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JOINT STANDING COMMITTEE ON TREATIES

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JOINT STANDING COMMITTEE ON

TREATIES

Monday, 27 February 2006

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

Members in attendance: Senators McGauran, Sterle and Wortley and Mr Adams, Dr Southcott and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 1 October 2005 and in February 2006

WITNESSES

Committee met at 10.05 am

CHAIR (Dr Southcott)—Good morning. 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 hear evidence on six treaties tabled in parliament on 7 and 8 February and hear further evidence on the Convention on the Marking of Plastic Explosives for the Purpose of Detection, which was tabled in parliament on 11 October 2005.

I understand that witnesses from various departments will be joining us for discussion on the treaties. I thank witnesses for being available for this hearing. I 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.

[10.06 am]

BACON, Dr Rachel, Acting Assistant Secretary, Office of International Law, Attorney-General's Department

COLOMER, Mr Julien, Acting Assistant Director, Migratory and Marine Species Section, Marine Environment Branch, Marine Division, Department of the Environment and Heritage

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

Amendments, done at Nairobi, Kenya on 25 November 2005, to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979

CHAIR—We will now take evidence on the amendments done at Nairobi, Kenya on 25 November 2005 to appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979. On 11 January 2006, Senator the Hon. Ian Campbell, the Minister for the Environment and Heritage, informed the committee that at the eighth meeting of the Conference of Parties to the Convention on the Conservation of Migratory Species of Wild Animals the basking shark was listed in appendix II of the convention. Further, the committee was informed that the amendments to the convention would enter into force 90 days after adoption, where no objection was lodged. This occurred for Australia on 23 February, shortening the committee's review time frame from 15 to seven sitting days. On behalf of the committee, I thank the minister for early notification of this treaty and the accompanying national interest analysis.

Although the committee does not require witnesses 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 any introductory remarks before we proceed to questions?

Mr Colomer—The basking shark is the only species for which Australia is a range state that was added to the appendices of the convention on migratory species. I would like to clarify that the basking shark was added to appendix I as well as appendix II of the convention on migratory species at the eighth conference of the parties.

Mr WILKIE—How is compliance with the provisions in the treaty enforced?

Mr Colomer—Those species that are listed under the convention are automatically listed as a migratory species under the Environment Protection and Biodiversity Conservation Act. Most fisheries that operate within Australian waters have logbooks that allow for interaction with

protected species to be noted. That is how the convention is implemented within Australian waters.

Mr WILKIE—Who examines the logbooks?

Mr Colomer—I would imagine it would be the Australian Fisheries Management Authority for those fisheries that are managed by them. Within state waters, it would be the respective fisheries management authorities of each state.

CHAIR—Why did Australia decide to jointly nominate the basking shark with the United Kingdom?

Mr Colomer—Australia is a range state for the species. Australia is also recognised as a leader in shark protection internationally and domestically, so it was seen as an opportunity to further our leadership in this field.

CHAIR—In the NIA it says that Australia has a rare incidence of basking sharks in its waters. Would you care to elaborate on that?

Mr Colomer—The species is rare, generally, and it is rare in Australian waters as well.

CHAIR—Thank you very much for coming. We also appreciate that the assistant secretary was able to write to us before the conference, notifying us of the government's joint nomination.

[10.10 am]

BROOKS, Ms Louise, Acting Section Head, International Section, Aviation Operations, Department of Transport and Regional Services

DOHERTY, Mr John Robert, Executive Director, Aviation and Airports Division, Department of Transport and Regional Services

HENDERSON, Ms Jeannie, Director, United States and Canada Section, Department of Foreign Affairs and Trade

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

HOLZAPFEL, Mr Eugene, Manager, Manufacturing and Certification, Civil Aviation Safety Authority

CHAIR—We will now take evidence on the Agreement on the Promotion of Aviation Safety Between the Government of Australia and the Government of the United States of America and also on Implementation Procedures for Airworthiness Covering Design Approval, Production Activities, Export Airworthiness Approval, Post Design Approval Activities, and Technical Assistance Between Authorities under the Agreement on the Promotion of Aviation Safety Between the Government of Australia and the Government of the United States of America, both done at Canberra on 21 June 2005.

I welcome representatives from the Department of Transport and Regional Services, the Department of Foreign Affairs and Trade and the Attorney-General's Department. 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 Doherty—I have a very short statement to set the context for these two documents. The agreements that have been tabled are aimed at reducing regulatory processes for the trade of aircraft products with the United States of America. The United States is a significant partner as Australia's largest market for both the import and export of aircraft manufacturing products. According to ABS statistics, and as noted in the regulation impact statement accompanying this treaty, Australia exported $377 million worth of aircraft manufacturing products to the US in 2004-05. Currently in the area of aviation safety, Australia is already party to a bilateral airworthiness agreement with the United States. This agreement, which was signed in 1975, between Australia and the US has a very limited scope. The agreement on the promotion of aviation safety, which was tabled in parliament on 7 February, will supersede the 1975 agreement and is based on the mutual agreement that there is sufficient common ground between Australia and US aviation safety standards to move forward in a range of areas.

The agreement paves the way for the possibility of bilateral cooperation in a variety of areas, including aircraft certification, maintenance and flight operations. Australian manufacturers are currently required to obtain Australian certification from the Civil Aviation Safety Authority, or CASA, before they can apply to the Federal Aviation Administration, or FAA, for US approval. This process involves much repetition and is both time consuming and costly. The agreement before parliament will establish a mechanism through which the US authorities will accept certifications and approvals issued by CASA, thereby reducing the need for duplication of processes in both states. Colloquially known as the bilateral aviation safety agreement, or BASA, the treaty is made up of two parts: an umbrella agreement, which is known as the executive agreement, and a series of implementation procedures on specific topics. Both the executive agreement and the implementation procedures will be treaty-level documents.

There are two tabled documents for consideration. One is the executive agreement—that is, the broad framework agreement which provides for developing the implementation procedures, which will give practical effect to the treaty. These procedures will establish the working arrangements which follow, which allow for the mutual acceptance of certifications and approvals issued by CASA and the US FAA.

The second tabled agreement is the first of the implementation procedures. It is the implementation procedures for airworthiness. They set out the detailed technical processes which CASA and the FAA will undertake in certifying, approving and overseeing a range of airworthiness activities, including design and production of aeronautical products.

In the development of the agreement the Department of Transport and Regional Services consulted extensively with the aviation industry and Commonwealth and state departments and agencies. Of the 32 submissions received all expressed firm support for the agreement, stressing the expectation of not only cost savings but also anticipated growth for industry in Australia. No financial costs to the Australian government are anticipated in the implementation of the agreement and no new legislation is required to give effect to the proposed agreement.

Article 6 of the executive agreement specifies that the agreement will enter into force when the parties have notified each other in writing that their respective domestic requirements for its entry into force have been satisfied. The government proposes that this will be done as soon as practicable following conclusion of the 20 sitting days from the date the agreement was tabled in both houses of the parliament.

Mr WILKIE—I am just curious: how does this agreement differ from the 1975 agreement? You have answered that generally but are there any specifics other than the one that you have just talked about?

Mr Doherty—The 1975 agreement, as I understand it, was limited specifically to type approval certificates for aircraft.

Mr Holzapfel—This is a greatly expanded scope. It increases the range of assistance we can provide each other and it increases the range of products where mutual recognition is afforded there. So it is an expansion of that. I think that our 1975 agreement is about the oldest one that the FAA still has in existence. It has been superseded in many areas now.

CHAIR—I notice in the NIA that it says we do not have any treaties of this type with any other country. What is the reason for that?

Mr Doherty—In terms of mutual recognition of the regulatory arrangements and general arrangements with New Zealand, I think, it does provide for reciprocal recognition. We do automatically recognise the requirements of some of the more developed jurisdictions, but as yet there has been no negotiation to get us to a stage where the authorities will recognise them. I guess that relates in part to the complexity of these arrangements. We are dealing with air safety and with systems where there has been quite a complex set of regulatory structures set up in each jurisdiction and they would probably have different treaty-making arrangements as well. So I guess it is no simple issue.

CHAIR—In the NIA it says that there are not yet any similar treaties with other countries on bilateral aviation safety or on implementing procedures. Is that correct?

Mr Doherty—Yes, that is correct. But I think that our objective over time would be to try to expand this.

CHAIR—Do other countries follow the United States on this as well?

Ms Brooks—The United States basically set up this template framework and they have been negotiating similar agreements with a range of states. They have quite a number of bilateral aviation safety agreements with other states. We have actually learned quite a lot from this experience and are looking to make similar arrangements with other states.

Senator McGAURAN—My question may be based on my not being fully briefed across the whole treaty, but in my briefing notes it says:

This Agreement with the USA would have potential benefits for Australia by promoting aviation safety ...

Can you expand on that and explain it properly?

Mr Doherty—The framework agreement provides for beyond mutual recognition and a range of issues around exchange of information and things like that. I think that that is where probably there will be significant benefits in safety over time.

Senator McGAURAN—That is it?

Ms Brooks—There is also the enhanced understanding of the FAA system and the Australian system and I think that will actually bring these systems closer together as they move forward. The intention is that the two systems will look for advantages for safety through collaboration as we implement.

Mr Holzapfel—To expand on that a little—

Senator McGAURAN—Please do.

Mr Holzapfel—as we were working through the arrangements the FAA came and visited us a number of times to look at our regulatory procedures and how we are implementing them in practice. Their advice and comments as they were going through were of great value and assistance to us in improving our own service there. There is also an agreement to mutually discuss and to exchange data on defect reports and problems which do occur. So there is a measure of safety improvement for us. But the biggest emphasis in the whole arrangement is that the FAA are increasing their recognition of Australian products. We already recognise and accept a very wide range of products from the United States so this is improving the range of Australian products which are recognised there. A few flows of safety data and assistance auditing have come before us and will continue as we go through.

