protocol to the Constitution of 10 July 1964, as amended; Convention, and Final Protocol; General Regulations, done at Bucharest on 5 October 2004

WILLIAMS, Mr Don, Manager, Postal Policy Section, Enterprise and Infrastructure Branch, Telecommunications Division, Department of Communications, Information Technology and the Arts

CURRO, Mr Samuel Emilio, Manager, International Communications, International Treaty and Policy Group, Australia Post

GROSSER, Mr Christopher John, Group Manager, International Treaty and Policy, Australia Post

ACTING CHAIR—Welcome. 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 Williams—I would like to make a short opening statement which covers a brief overview of the Universal Postal Union and the main amendments to the documents of the Universal Postal Union that were agreed at its October 2004 congress. The Universal Postal Union is a specialised agency of the United Nations which comprises 190 member countries. The Universal Postal Union aims to promote the universal organisation of postal services and also provides a forum where different postal administrations can voice their opinions and concerns. In particular, the UPU encourages the development of international collaborations for increases in efficiency for international mail transit. The acts of the UPU establish a single postal territory for the reciprocal exchange of international postal articles, with freedom of transit throughout. The treaty status documents of the UPU include the constitution, the general regulations, the convention and additional protocol and the Postal Payment Services Agreement and regulations.

Australia is a member nation of the UPU, and Australia Post is the nominated postal administration. The constitution provides the fundamental rules of the UPU and its legal foundation. It is binding on all members. The general regulations comprise provisions regarding the day-to-day working of the UPU. They also ensure the implementation of the constitution and are binding on all members. The convention and additional protocol contain the rules applicable throughout the international postal service and provide rules concerning the letter post and parcel post services. The Postal Payment Services Agreement—and its regulations—is an optional protocol which Australia has not signed and to which Australia is not a party.

The 2004 Bucharest congress resulted in a range of policy reform, continuing the work initiated at the 1999 Beijing congress. While progress was made at the congress, the majority of the proposed amendments were procedural in nature and will not have any significant impact on

Australia Post's international mailing systems. Some of the key proposed amendments include: the general regulations being made permanent so they do not have to be renewed each congress allowing congress to focus on more important postal issues and not be tied down with small regulatory changes; congress meeting every four years instead of every five years; amendments imposing standards on postal stamps will help ensure the protection of intellectual property rights; and amendments enhancing postal security and environmental sustainability.

The 2004 UPU Congress adopted worldwide quality of service standards and targets for international mail and revised the current terminal dues system. The new transitional system will use the country classification system used by the United Nations Development Program and adopted by congress in order to develop a country specific terminal dues system before the end of the transition period in 2014. The 2004 congress also created a new UPU body, the consultative committee, to represent the interests of private sector operators and to provide a framework for dialogue and better engagement between postal industry stakeholders.

Australia has been a member of the UPU since 1907. As an active participant in the UPU, Australia has sought continuing reform and efficiency in its operation and continues to advocate reform of the UPU to enhance the relevance of postal communication in a rapidly changing global market. Australia also actively participates in the UPU through representation on various UPU bodies.

At the 2004 congress, Australia was re-elected to serve as a member of the Council of Administration and the Postal Operations Council until 2008. The Council of Administration is the government representative body of the UPU and ensures the continuity of the union's work between congresses, supervises union activities and studies regulatory, administrative and legal issues of interest to the union. The Postal Operations Council is the technical and operational body of the UPU. The Postal Operations Council is concerned with the operational, economic and commercial aspects of services and activities of the UPU. Continued participation in the UPU provides Australia with the opportunity to voice its opinion concerning the conduct of the UPU's affairs and operations of the universal postal service over which the UPU presides. The UPU is an important forum of Australian participation, given the increasing trend of liberalisation and deregulation and the competitive nature of the international postal market.

That concludes my opening remarks. However, I would like to draw the committee's attention to a small typographical error in the regulation impact statement. There is a reference on the second line of paragraph 39 which should actually read 'the Attorney-General's Department' and not 'the Department of Justice and Customs'.

ACTING CHAIR—Thank you for your remarks. Do you have any further remarks before we proceed to questions?

Mr Curro—No.

ACTING CHAIR—I note that Australia did have some reservations about these amendments and I just wonder whether you could expand on those reservations and why we have had them.

Mr Williams—Some of the reservations relate to the terminal dues system where there is a possibility that, in Australia's view, it may be inconsistent with some of our World Trade

Organisation obligations. A number of countries have reservations about various sectors or segments of UPU acts.

