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JOINT STANDING COMMITTEE ON TREATIES

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JOINT STANDING COMMITTEE ON

TREATIES

Monday, 19 June 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, Mrs Mirabella, Mr Ripoll and Mr Bruce Scott

Members in attendance: Senator Trood and Mr Adams, Mrs May, Dr Southcott and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 10 May 2006

WITNESSES

Committee met at 10.32 am

CHAIR (Dr Southcott)—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 seven treaty actions tabled in parliament on 10 May. I thank witnesses from various departments for being available for a discussion on these treaties today. 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.

[10.33 am]

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

LENDON, Mr Bruce, Director, Africa Section, Department of Foreign Affairs and Trade

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

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

STEVENS, Major General Paul, AO (Retired), Director, Office of Australian War Graves, Department of Veterans' Affairs

UPTON-MITCHELL, Mrs Katherine Elizabeth, Deputy Director, Administration, Office of Australian War Graves, Department of Veterans' Affairs

Agreement between the Government of the Republic of Namibia and the Governments of Australia, Canada, India, New Zealand, South Africa and the United Kingdom of Great Britain and Northern Ireland concerning the Treatment of War Graves of Members of the Armed Forces of the Commonwealth in the Territory of the Republic of Namibia

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this proceeding 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?

Major Gen. Stevens—The purpose of this agreement is to strike an arrangement with Namibia over the handling of war graves for which the Commonwealth War Graves Commission is responsible. Australia and the other countries you mentioned in your introduction are the constituent members of the Commonwealth War Graves Commission, and that commission, on behalf of those countries, looks after the war graves of those who died in World War I and World War II. It also maintains memorials for those who have no grave—that is, those who are missing. To do its job, the Commonwealth War Graves Commission strikes agreements with countries in which war graves are located, but, as it has no international legal standing of its own, the member countries sign the agreements with the country in question, and that is what is being proposed in this particular case. As you would have seen from the papers, there are 21 other countries with which similar agreements have been struck, the latest of which was in 1991. I think that was before this process began. We see this particular agreement as part of a continuation of our support for the Commonwealth War Graves Commission.

CHAIR—Has Australia signed the agreement?

Major Gen. Stevens—No.

CHAIR—Is it normal practice for an agreement to be signed before it is tabled in the parliament?

Mrs Upton-Mitchell—No.

Major Gen. Stevens—This is the first time we have brought such an agreement, but I would say the answer would be no.

Dr Bacon—Maybe I can clarify, Mr Chair. There are a couple of ways that Australia can become a party to a treaty. We could sign and then ratify—that is, we would have a signature and then we would ratify—or we could accede to a treaty, and accession would be one process rather than a two-stage process of signature and ratification. So it is possible for us to do it in a one-step process.

CHAIR—Are there any questions?

Mr ADAMS—That is pretty straightforward. I commend the office for the work they do. I have an uncle, my grandfather's brother, who is buried on the Somme. You were very kind to find his grave for me, and I was able to visit there many years ago. What is the actual cost per year now that we put into the commission?

Major Gen. Stevens—Australia contributes to the commission on the basis of the percentage of war dead that Australians constitute, which is about six per cent. From memory, we contribute about $6 million annually to the Commonwealth War Graves Commission.

CHAIR—Is it true that the task of maintaining Commonwealth graves in Namibia is being contracted out to a private company, Kriegsgraber Fursorge Namibia?

Major Gen. Stevens—I would have to take that on notice. I do not know off the top of my head.

CHAIR—Okay. Do you know whether this company is going to continue to have the responsibility of maintaining Commonwealth graves?

Major Gen. Stevens—Again, I will take that on notice. We will have to ask the commission itself.

CHAIR—The agreement does not stipulate how the upkeep and care of the graves will be done. How is that done? Is that done through the auspices of the Commonwealth War Graves Commission?

Major Gen. Stevens—That is done by the Commonwealth War Graves Commission according to their standards and policies.

CHAIR—Are there any further questions on this treaty?

Mrs MAY—Just on that issue: we can be sure that those standards will be maintained? Are we happy with what is in place to ensure that that happens?

Major Gen. Stevens—Yes, we are happy with what is in place. One of the members of the commission itself is the Australian High Commissioner to the United Kingdom, in London, so he constantly monitors the way the commission is doing its work on our behalf.

CHAIR—Prior to 1990, Namibia was South-West Africa. It was a territory of South Africa, which was a member state of this treaty. What is the status of Namibia—as this treaty was in operation until 1990, presumably—as South-West Africa was a territory of South Africa?

Major Gen. Stevens—I am not sure of the arrangement they had in place before Namibia became a country in its own right, but it is the standard practice for the commission to negotiate agreements with each country. They might have done it in those days through South Africa, but I am guessing. We would have to find that out as well.

CHAIR—It is not that important. There being no further questions, thank you very much for appearing before the committee today. That concludes the discussion on this treaty.