Mr WILKIE—In paragraph 13 of the national interest analysis there is a discussion there about both the certification systems and the implementing authority and giving them equal standing. What are the differences in those now?

Mr Holzapfel—The standards are not all that different at present. We have largely adopted the FAA standards. The differences that do occur are usually in the implementation and the detail in how they are carried out. At all times you must show compliance to the standards but occasionally you will be able to say that an equivalent level of safety can be found or a detailed way of showing compliance in a simplified way. We looked to the FAA to help us in finding the easiest ways.

Mr WILKIE—There is also discussion there about the possibility of increasing trade from Australia to the US in aircraft products. How realistic is that? Do we actually manufacture many products that we could export?

Mr Doherty—I think that there are some statistics in the regulatory impact statement. There is an existing trade of some tens of millions of dollars. Yes, we do believe there is a significant possibility here. Probably the most significant impact in practice for this is that the manufacturers who want to access the US market will not have to go through two regulatory clearance processes. At the moment they effectively apply through CASA for approval here and then if they want to market to the United States they go through a separate process, at least in many cases, with the FAA. The effect of this treaty will be that in certain circumstances the FAA will accept CASA's certification and not require our manufacturers to go through a second process, and of course the second process of dealing with an offshore authority can be quite expensive and quite time consuming.

Mr WILKIE—Does this agreement have any impact on maintenance of aircraft?

Mr Doherty—At the moment the framework agreement, the main document, will set up a broad enough scope that maintenance activities can be brought within it. But I do not think that the particular implementation procedures cover maintenance. That would be one for a further set of implementation procedures down the track.

Mr WILKIE—There has been quite some discussion recently in the media about the possibility, for example, of Qantas moving a lot of its maintenance procedures offshore. Would this agreement have an impact on that or would it be likely to in future—not just on Qantas but generally on aircraft maintenance?

Mr Doherty—My understanding would be that in that situation the maintenance which was carried out would still need to be certified to CASA standards for Qantas. I think that the impact of this would be more the prospect of Australian maintenance businesses doing maintenance for US registered aircraft.

Mr Holzapfel—That is entirely correct. There is no intention in this to ease or in any way make it more favourable to transfer maintenance there. This is an exchange of design approvals and manufacturing approvals. Maintenance is outside of it. The eventual possibility, which is in the executive agreement at a higher level, is mutual assistance with auditing of maintenance approvals so that, if an Australian company had United States maintenance approval, we would be able to do the auditing on behalf of the FAA and assist them to reduce their oversight costs. But that is all for the future; that is not in this at all.

CHAIR—The regulatory impact statement says, I think, that the value of aircraft manufacturing exports is $377 million. That is just exports, isn't it?

Mr Doherty—I understand that figure is exports to the United States.

CHAIR—I understand that covers a broad range of things in the aerospace industry, but what sort of products would that typically be made up of? Is it light aircraft, software systems design or that sort of thing?

Mr Doherty—We might have to take that question on notice and come back with as much detail as we can on the breakdown of that $377 million figure.

Mr WILKIE—I would be interested to know whether the agreement covers military aircraft as well or just commercial aircraft. We have been doing quite a bit of work with the Joint Strike Fighter, so I would be interested to know whether those sorts of standards would be across the board.

Mr Holzapfel—I get requests daily from Australian manufacturers on how we can help them sell internationally. The Australian market is not large and, with aviation generally, there is a fairly high overhead of design and certification costs, and the best way of getting recovery of that is to sell on the world markets. So I get requests virtually daily on how they can do that. The two biggest markets are Europe and the FAA, and both of those are very widely recognised by many other countries. If you can sell into the FAA, many other countries will pick that up as being an acceptable standard to them. So there is considerable interest in Australia's manufacturing and, as you have correctly said, it is largely on the small aircraft side.

Mr Doherty—I just need to clarify that. I think this agreement relates to civil aircraft, or aircraft which would require certification through civil processes, so its application to defence aircraft would, I think, be limited.

CHAIR—Thank you for that clarification and for appearing before the committee this morning.

[10.28 am]

NAIRN, Captain Roderick Robert, Hydrographer of Australia; and Commander, Hydrographic, Meteorological and Oceanographic Force Element Group

Protocol of Amendments, adopted in Monaco on 14 April 2005, to the Convention on the International Hydrographic Organisation, done at Monaco on 3 May 1967

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?

Capt. Nairn—Yes, please. The International Hydrographic Organisation is an intergovernmental organisation responsible for the harmonisation and standardisation of nautical charting services across the world. It began its operations in 1921, initially with 24 members. Australia has been a member since that time, initially with joint membership with New Zealand and the United Kingdom but since 1958 as an individual member. The present convention was signed by Australia in 1967 and has been in force since 1970. There are currently 76 member states, and a number of others are waiting to join.

The Chief of Navy is charged with the responsibility of providing Australia's national charting service to meet national requirements and international obligations under the Safety of Life at Sea Convention and the United Nations Convention on Law of the Sea. The Australian Hydrographic Service is a component of the Hydrographic, Meteorological and Oceanographic Force Element Group in Navy's Maritime Command. It fulfils this obligation on behalf of the Chief of Navy. Accordingly, the Hydrographic Service represents Australia at the International Hydrographic Organisation. Australia has had a long history of active and influential involvement in the IHO. This is particularly because of Australia's unique geographic and maritime situation, which is very different from that of any other member state. Thus active involvement is necessarily to ensure that international hydrographic standards, specifications and obligations are consistent with our own national considerations.

In recent times, the lack of responsiveness of the IHO—that is, its inability to act in a time scale appropriate to the rate of change of hydrographic surveying technologies and the changing requirements of mariners—has become a concern to member states. At the 2002 International Hydrographic Conference, the IHO embarked on a wide-ranging review of its role and its convention, seeking to modernise the working arrangements in order to meet its objectives and the aspirations of its member states more effectively. A strategic planning working group was tasked to develop proposals for amendments to the convention. The Australian Hydrographic Service was a member of this working group and represented both Australia and the South West Pacific Hydrographic Commission. It presented positive, constructive contributions to the strategic planning working group, most of which led to debate and strongly influenced the eventual outcome. The strategic planning working group recommendations were to adopt an organisational model based primarily on the International Maritime Organisation. The most

significant proposals were therefore the formation of a governance council comprising a quarter of the IHO's member states; and a streamlined decision-making process, particularly for technical matters.

The Third Extraordinary International Hydrographic Conference was called in April 2005 to consider the report of the strategic planning working group and its consequential proposals to modify the IHO convention and subsidiary documents. As a result of our active participation in the strategic planning working group, Australia was able to support all of the proposals. The conference, with 60 of the 74 members present at the time, resolved by consensus to amend the IHO convention in accordance with the protocol of amendments. As previously stated, this protocol of amendments seeks to modernise the IHO and the working arrangements. The amendments primarily affect the internal business processes, improving corporate governance, streamlining decision-making processes and making it easier for new states to join the organisation. The benefit to Australia comes from its ongoing membership of a more efficient and effective organisation. I recommend Australia accede to the protocol of amendments adopted in Monaco on 14 April 2005 to the Convention on the International Hydrographic Organisation, done at Monaco on 3 May 1967.

Mr WILKIE—The background says that one of the reasons for having this particular agreement is that, if consensus is not able to be achieved amongst the member states, you can have a vote. Has it been the case very often where they have not been able to reach a consensus?

Capt. Nairn—Most decisions have been made by consensus in the past. However, there have been some areas which have meant no decision has been made rather than proceeding to a vote. When an issue goes to a vote under the current arrangements, it requires a two-thirds majority of all member states. You might call many of the member states silent members who do not cast a vote—most of this is done by correspondence. So, in effect, the organisation is paralysed and cannot make a vote even though most would agree if they actually got to vote. The new arrangements allow the vote to be taken by a majority of those actually voting.

Mr WILKIE—I know it says it in here but I have missed it. How many states need to ratify this before it enters into force?

Capt. Nairn—I am not sure of the exact number.

CHAIR—It enters into force three months after the government of Monaco receives notification of approval by two-thirds of the member states that are party to the convention.

Mr WILKIE—Given that this appears to be quite an important step forward for the organisation, it is curious that only three have ratified it to date. Obviously there will be more in 2006 and 2007. When is it likely to enter into force? Do you have any idea? It looks like it is not going to happen for a couple of years.

Capt. Nairn—I would imagine it would be a number of years. Historically, if we look at the 1967 convention, it was ratified in 1970. The last convention was in April 2005. We have moved as quickly as possible, and I think we have been very proactive in this, but it has taken us 12 months to get to this stage—probably with ratification sometime this year. We are also actively encouraging our neighbouring countries to take the steps towards ratification. One difficulty is

that the national representative for this is normally at a lower level than some of the other committees and they do not have access to their political process to the same level, which does slow down the ratification process, particularly in some of our neighbouring states in the south-west Pacific. We play an active role in the south-west Pacific and encourage and assist them in moving towards ratification.

Mr WILKIE—You would think the United States would want to see this happen fairly quickly, and they are not listed as even being in a position to consider the ratification at this stage.

Capt. Nairn—It is interesting, because at the convention the United States was very aggressively supporting the urgent ratification of this document, and I was expecting to see their name on the list by now.

Mr WILKIE—Have there been any concerns raised about implementing the change?

Capt. Nairn—No, no concerns have been raised. It is more just a matter of process, I think, that is delaying the ratification.

CHAIR—The committee has previously conducted inquiries into the UN safety of life at sea convention. I understand under the convention all contracting governments are required to provide and maintain hydrographic services and products. Are there examples of countries that are not able to provide this service?