Mr Grosser—A number of reservations relate to the detailed regulations. They are looking at procedural arrangements where a number of countries have drawn a position where they have said basically, 'We would prefer not to go down this particular path; we want an alternative one.' Many of them, I believe, have probably been not all that commercially sound for many of the posts. They have been more a political demonstration of the direction they would like to see followed than a basis of commercial outcome.

ACTING CHAIR—Does being a signatory to this convention mean that Australia has to compromise in any way the way our postal services are delivered or implemented in this country?

Mr Williams—The arrangements that are undertaken by the UPU are all contingent on the conditions and legislation which apply in the sovereign countries themselves, so there is nothing that the UPU will do which will override that. A number of the reservations are where there is a potential conflict. I think it would be best to describe the UPU as a consensus organisation. It is not one where there is a lot of animosity. People are looking for common outcomes.

ACTING CHAIR—Do most UN countries belong?

Mr Williams—The UPU has 190 member countries, which represents—

ACTING CHAIR—Is that the majority?

Mr Grosser—It is about 96.7 per cent of countries in the world. I think that 212 countries are known and listed in United Nations type environments. The UPU must be regarded as one of the most successful, I think, in terms of its membership, with 190 countries.

Mr WILKIE—I note that it is currently costing us around $1 million a year, or just over, to administer the current arrangements. It will be about another $2 million to $3 million to enforce the new arrangements. Where does that $2 million or $3 million get allocated? What is the breakdown on that?

Mr Grosser—Are we talking here specifically of the $2 million to $3 million in terminal dues in relation to the proposal?

Mr WILKIE—The proposed amendments are estimated at around $2 million to $3 million. I am wondering where the additional money is going to be spent.

Mr Grosser—The $2 million to $3 million is additional expenditure by Australia Post in fulfilling our obligations under the treaty. It is directed to industrialised countries in the main—where increases in payments have been agreed at the 2004 Bucharest congress—and subsequent increases are paid to developing countries as well. While we also receive an increase in payments directed to Australia Post for incoming mail to the country, when you look at the balance of the extra $2 million to $3 million it says we are sending more items out of the country than we are receiving in certain sectors.

Mr WILKIE—That is the point. It is really an administrative charge rather than because of a need to purchase equipment or do anything else?

Mr Grosser—Indeed. Your words are quite correct.

ACTING CHAIR—Is there a list of prohibited articles?

Mr Grosser—Yes. There is a very extensive list of prohibited items and we are working on a current revision of the list in conjunction with Australian Customs. There is a list of prohibited items and items that are admitted under reasonably restrictive conditions. It is a rather large dossier.

ACTING CHAIR—How does the UPU decide what goes on that prohibited list? Obviously some countries would accept some prohibited items and some would not. How is consensus reached with the UPU members?

Mr Grosser—The UPU listing reflects each individual country's prohibitions. There is not a universal list of prohibitions other than those contained within the treaty itself, and these are fairly limited. Outside of that, they are further prohibitions that any one country can hold up, and they are reflected in UPU work and in the documents. In fact the UPU becomes just a facilitator in ensuring that the information is distributed between countries.

ACTING CHAIR—So each country knows what is on the prohibited list for a particular country?

Mr Grosser—Correct.

ACTING CHAIR—And ours can be different from another country's?

Mr Grosser—Indeed.

Mr WILKIE—With the suggestion that Australia Post be privatised, would Australia Post operating as a purely private entity be affected by any of this, and what are the current rules that apply to private operators now?

Mr Williams—At the moment, the government has indicated it is not privatising Australia Post. The world postal market is changing. We are seeing a greater number of privatisations or the involvement of private organisations in traditional postal administrations. Those organisations would still be required to comply with the UPU guidelines and treaties. The UPU has recognised the fact that the global postal market is changing. At the 2004 congress, it took the initiative to establish a new group called the consultative committee, which is directly targeting private sector operators—not just people who are involved in postal administration but courier services, unions and anyone who is involved in moving freight, logistics, letters and mail around. The idea of that is to increase the dialogue and exchange of information so that people recognise that the market is changing.

Mr WILKIE—So all of these provisions would apply to the major freight companies that deal with parcels?