[10.41 am]

HUTCHINSON, Mr Peter, Section Manager, Agreements, International Branch, Department of Families, Community Services and Indigenous Affairs

STAWYSKYJ, Mrs Michalina, Branch Manager, International, Department of Families, Community Services and Indigenous Affairs

LATIMORE, Mr Leon, Analyst, Superannuation, Retirement and Savings Division, Department of the Treasury

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

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

WOODS, Mr John, Acting Assistant Secretary, Northern, Southern and Eastern Europe Branch, Department of Foreign Affairs and Trade

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

Agreement on Social Security between the Government of Australia and the Government of the Kingdom of Norway

CHAIR—I welcome representatives of the Department of Families, Community Services and Indigenous Affairs, the Treasury, 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.

Mrs Stawyskyj—The treaty action proposed is that Australia and the Kingdom of Norway enter into a new social security agreement. As you may have noted in the national interest analysis, the proposed agreement was signed on 2 December 2005. The new agreement is an important addition to Australia's network of 17 social security agreements.

Briefly, the benefits of such agreements are that they address gaps in social security coverage for people moving between countries; help people to maximise their income and allow greater choice in where to live or where to retire; contribute to the overall bilateral relationships between countries; and can also provide foreign currency benefits for a country. Agreement countries pay approximately $602 million per annum into Australia while Australia pays about $244 million in pensions into agreements countries.

The agreement with Norway is another shared responsibility agreement. Australia's current shared responsibility agreements are with Austria, Belgium, Canada, Chile, Croatia, Cyprus, Denmark, Germany, Ireland, Italy, Malta, the Netherlands, New Zealand, Portugal, Spain and the United States of America. Consistent with Australia's other shared responsibility agreements, the new agreement will allow people to lodge claims from the other country, overcome time and other limitations on the portability of payments if people live in either country and provide avenues for mutual administrative assistance to facilitate the determination of correct entitlements.

From Australia's perspective the agreement will cover age pension and disability support pension. Outside Australia, disability support pension will be limited to those people who are severely disabled. Norway will reciprocate with the age pension, disability pension and pensions for survivors. The agreement also includes provisions to avoid double coverage for seconded workers. These provisions are also included in our agreements with Belgium, Chile, Croatia, Ireland, the Netherlands, Portugal and the United States of America.

For Australia, these provisions affect the operation of the superannuation guarantee laws and have been negotiated in close cooperation with our colleagues in Treasury, who are responsible for their administration. Mr Leon Latimore from the Treasury is appearing before you later today and will be able to elaborate if the committee has particular questions about that aspect of the agreement.

In January this year, a letter of information and an information paper were sent to Norwegian community groups for consultation—seven groups were consulted with—and to 20 welfare organisations and to all state and territory governments advising them of the new agreement. Comments on the new agreement were invited. Comments supporting the agreement were received from the Multicultural Communities Council of South Australia. The Federation of Ethnic Communities Council of Australia did not comment directly on the agreement but did raise concerns about the treatment of overseas pensions as income for the purposes of determining the rate of Australian pensions payable. A reply was sent to FECCA advising them of the rationale behind the assessment of overseas pensions as income.

CHAIR—Thank you very much. Is there any more detail you could provide about the concerns raised by the Federation of Ethnic Communities Council of Australia?

Mrs Stawyskyj—The Federation of Ethnic Communities Council of Australia members were concerned about the fact that in the Australian social security system a means test is applied and therefore pensions, or income received from overseas pensions, will be counted in that means test. That is their main concern.

CHAIR—I am unfamiliar with the Norwegian social security. Do they apply an income or assets test to their pensions?

Mr Hutchinson—In general, they do not. They have a contributory system. They have a basic pension which is paid based on residence in Norway. You achieve a maximum basic pension after 40 years residence in Norway. They have a supplementary pension scheme as well, which is based around earnings, perhaps broadly similar to our superannuation guarantee. And they

have, like most countries, a range of special supplements, which are income tested, for people who do not have sufficient insurance coverage.

CHAIR—Could you clarify whether a person eligible for full dual entitlement would receive two full entitlements: one from Australia and one from Norway? Or would the recipient be able to claim equivalent to only one title?

Mr Hutchinson—Essentially, a person who received a full Norwegian pension would not receive a full Australian pension, because of our income test. But, as we pointed out to the Federation of Ethnic Communities Council in our reply to their concerns, the means test in Australia is relatively generous in terms of there being a very significant free area up to which a person can have income and still not affect their Australian pension. And, of course, there is a taper of 40c in the dollar. A pensioner with other income, whether it is from private earnings or overseas pensions, is still significantly better off than a pensioner without any private income.

Mr WILKIE—I read that the legislative instruments will be tabled prior to JSCOT reporting on the treaty. Why was the treaty not referred to JSCOT earlier so that we could have completed our review before the tabling of the legislative instruments?

Mr Hutchinson—As you may know, the agreement was signed only last December. We endeavoured to have it tabled for the committee as soon as we could thereafter; unfortunately it was not tabled until 10 May. In terms of treaty action, the regulations, which we also have to table as part of the Social Security (International Agreements) Act, must be tabled in parliament for 15 joint sitting days. They are going to the Governor-General and Executive Council on the 22nd of this month. If they are approved then they will be tabled in August. So the tabling period for the regulations under the Social Security (International Agreements) Act will not expire, from memory, until roughly a month after the committee's report is due.