Capt. Nairn—There are many countries that still are unable to provide the service, but the requirement is not that the country itself provides it but that it ensures that those services are provided. That is certainly the interpretation that has been made. We are, as I said, active in the south-west Pacific trying to assist other countries and we would hope to extend our assistance to some of our near neighbours who are unable to provide that. The Australian Hydrographic Service currently provides that service on behalf of Papua New Guinea, under an agreement that has been in place since 1975. We may be able to expand that further.

CHAIR—That was my next question: do we lend our expertise to these countries or is that part of the role of the International Hydrographic Organisation?

Capt. Nairn—It is sort of a joint role. The International Hydrographic Organisation is a good umbrella organisation, but it does not have much in the way of resources and even people. The permanent employees are a number of secretarial staff and there are three on the current directing committee. We would hope that these new amendments will allow that to be more effective, but they do rely on the member states of the regions and suborganisations called regional hydrographic commissions to provide assistance to their regional areas.

CHAIR—While we have you here, could I ask you this: has the Australian Hydrographic Service had any involvement with regard to hydrographic services in the aftermath of the 2004 tsunami in South Asia?

Capt. Nairn—We had initial involvement from the point of view of providing direct military surveying support to the naval vessels that deployed to that area—that is, allowing them to get

their landing craft to the beaches et cetera—but we have not had any involvement with the subsequent resurveying work of Indonesia, Sri Lanka or other affected countries.

CHAIR—Would the Australian Hydrographic Service have any involvement in the development of an Indian Ocean early warning system?

Capt. Nairn—We hold all of the existing data for the shallow water areas of Australia and we maintain that national hydrographic database. Our main contribution here—and we are working with Geoscience Australia—is to provide them with all the data that we currently hold and to assist them in organising surveys of other areas that need to be urgently surveyed if those sorts of requests are made.

CHAIR—Do you also have a role in the offshore territories like Christmas Island, the Cocos (Keeling) Islands and Norfolk Island?

Capt. Nairn—Yes, our role extends to all of Australia's EEZ.

CHAIR—And to the Australian Antarctic Territory as well?

Capt. Nairn—Yes, we have a role in the Australian Antarctic Territory. Historically, we have deployed one survey team down there in most years, although we rely on the assistance and support of the Australian Antarctic Division to provide us with transport and safety. Their change from a sea bridge to an air bridge has limited their capabilities. We did not have a team going down this year.

CHAIR—I understand this is the last sea journey?

Capt. Nairn—I am not completely familiar with it; I just know that we were not able to get assistance this year to get a vessel down there.

Senator McGAURAN—What countries are seeking membership?

Capt. Nairn—I am afraid that I do not have the names in front of me at the moment. There are three that I am aware of that are seeking membership.

Senator McGAURAN—Would Australia be a natural supporter of those three? I know that you said you do not know who they are, but—

Capt. Nairn—Australia has already voted for the three countries that are currently seeking membership, but it is one of these matters of waiting for three-quarters of the existing members to provide an affirmative vote. Under the new proposed arrangements there will be no requirement for that. If a country is already a member of the United Nations, they will automatically be eligible for membership and it will not delay their membership. In some cases, countries have waited for eight to 10 years to get the ratification or the number of positive votes. I should be able to remember the names because I signed a document not that long ago—my apologies.

Senator McGAURAN—Perhaps you can get the answer to us on notice.

Capt. Nairn—I can certainly do that.

Senator WORTLEY—Are you aware of any countries awaiting these amendments in order to be able to join the International Hydrographic Organisation?

Capt. Nairn—I feel that the answer to the previous question, if I could have provided it, would certainly have helped you here. No, I am not aware of that. It could be a possibility.

Senator WORTLEY—Could you take that on notice?

Capt. Nairn—Certainly.

Mr WILKIE—Out of curiosity—this is nothing to do with the treaty but more with your work—does the organisation work with mining companies, for example? Do they ask for specific research to be undertaken so they can work out what the seabed is doing, or do they do their own?

Capt. Nairn—We hold a fairly extensive database of shallow water surveying information and depth information. That is available to any company that asks us for it, at the cost of the reproduction of the data. Mining companies generally have a much greater requirement for geophysical work as well as their bathymetric work, so invariably they will undertake their own surveys. In conducting those surveys, they usually collect bathymetric data as well as seismic data and core samples et cetera. In most cases, we are able to get copies of that data from them. I think it is lodged through Geoscience Australia. Some of those companies we have bilateral agreements with. They provide us with their data directly. But there are some survey operations in Australia that are conducted in our EEZ where I do not get the data. I think this is an area that we need to resolve, because I should be holding all of that data. It is one of the areas I am working on at the moment.

Mr WILKIE—Yes, I agree with you.

Capt. Nairn—Just to give you a bit more information on that, currently our own survey assets produce about 30 per cent of the survey data that I collect each year. Around 70 per cent comes from mining companies, state port authorities, private port authorities and educational institutions. I receive a lot of data that I do not actually collect myself. But, by the same token, I cannot control what I get or what they do. You just take what you get.

CHAIR—Thank you very much for appearing before the committee this morning.

[10.44 am]

WHYTE, Mr Graham Reginald, Assistant Commissioner, International Relations, Australian Taxation Office

SAXINGER, Mr Hans, Director, New Zealand Section, South Pacific, Africa and Middle East Division, Department of Foreign Affairs and Trade

McBRIDE, Mr Paul David, Manager, International Tax and Treaties Division, Department of the Treasury

RAWSTRON, Mr Michael, General Manager, International Tax and Treaties Division, Department of the Treasury

Protocol Amending the Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

CHAIR—We will now take evidence on the Protocol Amending the Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. 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 proceeds 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 Rawstron—We welcome the opportunity to present to this committee the benefits to Australia of the proposed agreement with Bermuda and the proposed protocol amending the agreement with New Zealand. It is our view that the proposed treaty actions will bring benefits for Australia. Today we are presenting two treaties actions with a similar theme: that of cooperation between countries to help ensure that taxpayers pay their full share of tax. Notwithstanding the similarity of the theme, the two treaties have different purposes, as I will explain when I get to discussing the individual treaty actions in more detail. In essence, these two treaty actions reflect the Australian government's policy decision to incorporate enhanced information exchange provisions in all future tax treaty negotiations. Pursuing the government's objective in this regard will bring our treaty practice in line with the OECD model exchange of information provisions.

I will now turn to New Zealand. The Australia-New Zealand protocol will amend the existing comprehensive tax treaty that Australia has with New Zealand. The comprehensive tax treaties in the main allocate taxing rights between jurisdictions so that taxpayers investing offshore can do so with confidence that they will not be subject to double taxation. Double taxation could otherwise arise where both countries sought to tax the same income, with one country taxing the income as the profits of one of its resident taxpayers from their worldwide operations and the

other country taxing the same income because it arises from activities that occur within the country's borders.

Tax treaties avoid double taxation by determining which country has the right to tax which income. They also dictate under what circumstances taxing rights should be shared. Comprehensive tax treaties also deal with administrative issues between the two jurisdictions by agreeing to cooperate on issues such as the exchange of information assistance in the collection of tax debts and by providing avenues for dispute resolution. Australia currently has approximately 40 comprehensive tax treaties in operation.

The main benefits of the proposed New Zealand protocol are as follows. The information exchange and assistance in collection provisions will extend to all federal taxes administered by the Commissioner of Taxation. This will assist in the administration and collection of goods and services tax and the extension of the benefits of Australia's wine equalisation rebate to New Zealand wine producers who export to Australia. The assistance in collection provision in the protocol will help in the recovery of tax debts from those Australian taxpayers who move to New Zealand. Hence, it will improve international tax compliance. The most favoured nation article ensures that, should New Zealand reduce withholding tax rates on dividends, interest and royalties in a treaty with another country to levels below those in our current treaty with New Zealand, New Zealand will enter into negotiations with Australia with a view to providing Australia the same treatment.

The proposed New Zealand protocol incorporates important safeguards to protect the legitimate interests of taxpayers. Some examples of where a request for information may be declined are where the provision of information would disclose a trade or business secret, where the information is protected by attorney-client privilege or where the disclosure of the information would be contrary to public policy—for example, if it were a breach of human rights policy.

In summary, the proposed changes to the Australia-New Zealand comprehensive tax treaty are primarily focused on improving the level of cooperation between the two jurisdictions. However, the amending protocol will also ensure that were New Zealand to change its position on withholding tax rates then our treaty would be one of the first, if not the first, to be updated. Does the committee wish to seek further information on that particular protocol or would you like me to go on and discuss Bermuda?

CHAIR—I think we will do this one and then we will discuss Bermuda.

Mr WILKIE—I understand that Australia wanted a lot more from the agreement than New Zealand was prepared to give up. Could you expand on that?

Mr Rawstron—I was not actually involved in the negotiations so I will hand over to my colleagues.

Mr McBride—In the context of the US and UK treaties that this committee reviewed and the review of international tax arrangements, the government have moved to a position of lower taxes on withholding tax. They have changed the position on how we tax capital gains under the article, and there have been more movements towards the OECD model tax convention over

recent years. So when we entered into negotiations with New Zealand we were advocating our most recent tax treaty policy—most prominently, lower withholding taxes. The New Zealanders acknowledge that that is now our policy. I think the press release after the negotiations said that they will now review their policy on withholding taxes in particular but also on the other aspects of the treaty that we proposed to them. We expect a response from them probably towards the end of the year as to which way they will go. If they do intend to move towards lower withholding taxes then we will look towards a more comprehensive review of the treaty soon, probably later this year or early next year.

Mr ADAMS—Did Mr McBride say 'holding tax'?

Mr McBride—Withholding taxes on dividends, interests and royalties.

Mr WILKIE—Given that there is going to be a significant cost, I would think, to Australia for complying with this treaty, I am amazed no modelling has been done to estimate those costs.

Mr McBride—Do you mean administration costs?