Mr Grosser—No, they do not. They apply to the delegated postal authorities, some of which around the world are partially privatised. Deutsche Post, TNT, the Dutch post office and Singapore Post are examples of partly privatised postal administrations, but they are designated by their governments to fulfil all the obligations of the treaty. Then there are the fully private operators like FedEx, UPS and even DHL. DHL is not the designated authority to fulfil the treaty; its parent company, Deutsche Post, is and so the provisions apply in that way. FedEx and UPS are regarded as being completely outside any of the UPU arrangements. They deal with the postal world on commercial terms in the same way that any other customer might deal with the postal world.

Mr WILKIE—If we are going down that path, will it create problems if they are not complying with this convention?

Mr Grosser—I think there is a clear dividing line that is established in the postal world at the moment between commercial and postal operators. There is some blurring at the edges. I think that the UPU is currently dealing with this as best it can in terms of the consultative committee. But I believe in the longer term it will remain the province of sovereign governments to determine which parties, companies or authorities will be the designated operator or operators. It might be the case that a country wishes to designate two or three operators as being bound to fulfil all the obligations. But it includes in many cases what I would call countrywide coverage. For some countries like Australia it may be very difficult to assign to two or three operators the same sort of onerous task of providing a universal service throughout the country.

Mr WILKIE—For companies like DHL and FedEx, would the parcels and, in many cases these days, letters go through the same sort of rigorous scrutiny for security purposes and prohibited goods purposes as Australian Post items?

Mr Grosser—I believe in the security areas—and I can only comment on what I understand to be the case at the moment in Australia—that, yes, they would. There is an undertaking in security clearance by DHL, for example, here in Australia to X-ray items before they are placed on aircraft. There has been, as the committee might know, a very rigorous analysis of incoming material by both the border agencies, AQIS and Customs. There is a full, 100 per cent, examination, whether it be by X-ray or physical examination, of items coming into the country. I believe the declaration purposes and the activities that AQIS and Customs are undertaking with the private operators are consistent with the directions that they have imposed on Australia Post, given that they have far more information at their disposal than we are able to provide.

In the case of the private operators, there is usually a full description of the contents of every item, while, in the case of items coming through the post, the description associated with the items is not in an electronic format. In our case I have to say that some of the descriptions of parcels are not as clear as Customs or a border agency would wish. That has been what you would call a problematic area for Post, and Post has taken that on board to improve the declarations that customers are giving to the system.

Mr WILKIE—I imagine parcels coming from overseas sent by their postal services would come to Australia on a normal commercial aircraft.

Mr Grosser—That is correct.

Mr WILKIE—Possibly a passenger aircraft.

Mr Grosser—Yes. Most of the postal environment is using what you would call dedicated passenger aircraft. Some mail occasionally comes by freighter, but it is by far the smaller component. We have with some of the larger private operators the allocation of freighter aircraft.

Mr WILKIE—I imagine these days nearly all postal items would come by aircraft rather than sea, as in the past.

Mr Grosser—We have noticed a dramatic change in the last 20 years, particularly as the frequency of airline flights to and from countries has changed. In our case, we have stopped sending letters by sea to the Asia-Pacific. We have tended to lift parcels by what is known as surface air lift to locations in Asia—we have dropped sea arrangements—and only maintained sea arrangements for very long distances, such as going to Europe and the Americas. Generally the trend is, as you say, that most items are now coming by air. Those that are coming by sea are generally much heavier weight items and items for which people can withstand a delay in delivery.

Mr WILKIE—Thank you very much. That was very informative.

ACTING CHAIR—On the security issue, which is obviously of great concern internationally, would you see the UPU as having a role to play in strengthening security internationally? Obviously countries differ on their security arrangements. Do you see a role to be played here by the UPU in strengthening security internationally?

Mr Grosser—Indeed, a very significant role is already played by the UPU in this area. My colleague Mr Williams has mentioned the POC or Postal Operations Council, which is a forum for the operators to join together and work on initiatives and directions. There is a subgroup of that council called the Postal Security Action Group, headed by the United States. It is a very large group, though perhaps not as large as some of the other forums, and something in the order of 70 to 75 member countries work with that group in dealing with security directions. They share information, look to trends and try to equip each other with information and capabilities. With the United States in the lead, they have by far the largest postal security group in the world and have very large technical laboratories to back it up. They can provide significant information to the postal world, and have certainly done so in the time I have been associated with the UPU. It is what I regard as one of the very credible parts of their operation.