Mr WILKIE—Was that an oversight on behalf of the department? Did they not realise that they had that time constraint? Normally, this would be something that we would only accept in extreme circumstances; it does not seem that this is a treaty of such urgency that that test would apply.

Mr Hutchinson—We have agreed with Norway that we would aim for implementation on 1 January next year, and the agreement itself provides that each side must exchange diplomatic notes advising the other of the completion of all processes in each country before the end of October. In order to do that we have had to overlap the committee's tabling period slightly.

CHAIR—We looked at a social security agreement with Belgium three years ago. When are you expecting that agreement to enter into force?

Mr Hutchinson—That agreement entered into force in July last year. In fact, I noticed an error in the NIA—

CHAIR—We saw in the NIA—

Mr Hutchinson—I was just going to say, I think the NIA refers to the agreements with Belgium and with Malta as not being in force. But both agreements came into force last July. I apologise for the error.

Senator TROOD—Why did it take so long for the Belgian agreement?

Mr Hutchinson—It depends on the constitutional and legal processes in each country. Most countries tend to take roughly the same time as Australia does—between six and 12 months. But when we were negotiating with the Belgians they forewarned us that it would take them at least three years. In fact, it did take three years. We had to get our embassy in Brussels to help us to push them along a little bit to achieve the agreed date.

CHAIR—When we reported on the Belgian one, we got evidence that there were plans to evaluate the social security agreements with the United States of America and also with Germany. Have those evaluations taken place?

Mr Hutchinson—We did a preliminary assessment. I think I am correct in saying it was about 18 months ago. I will have to check, but I think we forwarded some preliminary information to the committee in 2004. Because these things move slowly, we are still in the process of trying to get further information. We would be happy to update the committee on that if it wishes us to.

CHAIR—Yes, if you could; thank you very much

Mr ADAMS—Is there any difference between this one and any other social security agreement we have? Is there anything out of the norm?

Mr Hutchinson—No, not really. The fundamental principles are the same in all our agreements—that is, we allow people to claim, whichever country they are living in; we export the payments and we allow people to add periods of insurance in the other country to periods of residence in Australia. The other country does the same.

Mr ADAMS—But you are not allowed to get two?

Mr Hutchinson—Our system is a non-contributory system; it is a means-tested system, and other countries recognise that.

Mr ADAMS—What is the status of our agreement with Switzerland?

Mr Hutchinson—We are in the process of finalising that. It has taken much longer than we had expected, but we are hoping that it will be signed during a high-level visit by a Swiss minister later this year.

Senator TROOD—Are there any other agreements that are in negotiation?

Mr Hutchinson—We have a number of other agreements under negotiation. We have an agreement with Japan that we hope to finalise and sign this year. We are in negotiations with Korea and with Latvia, and we have just begun talks with Greece.

CHAIR—What is the status of the talks with Greece? This has been foreshadowed for some time.

Mrs Stawyskyj—The Greek agreement has taken some time, but we are very pleased to be able to report that we met with the Greeks last week for our first discussions since about 1994. We had very productive discussions, mainly as an information exchange preparatory to the first negotiation discussions. The Greek delegation is expected to come out to Australia some time in September or October this year. Both sides agreed that it would probably take us two or three discussions, and there seems to be commitment on their side as well as ours to progress it as quickly as possible.

CHAIR—Thank you.

Mr ADAMS—And where are we with Germany?

Mr Hutchinson—We have an agreement with Germany that I think commenced on 1 January 2003. We are in negotiations at the moment for a supplementary agreement to include provisions for seconded workers affecting Australia's superannuation guarantee scheme.

Mrs Stawyskyj—Discussions on that will occur in two weeks time.

Mr ADAMS—This is to make sure that an employer only has to pay into one superannuation scheme—is that right?

Mrs Stawyskyj—Yes.

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

[10.55 am]

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

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

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

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

DAVIS, Dr Richard Linton, Head, National Security Science and Technology Unit, Department of the Prime Minister and Cabinet

FLOYD, Dr Robert Bruce, International Programs Coordinator, National Security Science and Technology Unit, Department of the Prime Minister and Cabinet

Agreement between the Government of Australia and the Government of the United States of America on Cooperation in Science and Technology for Homeland/Domestic Security Matters

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 or 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?

Dr Davis—Yes, please. Mr Chairman and committee members, this agreement will establish a formal arrangement to facilitate science and technology exchange and interaction on homeland/domestic security. Cooperation with the United States will be of significant benefit to Australia's security and also to our science and technology industry. Other bilateral and multilateral mechanisms exist but none provide the required scope—that is, homeland security which cuts across a number of federal and state departments; classification—this agreement goes up to 'top secret'; or degree of sharing and trust in terms of collaborative projects, staff exchange, shared intellectual property et cetera.

The scope covers any homeland domestic security activity which has a significant science and technology component and allows for different types of cooperative activity, such as development of threat and vulnerability analyses, staff exchange, prototype development and joint exercises. I note also that this potentially includes any events which have domestic security consequences such as extreme weather and pandemics, as well as specific activities around countering terrorism.