Mr WILKIE—Administration costs. There is discussion here about us having to expand the ATO's operations in order to comply with this requirement. Has any modelling been done to work out how much it is going to cost Australia to implement this treaty?

Mr McBride—There will be administrative costs. I think Graham from the ATO can indicate their best guess on what that cost will be. It is a bilateral relationship, so they will assist us with exchange of information, which is important for the ATO in administering the taxation law. Requests for assistance in collection will be bilateral as well. We will ask them to assist us in collecting debts and they will ask us to assist them in collecting debts.

Mr WILKIE—In terms of it being a two-way street, which is what you are talking about, that is fine. But I would imagine that it would be costing Australia a lot more than it would be costing New Zealand.

Mr McBride—Once again, Graham may be able to help us out. We enter into memorandums of understanding so that there is balance in the agreement. They sit subsidiary to the treaty. These things work in a mutually beneficial way.

Mr WILKIE—Do you have any idea of the modelling?

Mr Whyte—I do not believe that any modelling has been done. Based on our experience around exchange of information, we already have in place the infrastructure and the people to do this type of work. We already have in place, as was mentioned, over 40 treaties. With a lot of them, some more than others, we are active in exchanging information. In that area I do not believe that there will be need for a great increase or there will be a great burden, as we already have the infrastructure in place. Assistance in collection is new for us but it is something that will assist us. There will be some increased administrative costs around this area. It is one of those things where we do not know quite yet how much activity we will have and how much we will need to put into it. It is virtually impossible at this stage to do any models or anything like that on the costs.

Mr WILKIE—How does sharing of information impact on the right of individuals for privacy? Are we talking about sharing of individuals' information?

Mr Whyte—We are, but there are a number of safeguards, particularly around privacy and secrecy. The Australian Taxation Office must keep the information that we receive secret, like we would any other taxpayer information. There are some areas where we can disclose it—for example, in a court of law or that type of thing—but that would apply generally to any taxpayer information that we might get through our work.

Mr WILKIE—If they were seeking information, for example, on a certain taxpayer, how would they do that? Would they submit a request, and what sorts of processes are in place?

Mr Whyte—Generally, the process is that it is in writing and we would receive a request. We also require some information to help us identify the particular person. Generally, there is also some information about why they want it, so that we can see that it is relevant to tax administration.

Mr WILKIE—Do you have a specific unit set up to assess those applications?

Mr Whyte—Yes, we do. We have a unit with a manager, and there are about six staff there. They are very experienced people. They have been doing it for quite some time. They are also internationally acknowledged experts in that type of work.

CHAIR—In the consultations that were done, four issues were raised. Could you provide the committee with more information about the tax exemptions for temporary migrants, who raised it and what they were seeking?

Mr McBride—Off the top of my head, I cannot remember who raised the temporary migrants thing. Sometimes people supply it on an in-confidence basis. But what they were suggesting is consistent with the bill that has just been introduced on the temporary migrants exemption. I do not think it would ever have been covered by the treaty. It has been covered by other means unilaterally. Most of those requests have more to do with our broader relationship with New Zealand than they do with the actual treaty. Very few of those things would actually be covered in the treaty negotiation, but they were just raised in the general context of our relationship with New Zealand.

CHAIR—What about the second thing—the interaction of debt equity rules?

Mr McBride—Because you can get a deduction for interest but not equity, you want to make sure, to the extent possible, that what is treated as debt in Australia would be treated in the other country as debt. There are slight mismatches in our relationship with New Zealand on that front, so it was more to try and align, or at least work through, some of those mismatches in our debt equity definitions with New Zealand.

CHAIR—But that would not be done through a tax treaty?

Mr McBride—To some extent it would be. To some extent it relies on domestic law. So it would be a bit of both. We are both working on that.

CHAIR—What about the treatment of trusts and hybrid entities?

Mr McBride—Once again, that would happen outside the treaty context, although it was to make sure that we treat the same instruments, whether they be trusts or hybrids, the same way—either as flow-through entities or opaque entities that are taxed at the entity level.

CHAIR—And what about the interaction of the superannuation systems of both countries?

Mr McBride—Once again, I think that will happen outside the treaty context, but it was raised in negotiations. We have a very good relationship with the New Zealanders on an international tax front, so that is something we will probably raise more in that context than through actual treaty negotiations.

CHAIR—What were the issues there?

Mr McBride—I am relying on my memory here, but I think it was the way that different countries tax superannuation payments at different levels: on entry, during the accumulation of the funds or on exit. I think there was a slight mismatch between the way we tax them and the way New Zealand taxes them, such that when New Zealanders come to Australia they may in some instances have been treated in a disadvantaged manner. However, I would have to check that.

CHAIR—Was the extension of the WET rebate to New Zealand producers something that came under CER?

Mr McBride—I think the discussion evolved under CER, and it was decided to extend it to them. What we are doing with the exchange of information and assistance in collection is making sure that the ATO has proper oversight of the administration of the rebate.

CHAIR—Is that the only indirect tax they get a rebate for?

Mr McBride—Yes.

Mr ADAMS—In relation to the collection of debt from the ATO, is it that there are New Zealand citizens who are not paying their tax in Australia at the moment and they have a concern about this?

Mr McBride—This has evolved from the OECD. We are a member of the OECD working group on tax treaties, and they have come up with the model tax convention. In the last few years, they have added an additional paragraph to the model tax convention which covers assistance in the collection of tax debts. Australia has only adopted that article recently, so it will now be part of our treaty practice for all negotiations. It just so happens that New Zealand is the first one we have concluded it in. It is not a specific concern about New Zealand; it is just a general idea that, if we have a network of treaties where we can pursue Australians that abscond without paying their debt, that can only be a good thing.

Mr ADAMS—But that is going to cost us.

Mr McBride—There will be administration costs to chase the debt when we are asked by the other side to collect their debts but, as I said, there is a subsidiary agreement memorandum of understanding, so both parties agree to a level of debt in other administrative arrangements, so it is in the interests of both countries to have this article.

Mr ADAMS—Sure, but I still do not quite understand it. The OECD has laid down a system of what to pursue in collecting debt. Can you elaborate on that for me?

Mr McBride—The OECD has a model tax treaty, which Australia largely replicates in our treaty negotiations. There are 30-odd articles. One of those articles now covers assistance and collection. Another one covers exchange of information. European countries in particular have had assistance in collection articles in their tax treaty networks for a few years. They thought it was working to their benefit overall, so they proposed it to the OECD. The OECD examined it, and there is now an optional article in the OECD model that says that, if it is in both countries' interests in the negotiations, you can have this article that covers the rules and the guidelines that you follow in asking another country to pursue your debts.

Mr ADAMS—Basically, you get the collections of people who are not paying their tax.

Mr McBride—People who are not paying their tax and have escaped the Australian tax man, so the commissioner cannot pursue them.

Mr ADAMS—Because they are in another country. The Europeans have found that, because of the movement within the European Union, they have been able to capture lost tax.

Mr McBride—It also has a deterrent effect.

Mr ADAMS—What is happening in the Australia-New Zealand context? Can you throw any light on that?

Mr Whyte—I do not have any information to hand on that.

Mr ADAMS—That is a shame.

Senator McGAURAN—Given that both countries are committed to the transTasman single economic model, is that across all departments, or is that a tax department led commitment?

Mr Rawstron—That is government policy across all departments.

Senator McGAURAN—What is the company tax rate in New Zealand, just out of interest?

Mr McBride—I think it is the same as ours, but I will have to check that.

CHAIR—We will have to wait for the inquiry.

Mr McBride—I am sure we will know in a few weeks. From recollection, it is 30 per cent.

Senator McGAURAN—And the top marginal income tax rate?

Mr McBride—I would not even hazard a guess on that one.

Senator McGAURAN—What is their GST at the moment?

CHAIR—Their GST rate is 12.5 per cent.

Mr ADAMS—A paper in relation to this was put out by the library a couple of weeks ago.

Senator McGAURAN—We should go to the library.

Mr Rawstron—One of my colleagues here has said that the corporate tax rate in New Zealand is 33c in the dollar.

Mr WILKIE—I am curious to know what other countries we are looking at negotiating similar agreements with.

Mr Rawstron—Do you mean comprehensive tax treaties?

Mr WILKIE—Treaties like this one we are looking at here today with New Zealand. Are we looking at doing that with other countries? There is a suggestion here in the documents that we are. Which countries are we negotiating with?

Mr McBride—Our general preference is for a comprehensive tax treaty negotiation. That was our preference leading into the New Zealand protocol, so we do not have an agenda to pursue just exchange of information and assistance in collection, but we will pursue both of those articles in our more comprehensive tax treaty negotiations. The government directive at the moment is to focus on key investment partners. We have done the UK and the US lately, but we will be trying to review them every four or five years. If you look through our other key investment partners, you will see that they are the countries that we will be looking at. We also had in our tax treaties most-favoured nation obligations such that, if we ever gave lower withholding taxes to another country, we would have to come back and give it to those countries. It is the same with non-discrimination.

We have agreed on lower withholding tax rates with the US and a non-discrimination article with the UK. So that has triggered a further 12 obligations to negotiate with countries—mostly European but there is also Korea. The countries involved are Finland, Norway, Switzerland, Austria, Italy, Korea, France, Spain, Romania, Mexico, South Africa, and our treaty with Taipei. That represents most of our most favoured nation obligations, and then we have the key investment partner countries on top of that.

Mr WILKIE—Thank you. That was pretty good, coming off the top of your head!

Mr McBride—I am sure I missed one or two.

Senator McGAURAN—You mentioned that these agreements are negotiated mutually. Did you mean there are no winners and no losers?

Mr McBride—Both countries have to agree, so at the end of the day you have to be comfortable that the treaty is in your nation's interests before you will sign up to it. There will be articles where you win; there will be articles where you lose. You look at a treaty package that is overall in your nation's interests.