Senator STERLE—Mr Wilkie addressed a lot of my questions but, following on from that, Mr Grosser, my history is transport—that is, my last 25 years. I know that, no matter how efficient security seems to be on the waterfront et cetera, a lot of it is dependent on what is on the con note as to the contents of the parcel et cetera. I know that it will be an ongoing process. People who consign freight do not necessarily always tell the truth about what is in the carton, the box or the consignment. Out of curiosity: with regard to UPU, how many times, in terms of numbers of weeks per year or whatever, do you find infringements—that what is on the paperwork is not what is in the carton?

Mr Grosser—I would be guessing to give you a direct answer to that question. There is a concern. As I mentioned, it is a problematic area to ensure that the postal declaration of a

consignor to a consignee is correct. We are trying to help by promulgating more information with regard to the various customs harmonised coding systems, particularly to business operators to ensure that they comply. There has been pressure now for businesses to use the first six digits of the harmonised code system in their consignments. But for individuals it is still a problematic area, and I have to say that we will do our utmost to ensure, where we can, the statements comply. I think that the increasing examination practices by Post—for example, the way we are working in Australia with X-ray examination of most parcels coming into the country—are lending a great deal of force to people making the appropriate declarations. When inconsistencies are seen, we can pick them up and take it up with the consignor.

Senator STERLE—Could you take that on notice and provide the committee with the figures that you have?

Mr Grosser—We can certainly take it on notice, and we would be pleased to see what information we can provide on that question.

ACTING CHAIR—Thank you very much for your time this morning.

[11.19 am]

Annex G: Settlement of Disputes to the Stockholm Convention on Persistent Organic Pollutants, done at Stockholm on 22 May 2001 (Punta del Este, Uruguay, 6 May 2005)

EELES, Mr Lee Malcolm, Director, Chemical Policy Section, Environment Protection Branch, Department of the Environment and Heritage

HARWOOD, Ms Mary Beatrice, First Assistant Secretary, Environment Quality Division, Department of the Environment and Heritage

MOBBS, Mr Christopher James, Assistant Director, Chemical Policy Section, Environment Protection Branch, 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

TOMASKA, Dr Luba Daniela, Policy, Standards and Reform Leader, Office of Chemical Safety, Department of Health and Ageing

CHAIR—Welcome. 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?

Ms Harwood—Yes, I will. Thank you. This is a brief background to the convention and the annex. The Stockholm convention establishes control measures for the substances known as persistent organic pollutants or POPs, as I will refer to them. POPs are substances used for industrial and agricultural purposes or are by-products from industrial processes. They are environmentally persistent and hazardous to human and animal populations. The convention currently lists 12 POPs which have been used as pesticides for industrial purposes or are by-products from industrial processes. They are: aldrin, chlordane, dieldrin, endrin, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls, DDT, dioxins and furans. The main obligations of the parties to the convention are to ban or phase out the production and use of intentionally produced POPs, to manage stockpiles of POPs wastes in an environmentally sound manner and to reduce or, where feasible, eliminate releases of unintentionally produced POPs—that is, dioxins, furans, polychlorinated biphenyls and hexachlorobenzene.

The convention entered into force generally on 17 May 2004. Australia ratified on 20 May 2004 and the convention entered into force for Australia on 18 August 2004. The implementation of the convention within Australia requires the cooperation of several agencies, particularly the Department of the Environment and Heritage, the Department of Health and Ageing through the National Industrial Chemicals Notification and Assessment Scheme, NICNAS, and the Department of Agriculture, Fisheries and Forestry. In May 2005, the first conference of parties to

the Stockholm Convention adopted amendments to the convention to add a new annex in accordance with article 18. The treaty action involves the addition of the new annex, annex G, which sets out arbitration procedures for the purpose of article 18.2(a) of the convention and conciliation procedures for the purpose of article 18(6) of the convention. These arbitration procedures are identical to those for the Rotterdam convention, which were considered and agreed to by this committee in June 2005.

Article 18 of the convention provides that a party may declare that it recognises arbitration and/or the International Court of Justice as a compulsory means of dispute settlement in relation to any party accepting the same option. As paragraph 9 of the national interest analysis notes, parties have the option to make a declaration in relation to their preferred method of dispute settlement under the convention. Australia is currently considering whether to make a declaration to accept arbitration, adjudication by the International Court of Justice or both. Until such declaration is made, Australia will be bound by conciliation as a means of dispute settlement in accordance with article 18(6) of the convention.

ACTING CHAIR—Thank you. There were some tongue twisters there, I would say!

Ms Harwood—Yes, sorry about that.

ACTING CHAIR—That is fine. Could you advise the committee if there have been any disputes to the Stockholm convention to date?