I will say a couple of things on the time line. Informal negotiations started in 2004 and there were a number of agencies and legal teams involved in that. We had formal negotiations on the agreement in August 2005. The Executive Council authorised the treaty for signing on 15 December 2005. It was then signed in Washington on 21 December by the Australian ambassador, Dennis Richardson.

For the future, the implementation of this agreement will be coordinated in Australia by the National Security Science and Technology Unit in PM&C. The intent is to hold regular meetings, alternating between the US and Australia, in order to maintain momentum and coordination. The activities to date, I would note, have helped bring together the relevant US and Australian communities of interest and have also energised a coherent Australian federal and state team, which bodes well for our future interactions. Thank you.

CHAIR—Thank you. We will go to questions.

Mr WILKIE—DSTO does a lot of work developing these sorts of technologies. You have mentioned that there are some intellectual property safeguards there. Can you outline what they are and how they would protect our department?

Dr Davis—I know that intellectual property was a major feature of the negotiations and a great deal of effort was made to make it explicitly very fair, such that all future collaboration effort and any royalties, licences and so on reflect the contribution of both parties. Rob, do you want to add any comments?

Dr Floyd—We were delighted with the outcome we managed to achieve with the text of this treaty, where there were some very significant concessions given by the US around intellectual property clauses. We had legal people from CSIRO and particularly the Australian Government Solicitor supporting DSTO and helping us through this intellectual property issue. The various parties we have consulted with are very happy with the outcome.

Mr WILKIE—Could you give us some examples of the sorts of projects we would be working on cooperatively with the Americans?

Dr Davis—Under this treaty?

Mr WILKIE—Yes.

Dr Davis—There are a number of areas. There are projects on chemical, biological, radiological and nuclear. They are looking at forensics analysis and detection methodologies. There has been potential work on port of entry scanning of cargo and personnel, and biometric analysis. There is a strategic risk assessment of the risk of terrorist attacks and so on. There is human and behavioural studies of the causation of terrorists and how you may identify them. There is also surveillance techniques either in airports or in other ports of entry. There is a range. In fact, the Australian delegation covers the state police and fire, and we have people from the department of agriculture, DOTARS and Customs. It covers a very wide range. I guess the things that will be taken forward will be those which are of most benefit to Australia that we can identify for which some collaboration with the US would take us significantly further ahead.

Mr WILKIE—You have covered some really important areas there across a whole range of different departments, I would think, both federal and state.

Dr Davis—Yes.

Mr WILKIE—But we have noticed in here we have had consultation with DSTO and CSIRO. What other consultations took place with other agencies that would be affected—both state and federal?

Dr Davis—The consultations to date include certainly the Department of Defence; Foreign Affairs and Trade; Transport and Regional Services; Attorney-General's; Education, Science and Training; Health and Ageing; and Agriculture, Fisheries and Forestry. We really have had a lot of interest from all these departments. In fact, we are running another session tomorrow where we are having representatives from each coming for a coordination meeting.

Mr WILKIE—Have there been any consultations with state departments?

Dr Davis—Yes, we have had representatives from water, fire brigade and of course police.

Dr Floyd—The states and territories have been made aware of this treaty through a number of the national committee structures that support national security and are very keen to engage. We are keen to see that roll out and ramp up. We want to walk and then run later. The states and territories, with the prime responsibility for the protection of people and property, are absolutely integral to the success of this.

Mr WILKIE—Thank you.

CHAIR—At paragraph 11 of the NIA it says that failure to ratify this agreement would stall the development of a number of projects. Have any joint projects commenced and, if so, what are they and what is their status?

Dr Davis—The one where we wanted to have the exchange of diplomatic notes was the Attorney-General's critical infrastructure protection modelling and analysis project, for which we did have explicit data and models that we wanted to exchange. I guess if the treaty stalled we would have to pursue other mechanisms for that. I do not think we have formally started any other collaborative projects.

Dr Floyd—That is the only one that has commenced to date, but the planning for a number of others is well advanced.

Mr ADAMS—The Attorney-General's has an agreement? I did not quite understand. It is a pretty bold statement that this committee is confronted with where it says that if we do ratify this then the whole world is not going to go forward in this area. I do not think what you have told us has justified that. Would you like to elaborate on that a bit more?

Dr Davis—We see the agreement as a very important mechanism. Mechanisms which went across a number of departments did not exist for national security exchange at the classified level. I guess if we do not have this mechanism for doing it, we would have to be relying on

some of our extant mechanisms, which then do not have that breadth and that ability to have the classified information exchange.

Mr ADAMS—On the issue of each party's intellectual property rights and the commercialisation of that, how do we protect Australian companies in that regard? The Americans are known to be pretty predatory.

Dr Floyd—The treaty lays out arrangements for establishing projects, and each project will be covered by a project arrangement which would be enforceable in national law. That is a hard wired implementation tool that is specified in the treaty—that there must be a project arrangement that outlines the kinds of issues that will be in the project arrangement and that the intellectual property clauses in the project arrangement must be in harmony with those outlined in the treaty. This was the mechanism we put in place so that each individual IP owner does not have to go through the same machinations of debate and discussion around intellectual property but can merely borrow the principles enunciated in the treaty.