Senator McGAURAN—Correct. What about if you were just looking at the bottom-line dollar figure?

Mr McBride—That is an important component in any consideration. So when we are evaluating whether we will go into negotiations with a country and what we will ask for, we do a cost-benefit analysis before we go through and at various stages of the treaty negotiations once it becomes clearer what the treaty package is looking like.

Senator McGAURAN—What is that between Australia and New Zealand?

Mr McBride—On this treaty it really did not enter into it because it is only on an administrative basis. If we start going down the lower withholding tax path, we will obviously give up some withholding taxes that we would have otherwise collected, but our companies in a similar position in New Zealand will not get them on the way back, so they will be more inclined to repatriate profits. Withholding taxes can also be a cost to business, so there will be less cost to Australian business. So we would factor all of those into a cost-benefit analysis in working out whether the treaty would be in our interests.

Mr ADAMS—There has been some discussion in the last couple of weeks about capital flow between New Zealand and Australia. Has that been considered under this treaty?

Mr McBride—If New Zealand decided to change their withholding tax rate policy and go into a comprehensive negotiation that will cover the allocation of taxing rights, capital flow will obviously influence the amount of money that we will subject to tax—or, if we reduce our withholding taxes, less money will be subject to tax. In that context it would come under this committee's scrutiny.

CHAIR—There being no further questions, that concludes the discussion on this protocol.

[11.07 am]

DONALDSON, Ms Elizabeth, Executive Officer, United States and Canada Section, Department of Foreign Affairs and Trade

PEAK, Ms Elizabeth, Executive Officer, International Law and Transnational Crime Section, Legal Branch, Department of Foreign Affairs and Trade

McBRIDE, Mr Paul David, Manager, Tax Treaties, Department of the Treasury

RAWSTRON, Mr Michael, General Manager, Department of the Treasury

WHYTE, Mr Graham Reginald, Assistant Commissioner, International Relations, Australian Taxation Office

Agreement between the Government of Australia and the Government of Bermuda [as authorised by] the Government of the United Kingdom of Great Britain and Northern Ireland on the Exchange of Information with respect to Taxes (Washington, 10 November 2005)

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 a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Rawstron—Yes, I would. The second treaty action under the review in this session is the taxation information exchange agreement between Australia and Bermuda. Taxation information exchange agreements, or TIEAs, as they are generally referred to, are a more recent innovation. In fact the TIEA with Bermuda is Australia's first such agreement, and its signature makes Australia only the third country in the world after the United States and the Netherlands to sign such an agreement. As such, I might provide a little further information on the background of TIEAs. TIEAs evolved from the OECD's work on harmful tax competition, which identified the lack of effective exchange of information as a key factor to the existence of harmful tax practices. As such, TIEAs have been designed to deal solely with the issue of exchange of information; they do not seek to deal with the allocation of taxing rights, which are obviously a key feature of double tax treaties. The conclusion of an increasing network of bilateral tax information exchange agreements provides the scope for considerable benefits to Australia, our agreement partners and the international community more broadly.

At a domestic level, TIEAs will be an invaluable tool in supporting the efforts to ensure that Australian taxpayers pay their fair share of Australian taxes and to protect the Australian revenue used to provide such essential infrastructure and welfare support. The existence of a network of information exchange arrangements with identified offshore financial centres, together with the existing information exchange arrangements with more comparable taxing jurisdictions through Australia's extensive tax treaty network, will provide a significant upfront deterrent to those

considering evading their tax responsibilities by hiding money offshore. With the increasing ease with which money can be transferred overseas, the opportunity for people to seek to avoid their tax obligations is more broadly based than traditionally regarded. Awareness that the relevant jurisdictions will be sharing information with Australia, overturning the traditional veils provided by bank secrecy laws or the need for domestic tax interest, should provide a check to such speculative intent.

TIEAs also aid the administration of existing Australian tax laws introduced to support the objectives of our international tax arrangements—for example, the controlled foreign company and foreign investment fund regimes. The agreements enable information to be obtained to support the general administration of these provisions, before ex post enforcement activity is required. Finally, TIEAs allow information to be sought with regard to potential civil and criminal prosecutions under the respective tax laws. Traditionally, the limited information that has been available from jurisdictions providing offshore financial centres has been restricted to a very narrow set of criminal matters.

At the higher level, the commitments underpinning TIEAs require introduction of agreed standards of transparency in terms of ownership and accounting information, and removal of impediments to the collection and exchange of relevant information. In most cases these standards are higher than the arrangements that are currently in place. There are considerable benefits to offshore financial centres that will flow from the improved corporate governance and accountability arrangements these standards imply.

The emergence of a network of TIEAs between the OECD countries and offshore financial centres assists international efforts for countries to work together to integrate economic and financial architecture, to support and benefit from global growth and development. This focus is consistent with the principal objectives underpinning Australia's engagement in international development bodies and its more direct aid programs. These factors are key elements to the development of sustainable economies and international efforts to introduce systems that support financial stability. Furthermore, enhanced transparency and effective information exchange necessarily support existing international efforts to counter scope for money laundering and other criminal activity through the Financial Action Task Force and related initiatives.

Turning to the benefits of the proposed agreement, it will enable Australia to administer and enforce its tax laws by information exchange on both civil and criminal matters. The proposed agreement will help Australia protect its revenue base by allowing access to necessary offshore information and improving the integrity of the tax system by discouraging tax evasion by certain individuals and businesses. The proposed agreement will protect compliant businesses and individuals from unfair competition from those who evade their tax obligations.

The proposed agreement will enhance economic cooperation between Australia and Bermuda. According to the ABS report on Australia's international investment position, Bermuda invested $2.2 billion in 2004, making it the fourth leading investor in Australia that year, behind the United States of America, the Netherlands and Canada. Bermuda has already introduced legislation into the parliament to give effect to the agreement with Australia. The Minister of Finance of Bermuda, Ms Paula Cox, referred to fair tax competition principles outlined by the OECD while introducing the legislation. She also stated that both Australia and Bermuda were

committed to ensuring that their financial sectors were not used for money laundering or terrorist financing.

The proposed agreement incorporates important safeguards consistent with the OECD model of taxation information exchange agreements to protect the legitimate interests of taxpayers. Some of the examples are that Australia and Bermuda cannot engage in `fishing expeditions' or request information that is unlikely to be relevant to the tax affairs of a specific taxpayer. The agreement specifies the type of information Australia needs to provide when seeking information from Bermuda, to demonstrate the relevance of the information to the request. The same proviso applies to Bermuda while seeking information from Australia. Hence, the requesting jurisdiction can only request information from the other jurisdiction with regard to the administration and enforcement of its own domestic tax laws. A request for information can be declined if the information will disclose a trade or business secret or if the information is protected by attorney client privilege. Australia and Bermuda may decline a request for information if the disclosure of the information will be contrary to public policy. The agreement requires any information exchanged to be treated as confidential. The information can be disclosed to third parties or third countries only if the jurisdiction supplying the information gives consent in writing.

Finally, improved transparency leads to good governance which is vital to the ability of the Australian Taxation Office to enforce Australia's taxation laws. In summary, the taxation information exchange agreement provides essential tools in Australia's effort to reduce offshore tax evasion; while the New Zealand arrangement will be beneficial to Australia in relation to assistance in the collection of taxes and the potentially lower withholding tax rates should the most favoured nation clause come into play in the case of New Zealand. Therefore, we recommend that the members of the committee support the treaty action as proposed.

CHAIR—Thank you very much. This is the first treaty we have signed with Bermuda. We are also the third country to have signed one of these TIEAs with Bermuda. Was Bermuda the number one priority for the Treasury in signing a TIEA?

Mr Whyte—It was certainly in the top five.

CHAIR—So it is an important one, okay. Bermuda invested $2.2 billion in Australia in 2004 and was the fourth leading investor in Australia that year—that is from ABS data, would that be a bit of a surprise?

Mr Whyte—Not really, Bermuda is an offshore financial centre of substance. There are a lot of genuine businesses there. For example, it is a leader in the insurance market. If you look at some of the information that is out in the public domain, it is third in the world after New York and London in those markets, so that gives you a bit of an idea of how big they are. We see, from our work through the AUSTRAC database, quite substantial flows between Australia and Bermuda. In particular, there are areas around fund management and also around foreign exchange trading. Different companies trade in the Australian dollar. The Australian dollar is in the top 10 traded currencies in the world. That is a lot of the sorts of things that we see.

CHAIR—But Bermuda is bigger than the United Kingdom in terms of foreign investment in Australia in 2004.

Mr Whyte—From the tax office perspective we mainly see the AUSTRAC type of transactions which is around the actual money flows. Certainly, it would not be anywhere near the size of the UK in relation to money flows. I cannot really comment on the ABS data.

CHAIR—Do we have a list of the 33 low tax jurisdictions which have made a commitment to the elimination of harmful tax practices?

Mr Whyte—Yes, we do.

CHAIR—Could we have that provided to the committee?

Mr Whyte—Yes.

CHAIR—I do not think we have it. Are you able to say which are the top five countries that the Treasury is interested in concluding TIEAs with?

Mr Whyte—I think I am. I do not actually have it with me but I can look at list. Bermuda is certainly up there, the British Virgin Islands is important as well, Vanuatu is important, the Channel Islands and the Cayman Islands are also important. That is probably about five or six.

CHAIR—That is five.

Mr Whyte—The Channel Islands are two countries—Jersey and Guernsey.

Mr WILKIE—I am just curious what the incentive there was. I think it is a great agreement. I think you have done well, but what incentive was there for Bermuda to agree to it? I would think that potentially they stand to lose a lot of money.