Ms Harwood—Not as far as we know.

ACTING CHAIR—So there have been none to date. A number of Australian industry groups who represent private companies were on the list of stakeholders who were consulted with regard to the convention. Could you advise the committee how a private company, an industry group or a state or territory government would in actual fact raise an issue or a problem under the Stockholm convention?

Ms Harwood—For Australia, we have a reference group which meets to discuss issues relating to the convention and its implementation. Industry groups, state governments and others are welcome to participate in that reference group and to discuss issues relating to the convention.

ACTING CHAIR—So industry groups would be aware of that reference group?

Ms Harwood—Yes—the industry players that are affected by the convention.

ACTING CHAIR—Okay.

Mr WILKIE—Why hasn't Australia made a declaration about the arbitration of the court?

Ms Harwood—That relates to a more general issue in terms of our approach on arbitration and reference to the international court as opposed to conciliation. I am hoping my colleague from the Department of Foreign Affairs and Trade is able to give us some advice on that matter.

Mr WILKIE—A great piece of handballing!

Mr Thwaites—Our preference has traditionally been to go to conciliation, but where the need is strong enough that can be reconsidered. At the moment, that is a question which is being considered generally but there is not, so far as I am aware, any pressure on it.

Mr WILKIE—Given the nature of what we are talking about here, I would not have thought it would be a greatly onerous task to declare it and get on with life like so many others have done. Is this a matter to do with sovereignty? Is the government concerned that we are handing over sovereignty to someone else?

Mr Thwaites—In general terms, historically that has been the restraint, and it takes a while for a matter to become sufficiently pressing for people to start questioning that constraint.

Mr WILKIE—I suppose there are sensitivities with the International Court of Justice. We saw that last week. I am concerned that Australia constantly appears to me to be saying, 'We're not going to bother declaring that the court should have jurisdiction.' I remember when Australia withdrew from the court's jurisdiction over the determination of maritime boundaries purely so that East Timor could not take us to court over that. If this is being held up purely for reasons such as fear of losing sovereignty, it is disappointing that we are being left behind in the wake of other countries.

Mr Thwaites—The withdrawal from jurisdiction related to a specific area of law—it was not a general withdrawal. In the case of any particular issue that might go to the court, the question comes up again as to whether the government wishes to resort to the court or not.

Mr WILKIE—Does not declaring weaken our position in instances where we might want to use the court to take other parties to task?

Mr Thwaites—If you are talking about the law of the sea situation—

Mr WILKIE—In general.

Mr Thwaites—We have not made a general declaration. We accept the jurisdiction of the International Court of Justice generally, except where we have said we do not.

Mr WILKIE—In this instance, what are the issues around not issuing a declaration?

Mr Thwaites—I am not conversant with this particular treaty but, as far as I know, there is no particular reason why it has not been done. It is just that the question has not come up.

Mr WILKIE—Could you take that on notice and try and find out for us?

Mr Thwaites—Yes.

ACTING CHAIR—Thank you very much for coming.

[11.31 am]

Agreement between the Government of Australia and the Government of the Republic of Turkey for the Promotion and Protection of Investments (Canberra, 16 June 2005)

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

BRAY, Mr Henry John Gordon, Executive Officer, Southern Europe Section, Department of Foreign Affairs and Trade

MATHEWS, Mr Richard Charles, Director, Southern Europe Section, Department of Foreign Affairs and Trade

TOMASKA, Dr Luba Daniela, Policy, Standards and Reform Leader, Office of Chemical Safety, Department of Health and Ageing

ACTING CHAIR—Welcome. 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 Bliss—I will make a few brief remarks. The Australian government decided in 1999 to agree in principle to commence negotiations on an investment promotion and protection agreement with Turkey. The first round of those negotiations occurred in 2001, with a further round in 2002. Negotiations continued informally to settle outstanding drafting issues, and the text of the agreement was settled in April of this year. Executive Council approval to sign the agreement was granted on 15 June 2005, and the agreement was signed by Mr Vale and Mr Kursat Tuzmen, the Turkish Minister of State in charge of foreign trade, on 16 June 2005 in Canberra. The treaty will come into force following the tabling of a JSCOT report and an exchange of diplomatic notes as per article 14.1 of the agreement.

The agreement with Turkey closely follows Australia's pro-forma investment protection and promotion agreement and is intended to put Australian investors in a better position to benefit from the investment opportunities in Turkey by providing a range of guarantees relating to non-commercial risk. It protects investment by ensuring fair and equitable treatment and includes post-establishment most favoured nation provisions. The agreement provides for certain protection against expropriations for free investment related transfers.