Mr ADAMS—Why would the Americans want to do this with us? They have 50 times the amount of money in these scientific areas than we do. Are we leading in this in some regard?

Dr Floyd—That is right.

Dr Davis—There are certainly areas in national security where we have science and technology that is of real interest to the US, and they are very keen to get access to it. That gives us something to put on the table so that we can ask for work they are doing.

Dr Floyd—The critical issue is not the value but the niche capability. Australia has niche capability that is clearly world leading in a range of areas. That is why there is keen interest in cooperation.

Mr ADAMS—And collaboration might help us advance that quickly?

Dr Floyd—We can advance that. It also allows us to engage with the US in a marketing commercialisation opportunity. We really have to look at a global market.

Mr WILKIE—Is it suggested, for example, that we would use some of our intellectual property and use their money to help develop some of those projects? Is that what is envisaged? I can see that in the past a lot of DSTO stuff has gone overseas, because we have not actually been able to develop that even though it is world beating technology. Are they the sort of project areas you are looking at?

Dr Floyd—It certainly is a possibility that this treaty covers a whole range of activities, including research and development collaboratively but also information exchange, exchange of people materials and test and evaluation et cetera. But where new technology is being developed, there is the opportunity for the Australian IP to be protected but to engage with an investment from the US which could more rapidly bring that through to market and to benefit the security of both nations.

Senator TROOD—Did we initiate the negotiations for this treaty or is this treaty at the instigation of the Americans?

Dr Floyd—There was a mutual agreement that we wished to enter into such a treaty. The recently formed US Department of Homeland Security established such a treaty with Canada and the UK, but before they established the one with the UK we had already had some discussions about the possibility of such an arrangement with Australia. It was one that was mutually entered into rather than them just firmly approaching us and saying, 'We want to have this treaty arrangement.'

Senator TROOD—There has been some collaborative work previously, I assume. How has that been regulated and why is this a preferable way of doing it?

Dr Floyd—The key element that this treaty brings is the opportunity to coordinate and prioritise across the whole homeland security space. Yes, there are various links—say, Customs to Customs or from police to police et cetera—but there is nothing that allows us to look across the whole homeland or domestic security space and then manage an arrangement like this so we can prioritise where we want to see those activities take place and move forward. This provides us with an instrument that allows prioritisation.

Senator TROOD—Are we largely expecting that this is work that will be undertaken through agencies rather than being undertaken outside other research establishments in universities and places like that?

Dr Floyd—The research performers, where it is a research collaboration, could be private sector, could be government laboratories, could be universities—could be any of those. The areas of interest that currently have come to the surface come from all of those different areas. So it is not aiming at one particular area but is aiming to provide that broad enabling capability.

Senator TROOD—Have the Americans ratified it as yet?

Dr Floyd—Indeed they have.

Mr ADAMS—There is some interesting work being done in the nuclear industry in the way that the new era of nuclear energy will be dealt with. Will the treaty be touching on that? I am talking about the new and interesting ways of reusing fuels so that there is much less live or active nuclear material left over into the future. I have heard the Prime Minister and, I think, the President of the United States talk about that briefly. Is the treaty going to cover that?

Dr Davis—This treaty is obviously looking at anything with a sort of homeland or domestic security focus. The way that this may pan out in future does have implications. ANSTO is represented, of course, in our community and will be taking a direct interest in that themselves.

Dr Floyd—There is a range of linkages between the US Department of Energy and various Australian agencies already. We see an opportunity here to pick up on some of the gaps which are not covered. But there are very mature relationships on a number of those fronts. A lot of the non-security aspects around nuclear power—waste disposal et cetera—would be covered off under existing arrangements.

Mr ADAMS—What about carbon capture and looking at putting some of the nasties underground and things like that?

Dr Floyd—I would imagine that existing arrangements are facilitating those exchanges already. But if there are gaps and it fits within the scope of it then this treaty could certainly help with that.

Mr WILKIE—Looking at the treaty terminology, I see that it talks about technology for homeland and domestic security, which is fine. We are looking at including our Defence organisation in this. $US200 million in real terms in the United States is a drop in the bucket—it is probably less than three fighters, so in the overall scheme of things it is not much. What real access are we going to get to their intelligence area in terms of intellectual property and ability to work with them? Are we just talking about working with organisations like the FBI and those sorts of departments or are we talking about working with their defence people as well? As you know, they operate in very different fields as opposed to ours, because of our size. We are a lot smaller so we have put a lot of things through Defence. Is this going to lead to us getting far more cooperation with their defence people in the long term? Or is it just for homeland and domestic security type issues?

Dr Davis—Defence is certainly involved on the team. We have, as you will know, existing arrangements for a lot of defence and intelligence-to-intelligence communities information exchange. What our defence and intelligence people have been saying to us is that they really value the access being given to the other federal agencies which, normally, they would not be able to access through their Department of Defence-Department of Defense linkages. So they see a benefit from a slightly broader ability to have access. I do not know whether this would provide any further access to the Defence-Defense communities than we currently already have because, I imagine, that link is very well made.

Senator TROOD—Are you inspired by this example to think that we perhaps should negotiate similar treaties with other countries? If so, which ones were you thinking about?