Mr Whyte—In Bermuda—and all countries are different—a lot of it is the type of markets they are involved in, they are on the world stage an offshore financial centre, as I said, of substance. For them, they want to be seen to be clean. That was a lot of what they saw. They wanted it to be seen on the international stage that they had good regulation in place, that they had exchange of information. They did not want to be seen to be somehow complicit in hiding Australian residents' money that they did not want to pay tax on—those sorts of things. They wanted to be seen to be a legitimate player on the world stage. Also, I think they saw this as partly a lot of money flows, and about encouraging financial business with Australia—that it would help with their credibility and things like that.

Mr WILKIE—I am curious why the existence and negotiation of this agreement were not made public.

Mr Whyte—I understand it was made public some time ago. Certainly it has been in the media a few times. The Australian Taxation Office published a publication a couple of years ago—I think it is mentioned in here—called 'Tax Havens and Tax Administration'. I don't know that it got wide press coverage or whatever.

Mr ADAMS—The OECD did a report some years ago, didn't they, which identified tax havens in the world? Was that the OECD?

Mr Whyte—Yes.

Mr ADAMS—And this is basically work that has come from that, isn't it?

Mr Whyte—Yes.

CHAIR—The ATO, the Australian Crime Commission and the Australian Federal Police have done an investigation of offshore tax havens. What other strategies are being looked at in addressing this?

Mr Whyte—We have a number of strategies in place. We have taken a multi-pronged approach in this area. Not one particular strategy will cover all the different issues. Just by way of introduction I will outline our objectives in this type of work and then talk a bit about the strategies that we have in place. We talk about the supply side. There we are talking about promoters and associates. The idea there is to strongly discourage the promotion of international tax avoidance and evasion arrangements to Australian residents, or non-residents with Australian sourced income. As well, we look at it in terms of the demand side—that is, the participants, the investors, the people who might get involved in these types of arrangements. It is a similar objective to strongly discourage the participation in international tax avoidance and evasion arrangements by Australian residents, and also again, non-residents in relation to their Australian sourced income.

The outcome we are seeking is a reduction in international tax avoidance and evasion, and that is one of the reasons why we have a multi-pronged approach to this area. Certainly one of the outcomes we are seeking is enhancing the community's confidence in the way the ATO is dealing with this area. You mentioned other agencies. An important part of this work is working with other agencies. Our approach is coordinated in the Taxation Office by a tax haven task force that was set up a number of years ago. Our strategy has been to increase our active compliance focus on promoters and their offshore facilitation and distribution networks that we might find in Australia. Sometimes we might find an offshore service provider operation maybe through someone in Australia. We would focus on them as well as the participants in the tax haven based arrangements.

We are also spending quite a bit of time increasing our understanding of the risks in this area and developing high-leverage strategies to address them, as well educating and informing the community. This is partly to discourage people and also to provide better education about the risks related to going into these types of arrangements. I mentioned a particular publication that the ATO published and in that publication we have what we call 'red flags' which, in many ways, are warnings to the ordinary taxpayer who might get caught up in some of these particular arrangements because they do not really understand what is involved. We do that in fairly plain language so that hopefully anyone can understand what they are.

Also, working with other tax jurisdictions is important—sharing intelligence as well as using the treaty network that we already have in place with our treaty partners. In particular, we are working through the OECD, through the working groups there. We also have a seven-country working group on tax havens which meets regularly and we have undertaken a number of projects working together. That group covers the UK, Canada, the US, Japan, Australia, France and Germany—so it is fairly broad. Also one of our strategies is around the negotiation of tax

information exchange agreements. We see this as an important part of this work and eventually having a network of these types of agreements in place.

We also make a lot of use of AUSTRAC information. We have online access to the AUSTRAC database so we are able to look at transactions between Australia and tax havens. For example, in the last few years we have issued over 1,300 questionnaires to people who have transacted with tax havens. That is in a situation where, on the face of it, we cannot tell whether it is an ordinary business or private type of transaction. So that is an example of the type of strategies that we have in place.

CHAIR—Are you able to say how many agreements like this we are currently negotiating?

Mr Whyte—Yes, we have nine other agreements that we are negotiating at the moment.

CHAIR—Are you able to say which countries?

Mr Whyte—Yes, I think I can. I have a list here. Antigua and Barbuda, Jersey, Guernsey, the Isle of Man, the British Virgin Islands, the Cayman Islands, Anguilla, the Netherlands Antilles and Grenada. In addition to that we have had what we call preliminary discussions with four other countries as well.

CHAIR—Are we negotiating one with Vanuatu?

Mr Whyte—That is one of the countries where we have had preliminary discussions. We actually have not started negotiations with them yet.

Senator McGAURAN—You spoke of cooperating and talking with other agencies such as the Australian Crime Commission. Would that also include ASIS or ASIO?

Mr Whyte—I would think not directly from the Australian Taxation Office, but they may have a relationship with those that I cannot comment on really—I do not know—but not directly from the Australian Taxation Office. It would maybe be through a referral to the Australian Crime Commission. I am not sure where. They may take it to one of those.

Senator McGAURAN—Nothing direct though? They may well have an interest in Bermuda for all sorts of reasons also. I must say you are on ball and on the job given this agreement because I agree with Mr Wilkie, I did also wonder what Bermuda's interest was in all of this. Could it be that the post-2001 war on terror atmosphere has broken down all these barriers?

Mr Whyte—I think that it has and I think it has also been the focus on anti-money laundering around terrorism as well. I think that while these do not necessarily go together they are linked up with financial flows and things like, and I think that that has certainly brought to the forefront these particular issues.

Senator McGAURAN—Who safeguards the safeguards? How do you know when to begin and end? Is it just typically a tax department discretion—'red flags' as you say? For example, you spoke of confidentiality. What are the penalties for releasing information that should not be released?

Mr Whyte—Jail.

Senator McGAURAN—That would be a safeguard?

Mr Whyte—There is a substantial fine and potentially a jail term for releasing information. So it is quite a significant issue for us individually, as officers.

Mr McBride—My understanding is that we have 40 tax treaties that all have exchange of information provisions. We have been exchanging taxpayer information for many years, and I am not aware of any instance where information that we have provided has been inappropriately used. There has been that safeguard protection and there is every evidence that it has worked over a large number of years.

Senator McGAURAN—Prior to this agreement—to put it in its simplest form—you were unable to go into people's accounts: AUSTRAC could track them to Bermuda but could not go in?

Mr Whyte—That is it. We could not get information from Bermuda without this. Once it is in place, we will be able to seek information about, say, ownership, banking details and that type of thing.

Senator McGAURAN—The Australian Crime Commission, working off you, can do that too?

Mr Whyte—They probably have their own powers. If we were working together, there might be some way of doing that.

Senator McGAURAN—So it is specifically a taxation department relationship?

Mr Whyte—Yes.

Mr ADAMS—These islands do not require their companies to pay income tax, and that is why they operate in this way.

Mr Whyte—Yes.

Mr ADAMS—They usually get their income from a consumption tax. Is that right?

Mr Whyte—That is correct.

Mr ADAMS—That is quite legitimate in world terms, but in some situations, which the senator alluded to, where we could not get any information even though we thought somebody was evading our tax. It might have been Mr Rawstron who mentioned penalties for passing on information to third parties. You mentioned that you have a seven-country task force. That does not mean those groups, does it? You can use the information you receive?

Mr Whyte—We can. We get information, and sometimes it is just general information. If it is taxpayer-specific information, it is exchanged under the treaty, and therefore secrecy and privacy is well covered.

CHAIR—Thank you very much for appearing before the committee today.

[11.34 am]

BACON, Dr Rachel, Acting Assistant Secretary, Office of International Law, Attorney-General's Department

BISHOP, Ms Karen, Acting Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

CHAPMAN, Mr Tim, National Manager, Cargo Branch, Cargo and Trade Division, Australian Customs Service

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

KELLEY, Ms Roxanne, National Manager, Research and Development, Australian Customs Service

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

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

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

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

Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991)

CHAIR—Welcome. On 13 December 2005, the Attorney-General, the Hon. Philip Ruddock MP, informed the committee about the draft law and justice legislation amendment marking of plastic explosives bill 2005 that will implement Australia's obligations under the convention. I thank the Attorney-General for his letter and making available to the committee a copy of the draft bill. In addition, I would like to inform witnesses that, under the terms of the usual treaty inquiry process, the expiration date for the inquiry into this treaty is 28 February. On 16 February, on behalf of the committee, I wrote to the Hon. Alexander Downer MP, Minister for Foreign Affairs, to inform him that the committee is reconsidering aspects of this treaty action and is continuing in its inquiry.

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 McDonald—Yes, thank you. The main point that I would like to make at the start is that in our statement before the committee on 7 November 2005, we mentioned the 1989 Lockerbie air disaster as the impetus for the establishment of the convention, which is absolutely correct, though in referring to that disaster we think immediately about carrying plastic explosives on passenger aircraft when we probably should have emphasised a little bit more that the convention is really much wider than that. It monitors and regulates the manufacture, possession and import/export of plastic explosives on a global level to ensure that plastic explosives, when used, can be detected. So in stopping something like Lockerbie, this aims at regulating the whole process—the legitimate and illegitimate trade in these explosives. We focused quite a bit of our discussion last time on the passenger situation.

Currently Australian manufacturers of plastic explosives for the domestic market are not required to tag or mark their plastic explosives with any detection agent in accordance with the convention. So Australia must ensure that its product is being used legitimately and that it complies with the international standards. Those standards are reflected in the obligations imposed by the convention in this bill. The convention, of course, requires that these markers be incorporated into the plastic explosives.