The agreement also establishes a dispute resolution mechanism for state-to-state disputes and for investor-state disputes. Disputes between Australia and Turkey are to be resolved by consultation. Should an agreement not be reached within six months, the dispute may be submitted to an arbitral tribunal or another dispute settlement procedure. The agreement envisages a private company being able to take a state to the International Centre for Settlement of Investment Disputes, ICSID, as both Australia and Turkey are party to the 1965 Convention

on the Settlement of Investment Disputes between States and Nationals of Other States. Alternatively, an investor-state dispute can be solved by arbitration.

Finally, I might point out two minor amendments which we have noticed are required to the national interest analysis, both pertaining to the section on consultation, where the reference to the Department of Immigration and Multicultural and Indigenous Affairs mistakenly says 'migration' rather than 'multicultural'. In the second paragraph of that consultation section, the phrase 'the decade-long treaty negotiation' is a slight overstatement of the length of time which those negotiations took, as I have previously explained. I will hand over to my colleague for him to say something about the bilateral relationship and investment situation.

Mr Mathews—The Australian private sector has been shown to have a growing interest in investing in Turkey—in particular in the agriculture, mining and energy sectors, as well as in some small infrastructure projects. For example, there is interest in dairy cattle breeding, boron mining projects, oil and gas projects and some small infrastructure projects in Turkey. The value of investment is still small and there are no official figures available yet. Turkish treasury figures on foreign direct investment do not show Australia in the top 20 foreign investors. However, with growing interest from the Australian private sector and with the benefit of an investment promotion and protection agreement, we expect investment to increase.

Interest in Turkey is growing world wide. Foreign direct investment into Turkey this year is estimated to reach $US5 billion, up from around $US2 billion last year. Investor confidence in Turkey has increased recently following the 3 October start of accession negotiations with the European Union. These negotiations will lead to the modernisation of the Turkish economy—for example, in agriculture—which is of interest for Australian investors.

Turkey has taken a proactive approach to try to attract investment. It recently reduced corporate tax from 30 per cent to 20 per cent. It has reduced bureaucratic investment procedures with the implementation of a new foreign direct investment law. Of the new emerging markets, Turkey, according to an IMF assessment, is one of the highest returning markets. Finally, I might note that most OECD countries and most of our major trading partners already have investment promotion and protection agreements with Turkey.

Senator WORTLEY—The NIA states that the substantial Australian Turkish community 'has the potential to emerge as a significant source of investment funds for the Turkish economy'. Was Australia's Turkish community formally consulted about the agreement through the negotiating period?

Mr Mathews—We are not aware of formal consultations, but we can take that on notice if you wish.

Mr WILKIE—Going on from that, the state and territory governments were advised that this treaty action would possibly be taking place. Were they actually consulted regarding the process?

Mr Bliss—They were consulted through the standard mechanism for consultation with states and territories, and that is the standing committee on treaties. This was placed on the agenda and

was, I believe, discussed in one of those meetings. Beyond that, there was not any more specific consultation, but it certainly was on the SCOT list.

Senator TROOD—You mentioned that the level of investment was relatively low. What is the dollar figure of that at the moment? Can you give us some idea?

Mr Mathews—As I indicated before, there are no official statistics available to us. The Australian Bureau of Statistics does not collect figures specifically on Turkey—Turkey is lumped in together with the Middle East as a whole. We have knowledge of a range of Australian investments already in Turkey. For example, we know of a major investment by an Australian company in the oil sector and some investments in the agriculture sector. We do not have any specific figures on investment flows. Investment flows are notoriously difficult to capture, especially for countries where the figures are quite low.

Senator TROOD—If there were to be a dispute in relation to this investment, would the agreement only apply to investments which commenced after the date of the agreement coming into force? In other words, it does not have retrospectivity, does it?

Mr Bliss—I need to check that, but that is my understanding. I have just been advised by my Treasury colleague that that is the case—it is only for those investments established after the date of entry into force.

Senator TROOD—You said in your evidence that this was a pro-forma agreement that presumably has been adjusted for the particular circumstances. Can you tell us whether there have been any disputes under any of the similar agreements that we might have negotiated from time to time?

Mr Bliss—To our knowledge, there have not been any.

ACTING CHAIR—Thank you for coming.

Resolved (on motion by **Senator Sterle**):

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 11.41 am