Dr Davis—We certainly would agree that other nations would be of benefit. As to particular nations, we have been looking at the UK and Canada. They already have their agreements with the US. In fact, the US now has bilateral arrangements with a whole bunch of countries. It would be much more efficient for us, probably, to end up with some sort of quadrilateral or five-ways agreement between a number of interested parties, and the UK and Canada are certainly two that we are looking at at the moment.

Senator TROOD—Have you made any progress in negotiating those treaties?

Dr Davis—We are at the informal stage. We have talked to the people who would be involved in the negotiations; we already have their enthusiastic support, I would say, for going down that path. I would hope that within a year or so we might be able to have a quadrilateral arrangement, at least.

Mr ADAMS—We could call that 'commercialising security', could we?

Dr Floyd—That is probably not the title we would use!

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

[11.16 am]

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

McFARLANE, Dr Neil Gerard, Director, Africa and Multilaterals Section, Australian Agency for International Development

O'BRIEN, Ms Julia Catherine, Policy Officer, Australian Agency for International Development

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

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

The International Institute for Democracy and Electoral Assistance Statutes (as amended at the Extraordinary Council meeting of International IDEA on 24 January 2006)

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

Dr McFarlane—Yes, I do. Thank you, Mr Chair and committee members. The International Institute for Democracy and Electoral Assistance was established in 1995. Australia was a founding member at the time, and we officially ratified in 1997. Two amendments have come to the statutes: one in 2003 on the status of associate members of IDEA and the most recent ones, in 2006, on fundamental governance reforms and arrangements cleaning up the governing council of the IDEA. Basically, the statutes say we need to strengthen the council, create a steering committee for the council, elect a secretary general, change the board of directors to a board of advisers and generally clean up the governance arrangements of IDEA. We generally support all the statute amendments.

I will note a few things. There will not be any financial mandatory implications for Australia. We need to agree to promoting the principles of supporting and promoting democracy, which IDEA outlines. The only possible impact we see is on privileges and immunities if IDEA decides to set up an office in Australia, which is unlikely at this stage. In the process of consultations in drafting the national interest analysis, we received comments from Attorney-General's, Foreign Affairs and Trade, Australian Electoral Commission and the Centre for Democratic Institutions. The latter two said they had productive working relationships with IDEA. The Minister for Foreign Affairs has approved the amendments, and the Special Minister of State, Gary Nairn, as well as the Attorney-General have recommended that we ratify the amendments.

In terms of our activities, we do not have a huge range of activities with IDEA. The AEC, the Electoral Commission, has had a strong BRIDGE project that they worked on with them, which was quite successful. There are a couple of projects in Indonesia that we have supported with IDEA. There are some possible ones in the Pacific that we are looking at. They are a good organisation at the international level. They do not work a lot in our region. But we use it very much for the aid program in our political governance work, so they can be an important partner for us in projects in the region.

CHAIR—Thank you very much. Most countries have something like the Australian Electoral Commission and something like our Centre for Democratic Institutions. I would like some more information about how IDEA interacts with the national electoral commissions but also with groups like the National Endowment for Democracy, IRI, NDI, the Westminster foundation and, in Australia, the CDI. What is the difference between those two groups?

Dr McFarlane—The CDI is more regional and is based in our region. IDEA is much older and is across the world. Its most important functions and most concentrated efforts, I would say, would be in Latin America and Africa, and that is why they are based in Stockholm. They are very good at training in electoral processes—training people in how to run elections, in how to do ballot papers and in all the ins and outs of running an election. They are very important in terms of giving us an overview of what works in different scenarios in different countries because one model does not always fit. Basically IDEA has all the intellectual and research capacity to help national governments run elections and run parliaments.

CHAIR—Does IDEA rely more on the Australian Electoral Commission to provide this sort of service in our region in places like East Timor and the Solomon Islands?

Dr McFarlane—Yes, that is right. We have had a couple of projects in Indonesia we have been looking at and possibly in the Pacific. We are just looking at them. We tend to find that the CDIs and the AEC, in particular, are probably better performers in terms of knowing how our region works, and we tend to focus our activities through those organisations.

CHAIR—Going back to my original question, what is the interaction between CDI and IDEA?

Dr McFarlane—I think it is an informal one. I think CDI tries to get to their meetings as often as they can, but, from talking to the new CDI director, I do not think he has managed to go around to IDEA. They certainly meet them regularly in the margins of other conferences and meetings and are certainly very interested in their research work and what is going on in the rest of the world. It is sort of a loose connection but an important one. I guess they are the same players in the same kind of field.

Senator TROOD—The NIA in paragraph 12 speaks about Australia possibly coming under some pressure to more actively participate in working groups and things of that kind. What is the source of that pressure? Why do you think that is likely to be the case?

Dr McFarlane—In the past, IDEA had a board of directors. We were not a member of the board; it was just individuals who had substantial experience. We have never been a board member but we have been a council member. As we go into this more strongly—the council

taking over the governance of IDEA instead of the board of directors—we feel that each country now, it is a much more intergovernmental body, is going to have to start thinking about putting more effort into some of the working groups of IDEA. There will perhaps be some pressure for us, for example, to be on one of the steering committees or the steering committee for a short period. That will probably be on a rotating basis. Possibly we might need to talk a little bit more about what we are doing in East Timor, Indonesia and the Solomons as kind of case examples for IDEA to look at.