I understand that the practice is that airlines do not carry plastic explosives on passenger aircraft. Bona fide air based trade in plastic explosives occurs through air freight. Discovery of a plastic explosive on a passenger aircraft would be highly irregular and treated with suspicion regardless of whether the explosives were marked or not. However, marking or non-marking of that plastic explosive would be relevant to any investigation into these explosives. The legislation would provide the option of an offence in the event it is not marked, as required by the law. Other serious charges could be contemplated by the police. In the Criminal Code there are bombing related offences—in particular I refer to section 72.3 of the Criminal Code. In all this the Customs Service will have an integral role in the international compliance with the convention, particularly where the plastic explosives are being freighted into Australia.

Customs have tried and tested methods, regulating the legitimate trade in other goods, which can be applied to the plastic explosives. I should mention that to facilitate this there will be need to be some minor amendments to the Customs regulations. Mr Chapman, who is here from Customs, can answer questions about the methods Customs would use in enforcing the legislation.

Australia is one of the last countries to accede to the convention. This convention is the final of the 13 UN counterterrorism instruments that Australia is not yet a party to. In fact, since the last public hearing three more countries—Nicaragua, Thailand and Vanuatu—have signed up to the convention. It is something that is really needed as soon as possible.

Mr WILKIE—At the previous hearing evidence was received about the cost and exact number of units. It was suggested that that was unknown at that stage. Have you got an update for us on that?

Mr McDonald—It would probably be best to speak to Mr Chapman about that, because we have had some revision of our thinking about aspects of that.

Mr Chapman—As the committee would no doubt be aware, Customs does administer a range of import and export controls on a very wide range of goods of which the import into or export from Australia is controlled. They range from all sorts of weapons, strategic goods and body armour to things which have been in the media over the last 12 months, like human embryos, dog and cat fur and hand-held electronic shock devices. These are all prohibited imports and they cannot be brought into the country or exported unless the importer or exporter has permission to do so.

The view that we have collectively come to is that a similar program would be the most effective way of controlling the import and export of plastic explosives, both marked and unmarked, into and from Australia. This would require amendments to the Customs prohibited imports and prohibited export regulations.

This takes the focus away from trying to have a broad-brush technology to identify any importations or exportations of unmarked plastic explosives which would be contrary to the MARPLEX convention. The regime which is being contemplated is that all plastic explosives would become regulated goods, so the import or export of those goods would be prohibited unless permission was given to import or export. Conditions would obviously attach to that permission, such as that it is MARPLEX-compliant. Other risk assessments could be done to confirm that it was a legitimate movement of goods across the border. Essentially, this would mean that, if any goods appeared at the border which did not have the required permission, Customs would be able to seize those goods as prohibited imports. It would also mean that we would not have to intervene with every movement of plastic explosives across the border. That obviously has an impact on trade, on legitimate companies that use plastic explosives, on the Department of Defence, and so forth.

The enforcement side of this is obviously very important and we would approach it in the way that we approach the enforcement of other prohibited imports and exports, which is to select, using the combination of intelligence, profiling and targeting, those shipments which we believe might be suspicious in some way. Obviously, if we find goods which we believe to be plastic explosives—marked or unmarked—which have not been declared or for which there is no permission, we have the legislative power to intervene and to act at that stage.

Even if there was a permission to import that we had reasonable suspicions about, we would be able to hold the goods and conduct tests on them—perhaps through a laboratory—to confirm that they did meet the conditions of the permission to import.

That is the broad structure of the approach that in discussion we believe is the best way to control that import and export. It is consistent with what Customs does with a large range of other goods and it does move that focus away from trying to have a regime where we are broadly screening very large amounts of cargo to find very small amounts of potentially prohibited imports. I do not have the precise figures for imports of plastic explosives because they are mixed up with those for some other explosive materials. In the broader group there were 118 importations over a 12-month period in the 2004-05 year, so the plastic explosives figure would have been considerably less than that.

Mr WILKIE—I think the treaty objective is quite positive in that it is ensuring that plastic explosives are marked and can be detected more readily than they have been in the past. As for the main problem that we had last time, what we were really looking at was if Customs could detect plastic explosives. What equipment are Customs getting to detect plastic explosives? Where are they going to put it? How much is it going to cost? Who is going to pay for it? These are the sorts of questions that were not covered last time. Maybe somebody can expand on those.

Ms Kelley—I can give you some information about the current technology we have and some information we have about possible technology that we need to test further. At Customs we have a range of technology that can detect trace or bulk explosives. Nationally, we have 85 X-ray machine units. They range in size from our large sea cargo container X-ray units—we have four of those—to five large pallet X-ray units and to our 18 mobile X-ray vans. The rest of the number is made up of cabinet X-ray units, which are largely at airports and in mail centres. We also have what we call ion mobility spectrometers. We have 41 of those, which can operate in dual mode; they can detect both narcotics and explosives. They are the same as the type of machines that you probably see at domestic airports if you are lucky enough to be selected for further screening for explosives. We have those exact same machines, and they are in all of our operational settings. While they are capable of detecting a wide range of explosives, they are not capable of detecting markers or taggants. We then have five specialised machines based on selected ion flow tube mass spectrometry—or SIFT-MS, which is probably an easier way of saying it.

Mr WILKIE—Can I ask you for a clarification. So at the moment none of those 85 units can detect markers?

Ms Kelley—The X-rays show up shape and density. If there were particular shapes of explosive or trigger devices, the X-rays would pick those up. The ion mobility spectrometry machines can detect explosives but they cannot detect the markers or taggants.

The next set of machines are based on a fairly specialised mass spectrometer which can detect a range of volatile organic compounds. We have them at our sea cargo examination facilities. The manufacturer has advised us that it could program this machine to test markers or taggants, but we have not been able to test that. Customs approaches what manufacturers say with the view that we like to test that in the field to actually prove that that is correct and accurate. We would need to explore that further.

We have got another 10 units of a new machine. It is called a BIOSENS D. It is an antibody based detector. We are using this as a complementary tool to the ion mobility spectrometer. If the ion mobility spectrometer says it has detected the presence of an explosive, we will then use the BIOSENS D for a confirmation test, because it has a much lower false-positives rate. We have these units deployed at airports and container examination facilities. We are looking at purchasing more of these. However, the BIOSENS D is not suitable for taggant detection.

In terms of our range of technology for explosives, we have finalised an evaluation of some automatic explosive detection X-ray machines. We are going to deploy them at the Sydney and Melbourne postal facilities. We have also heard that another company has indicated that it has a product which can detect some markers or taggants. We have not tested that bit of equipment.

Until we do, using our independent scientists to do a full evaluation, we would not feel comfortable to say that the machine is suitable for this purpose.

Mr WILKIE—I have a concern. We are ratifying this treaty, which requires us to mark explosives so they are tagged so they can be detected, but we have not really got any way of actually detecting them. We have talked about it but it should have formed part of this discussion. We should be able to know that if we are going to implement this treaty we can comply with it. What appears to be being said here is that we are going to ratify it, it is going to be great and everybody else is going to be able to comply, and the manufacturers will comply, but in reality when it comes down to testing it ourselves and complying with the obligations, we cannot do it.

Mr McDonald—That is not correct. We have just heard here that we can detect explosives—

Mr WILKIE—You are putting in this marker so that you can detect the marker. In order to comply with the treaty you have to be able to detect the marker. Otherwise, what is the point of having it in the explosive?

Ms Kelley—We have checked with other customs administrations and had a discussion with the FBI around their process for markers and taggants. Our understanding is that their process is exactly the same as ours. They have technology capable of detecting the explosives but then they send the explosives to a laboratory for the marker and taggant to be identified. That seems to be the international process at the moment. Laboratories are used to identify the taggants and markers.

Mr WILKIE—The taggant and marker is not there for you to identify an explosive; it is there so you can find out where it came from?

Ms Kelley—Yes. That is an important distinction. We can detect explosives but we do not have the capability at the moment to detect the markers or taggants, but laboratories do. The international process for the FBI and equivalent customs services is that they send the explosive to a laboratory for that detection.

Mr WILKIE—You are saying that this is not going to enable us to find any more explosives than we have found in the past; all it is going to do is help us identify where they have come from?

Ms Kelley—Yes.

Mr WILKIE—That is a clear distinction.

Mr ADAMS—I am not quite sure how many countries have agreed to this treaty, but it comes together to try to get some control over the amount of explosive that is made in the world and to know and identify where it comes from. That is the basis of the treaty, is it?

Mr McDonald—Certainly, it is about the whole issue of trafficking in explosives. Clearly, if there is a tragedy and the explosives are marked then from a forensic point of view that is an indication that they have been diverted from legitimate sources. Issues about identifying those

sources flow from that. On the other hand, if it is discovered that the explosives involved are not marked then that provides certain other indications. Where you have a problem with, let us say, illegal terrorist oriented activity in this sphere there would be many other components to the investigation.

Mr ADAMS—Of course. Several weeks ago I asked a question, which I received an answer to, on the amount of explosive that came into Australia over a period of some years. There seems to be enormous gaps in this information. I was also seeking to know whether we manufactured it in Australia and therefore whether we exported it. Do we have any of those figures?

Mr McDonald—We have the figures here for quantities manufactured in Australia.

Mr ADAMS—I do not have that sheet with me.

CHAIR—We have a letter from the former Minister for Defence giving us the quantities manufactured in Australia.

Mr ADAMS—There were variations on years, weren't there?

CHAIR—It is on page 286.

Mr ADAMS—I was interested in the variations on the years. There seems to be an enormous amount manufactured in 2001-02, nil in 2003, 165 kilograms in 2004 and 27,940 kilograms in 2005. Mr Hayward, can you throw some expert light on this?

Mr Hayward—It is an issue to do with supply chain dynamics and economic order quantity issues. When Defence orders ammunition, including explosives, it tends to be a batch production type process where we will buy two or three years worth in one go because that is the most economical way to manufacture it. That is fundamentally the answer. The nil quantity in 2003 was probably because in the previous two years we had met our requirements for the next few years. I do not know the exact answer about the 165 kilograms, but I suspect that may well be a very small amount that was used for qualifying a process. The manufacturer may have changed the process so they manufactured a small amount to prove that the new process produced the right quality.