Senator TROOD—Are we comfortable with this and prepared to accept this possibility?

Dr McFarlane—Yes. I think it is important that in our region we follow what is working and what is not working in the rest of the world.

Senator TROOD—How does one get to be a member of the board? Is that an elective process? Are we likely to be seeking membership of the council?

Dr McFarlane—We will sit on the council if these are agreed. I think it meets twice a year. All member states are on the council.

Senator TROOD—I see. What about the financial implications of this? I am a bit confused about this in relation to the NIA.

Dr McFarlane—There are going to be no mandatory financial obligations. We are not going to have to pay for the core funding of IDEA; that is not going to be part of the process. There might be a very small cost in going to a few meetings of the council but because our post in Stockholm covers the meetings the cost of attending will be very small.

Senator TROOD—Who pays for the upkeep or the structure of the organisation?

Dr McFarlane—It is done through voluntary funds. The Nordics fund most of the mechanics of running the IDEA because it is based in Stockholm. We look at the some of their programs in the area and we might co-fund some projects, say, in the Pacific, Indonesia et cetera. That is where we feel that we can add most value.

Senator TROOD—Do you think we are likely to be more actively involved in some of the projects of the—?

Dr McFarlane—If we see good ones. We have to judge whether we think it is going to work in that particular region or that particular country at a particular time. Sometimes it depends on where the project is based and who it is aimed at. Certainly I think in Indonesia we can continue to work on them quite strongly because they have quite a reasonable office in Indonesia. There is a lot of work to do in Indonesia, so I can see some more work on that front.

Senator TROOD—You will be doing that with AusAID funds essentially. Is that right?

Dr McFarlane—Yes.

Mr WILKIE—At paragraph 7 you have identified that the national interest analysis has identified, obviously, that our strategic interest is really in the Asia-Pacific region. I notice we are the only country in that group that is a member of the IDEA. Is there any intention to expand this list of membership to include any of the countries from our region and can that take place?

Dr McFarlane—No, I do not think that is being considered at this stage. We would like New Zealand and a couple of the others to join; that would be great. But the distance to Stockholm probably precludes them from doing that. We would probably need to strengthen that area. But I think we find our approach, which is more bilaterally, through what we do in the aid program is a more effective way at this stage.

Mr WILKIE—I also notice that the 2003 amendments talked about the IDEA gaining United Nations General Assembly observer status. Would that also include election observer status at different elections around the world? For example, often there are delegations like Commonwealth delegations, United Nations delegations, and European Union delegations sent to observe elections. Australia, for example, has sent delegations to observe elections in Indonesia, Zimbabwe and a few other places. Would this group be seeking to have their own observer status at elections as well as at the assembly?

Dr McFarlane—I think IDEA do sometimes send some observers, but not in an official capacity. Going to elections has to come under a UN mandate for it to be official. So it more of a UN than an IDEA question. IDEA might provide a couple of experts or help run some of those activities but certainly would not be running it themselves.

Mr WILKIE—Is there any process within the organisation to evaluate the conduct of their own members' elections to ensure that they are complying with the agreement themselves?

Dr McFarlane—Not that I know of.

Mr WILKIE—For example, if Namibia chose not to necessarily follow the principles of the agreement, would there be no action against them?

Dr McFarlane—Not that I know of.

Mr ADAMS—The issue Mr Wilkie just talked about was Indonesia. I was asked to go, I think the Electoral Commission. What role would this organisation have played in the first elections in Indonesia?

Dr McFarlane—I am sorry; I do not know exactly what they did in Indonesia. I do know that they have an office in Indonesia in Jakarta, and they do some training in capacity building activities. I can get you information on exactly what they did as part of the first election, if you like.

Mr ADAMS—Okay. Could you also let us have a copy of the articles of the organisation, its aims and structure?

Dr McFarlane—Of IDEA?

Mr ADAMS—Yes.

Dr McFarlane—I thought we had provided that.

Mr ADAMS—Is it in the analysis?

CHAIR—It came around as an email.

Mr ADAMS—I do not seem to have that, but I think it is here.

CHAIR—There it is.

Mr ADAMS—Okay, it is part of that. Can you build on how the organisation operates? Just tell me how it would operate in the Pacific. Would it say that it was going into one of the nation states to improve its governance in electoral matters?

Dr McFarlane—Yes, and probably train some of the electoral officials on how to conduct and run elections.

Mr ADAMS—They could ask Australia to play a role in that, and we could put in some money and put in some people.

Dr McFarlane—Absolutely. As I said, the AEC already does this in many places through the aid program. The AEC takes a leading role in that, and we would fund AEC officials to go over and help run elections and train. But IDEA could have a role in that if we wanted to extend it to IDEA.

Mr ADAMS—I take it the council will now lay down a series of work plans which they think should be done, and will prioritise this where they think the world needs it.