Mr ADAMS—Putting the taggant in it?

Mr Hayward—No, these quantities are manufactured by ADI at Mulwala and they do not include a taggant at the moment.

Mr ADAMS—They have not started that process?

Mr Hayward—No.

Mr ADAMS—You said that you had those in some ports and airports. Do you have a list of where they are? Can we have that?

Ms Kelley—Yes, we can provide a list of where the equipment is.

Mr ADAMS—Thank you. And the different sorts of machinery?

Ms Kelley—The different machines and their locations.

Mr WILKIE—Once we have found explosive we can find out where it has come from. But the amendment is really talking about increasing the level of the detection agent—not a marker; a detection agent—DMNB from 0.1 per cent to one per cent. It even talks about the national interest analysis. It says that this detection agent or deodorant is 'to be incorporated in the manufacturing of plastic explosives, imposing on the state parties an obligation to control the position and transfer of existing stocks of unmarked plastic explosives'. We are not talking here about finding out where it came from. We are talking here about detection. The whole idea of increasing the deodorant is to detect plastic explosives. That is why I want to find out what we are doing about ensuring that we can comply with our obligations by having equipment that can detect it. Otherwise, what is the point of doing it?

Mr McDonald—The concept of detection needs to be read in the light of the whole convention. Detection has a broader meaning than just the limited way you suggest. Detecting whether it comes from a legitimate or illegitimate source will be very valuable to law enforcement. The scheme of the legislation is one which is holistic. It covers manufacture, import, export and possession.

Mr WILKIE—You have to have equipment to be able to locate it.

Mr McDonald—We have equipment that can find the explosives, whether marked or unmarked.

Mr WILKIE—But this is talking about an odorant.

Mr McDonald—Yes, and then there are labelling requirements. There is a whole heap of requirements under this legislation. Of course, Customs have mentioned some equipment that they are investigating which would be calibrated to detect the marker, but the main safeguard is all the equipment, which has been outlined here, which deals with detection of explosives. Of course, that is an area where we have quite a lot of existing equipment. Clearly, government is always reviewing what equipment it has and there are obviously budget processes and things like that, which I think I might have mentioned last time that I cannot really go into. But it seems to me that, from what Customs have outlined, they certainly have the equipment to find the explosives.

Ms Kelley—I think it is also important to emphasise the way we use our equipment. Technology is a tool. It is really important that it sits within a framework of risk assessment and sits within a really solid policy framework as well. Sometimes people expect a lot of technology and do not take into account that there are false positives and there are false alarms. We need to factor in that technology is not going to solve all the problems. Because of that understanding, Customs is putting into place a layered approach. Part of what we were talking about with the permit-issuing approach, combined with our capacity to detect explosives is that it provides more of a safeguard than just spending a whole heap more money on technology.

Mr WILKIE—I agree with you there, but what I am talking about is the context of the particular treaty we are looking at. In the context of this specific treaty, which is about increasing the agent from 0.1 per cent to one per cent so that it can be detected, what I am being told is that we cannot actually detect it with the equipment that we have. We may need to buy more equipment. It is a good thing to do internationally, and I agree that increasing it is a good thing. But, if we are not going to be able to detect the actual ingredient that we are putting into the explosive, we are not able to comply, are we?

Ms Kelley—We will not be the only country that will not be able to comply, because the equipment that we have purchased is internationally available. Most other customs services actually have similar equipment to us.

Mr WILKIE—I just want us to be honest about that.

Ms Kelley—I am just saying that there is a difference between detecting explosives and—

CHAIR—Perhaps I could clarify something. Is it true that, in most European and North American countries, they do not detect this odorant at the airport or at the port?

Ms Kelley—That is correct.

CHAIR—Is it then true that they are set up to find plastic explosives, marked or unmarked?

Ms Kelley—They would have technology similar to that I described to you.

CHAIR—So this odorant comes into play when the plastic explosive is found and it is sent off to a laboratory. That would be the practice in European countries and North American countries?

Ms Kelley—That is our understanding.

Mr WILKIE—That is not what the object is. The object is that it is a detection agent. That is certainly stated in the treaty. It is a detection agent.

CHAIR—Hold on! Is there any country which detects this odorant at the airport or at the ports that you are aware of?

Ms Kelley—No, there is not.

Mr McDonald—I have one other clarification. I think there was mention of the increase of the amount of this stuff in the plastic explosives. The purpose of that is to make sure the marker stays in it for a longer period of time. That was the main reason the percentage was increased. I just wanted to clarify that.

CHAIR—Could I clarify: was it ever the intention of the treaty that the odorant would be to find the explosive or is the odorant to identify where the explosive has come from? There seems to be some confusion about the terminology here.

Mr McDonald—I think I should take that particular issue on notice. It could be that, in the early stages, they may have had greater aspirations for it. You will recall, of course, that it came out of the Lockerbie tragedy. That may have been the aspiration. Can anyone here provide a better answer to that?

Mr Chapman—This is a very minor point. My understanding is that by being able to identify the source of the plastic explosive you automatically have much greater controls on its movement between countries. The unregulated movement of plastic explosives is more difficult simply because the market is going to identify to any later forensic process where it was actually made. The point for us—and Ms Kelley identified the layered approach we have—is that a permit based approach gives a degree of confidence in the first place that you know what is coming in and what is not coming in. If we identify any plastic explosive which comes in without a permit, whether it is marked or not, an offence has been committed and we can seize the goods. If further laboratory analysis shows that it is unmarked plastic explosives, that is an additional offence against the Criminal Code. So there are multiple levels of it there.

CHAIR—This may have been covered in the previous public hearing. The bombing over Lockerbie was in 1988, and this treaty was opened for signature in 1991. Was a decision made that Australia not sign or was this one that just passed us by?

Mr McDonald—This was an initiative which has had considerable competition on the legislative program in terms of the various priorities. My previous answer was pretty up-front about that—there were many other terrorism related initiatives which basically got greater priority. We can be quite up-front about the fact that, as one of the last countries to be signing this convention, we need to give it attention.

CHAIR—Was a decision ever made not to sign?

Mr McDonald—I am not aware of any decision made not to sign. But I guess when you select your priorities to do something positive in a different area you are making a decision about that area and not this. I am not aware of any decision not to sign this. Of course, I am very aware of the decision to sign it.

CHAIR—So it was never really ever considered from 1991 to 2004?

Mr McDonald—For that whole period, especially the early part of that period, I could not swear that it had never been looked at, but I am certainly not aware of a decision that this would not be done. Of course, we dealt with getting authorisation for this amendment. My memory of that authorisation process is that we were not overruling a previous decision. In that period of time, of course, there have been two different governments as well.

Mr ADAMS—I take it that in the Lockerbie disaster they could not identify where the explosives came from.

Mr McDonald—The Lockerbie disaster raised issues about the regulation of these explosives. I do not think that it would have been necessarily the total solution to the Lockerbie disaster. Someone managed to get plastic explosives in a cassette player onto the plane. So there were a whole heap of other factors. Did they have scanning equipment? As has been described,

probably not. Did they have the sort of screening that we have now? No. There would have been a lot of factors in it. As I tried to explain at the start, last time I got a little bit carried away with Lockerbie. The result is a holistic thing going from manufacture to importation to possession—right across the board.

Mr WILKIE—A 'detection agent' is a substance, as described in the technical annex to this convention, which is introduced into an explosive to render it detectable. From the evidence you are giving today, it sounds as though, in the area of detection, they are talking not about a detection agent to find an explosive but a detection agent to find the agent itself. Could you clarify that, because it gets to the heart of what I have been asking. Is the agent there so that you can detect the explosive or is it there so that you can detect the agent itself and, therefore, determine where the explosive came from?

Mr McDonald—I do not think we can add much to the answer we have already given on this.

Mr WILKIE—Do you have the technical annex there?

Mr Hayward—Perhaps I can hypothesise a view. Given the origins of the convention, adding a detection agent to plastic explosive was probably seen at the time as a fairly quick and low-technology answer, particularly internationally. It was perhaps pitched at the lowest common denominator in terms of countries' ability to deploy technology to detect explosive. In those days, dogs were perhaps the lowest common denominator to detect explosive. We now have technology that is capable of detecting explosive itself, which we did not have at that time. The addition of the marker may in some respects have been overtaken by events; nonetheless, the addition of the marker does make the plastic explosive more readily detectable than it otherwise would be. To that degree, putting a marker in is still a good idea.

Mr McDonald—If you look at obligations such as article 3 and article 4, it is very much about controlling the transfer—the movement and manufacturing—of unmarked explosives. So what we have been saying about that is outlined in the convention.

Senator McGAURAN—I have a question which is more inquisitive than directly related to the protocol itself. Ms Kelley, you mentioned the different technologies and how it is not a panacea. Instinct is equal to technology sometimes. I cannot help but think of the foiling of the shoe bomber. Do the instruments you walk through at airports detect plastics?

Ms Kelley—The instruments that you walk through in airports are metal detectors. They are not ion mobility spectrometers, which take trace elements from baggage, cargo or whatever. There are now some ion mobility spectrometry portals being deployed. The US has deployed around 250 of them at its airports. People walk through them and, they say, they puff compressed air on you. My experience is that it is quite a strong puff of wind. It takes a sample and it can detect both narcotics and explosives that a person may be carrying. Those machines are being tested in the UK. We have run a small trial of one at Sydney airport as well. So we are looking at actual portals that can detect explosives that people may be carrying. But that is still fairly new and cutting-edge technology.

CHAIR—Thank you for coming back before the committee and helping our deliberations on this treaty.

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 12.15 pm