Dr McFarlane—That is right. They have a work plan that runs over one or two years. They look at where elections are likely to be held or where they are happening and go in and talk to those governments about the kinds of activities they need. They then seek support from other donors as required, depending on the cost of the project.

Mr ADAMS—The criteria of that—what the organisation believes democracy is—is in here, is it?

Dr McFarlane—A definition of democracy? Sorry, can you repeat the question.

Mr ADAMS—Well, the criteria that it believes in. I think the Chair has indicated that we have a document of what the articles say for the organisation. Does that indicate what it actually means and what its ideals are about democracy?

Dr McFarlane—They do have a set of principles that they adhere to in the objectives and activities—pluralism, sustainable democracy, good governance, accountability, transparency, strengthening democratic institutions, understanding democratic and electoral processes, advancing universally held norms, values and practises. So there is a range of—

Mr ADAMS—Non-intimidation?

Dr McFarlane—I do not think we have that there.

Mr WILKIE—It all sounds well and good and I have no problem with the organisation, but can you find us some examples of where they have actually done something? Can we have an indication of where they have performed on the ground, whether it be training or helping to run elections or electoral processes or whatever? The aims of the organisation are great, but I am curious to know what they are doing in real terms.

Dr McFarlane—Yes, we will get you that.

CHAIR—Thank you very much for that. It is a reasonable question, because in the election Mr Adams was referring to—1999 in Indonesia—there was a plethora of observer groups. There was a European Union observer group, the Jimmy Carter Foundation, and Australia sent an observer group as well. IDEA may have played a role in the training of the KPU, which is their electoral commission, and it would be interesting to hear what involvement they have had.

Dr McFarlane—Yes, we are happy to give you that.

Mr WILKIE—It is also important to ensure we do not duplicate our services in too many areas. I remember in Zimbabwe in 2000, when we were election observers there. We were part of the Commonwealth delegation as election observers and then we had our own delegation as well. If we are involved in this group who are involved in doing that, we could end up with three different delegations doing the same thing at the same election.

Dr McFarlane—Yes. My staff have just handed me information that IDEA were involved, through the AEC, in providing assistance to the KPU. Seven hundred thousand dollars in 2002-2003, and a component of this program provided bridge training for the staff. IDEA were subcontracted for $US109,000 to provide trainers as well as two staff to attend the bridge courses in Stockholm.

Senator TROOD—I have a comment rather than a question. Dr McFarlane, it seems to me there is someone in your section, or perhaps in AusAID more generally, who has been rather delinquent in relation to the 2003 amendment. I cannot help but notice the irony of that matter as the amendment apparently prohibited associate members and observers from being able to vote. Obviously, someone chose this irony in relation to an institute for democracy. Apparently that was not brought before the committee. Can I encourage you to pay a more conscientious attention to your obligations to the committee in the future?

Dr McFarlane—Yes I will. We noted that and we apologise. We should have brought it to the attention of the committee.

CHAIR—Thank you very much for your evidence today.

[11.36 am]

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

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

HAWKINS, Ms Catherine, Assistant Secretary, International Crime Cooperation Branch, Criminal Justice Division, Attorney-General's Department

RAYNER, Mr Peter Brian, Director, Malaysia, Brunei and Singapore Section, Department of Foreign Affairs and Trade

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

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

Treaty between the Government of Australia and the Government of Malaysia on Extradition and Exchange of Notes

Treaty between the Government of Australia and the Government of Malaysia on Mutual Assistance in Criminal Matters and Exchange of Notes

CHAIR—I welcome representatives from the Attorney-General's Department and the Department of Foreign Affairs and Trade. 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 a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Blackburn—Thank you, Chair, I have some very short introductory remarks that relate to both of the treaties under consideration by the committee this morning. As the committee is very well aware, combating terrorism and transnational crime is a very high priority for the Australian government. Improved communication technology and international travel have made it ever easier for criminals to plan crimes and commit them across borders. Against this backdrop, it is increasingly important to strengthen international cooperation, including through effective extradition, mutual assistance and asset recovery mechanisms. We need to ensure that criminals do not escape justice simply by crossing borders or because the evidence or proceeds of their crime are in different countries.

Establishing strong cooperative extradition and mutual assistance relationships with other countries is essential to effectively combat terrorism and transnational crime. A strong law enforcement relationship with Malaysia is a high priority for the Australian government in the

fight against terrorism and transnational crime in our region, particularly as Malaysia is a key player in ASEAN and a country with which Australia has growing economic and cultural links. Extradition and mutual assistance treaties with Malaysia are a substantial step towards achieving that goal.

As the committee may be aware, mutual assistance is the process countries use to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions. Mutual assistance can also be used to recover the proceeds of crime. Mutual assistance arrangements in Australia are governed by the Mutual Assistance in Criminal Matters Act 1987. It is separate from police-to-police, agency-to-agency and other types of informal assistance between countries.

Under our existing laws, Australia can make a request for mutual assistance to or receive a request from any country. However, in the absence of a treaty, whether a request by Australia is accepted and acted upon by another country will depend on the domestic laws of that other country. To facilitate mutual assistance, Australia has concluded 24 bilateral treaties. While we currently enjoy a mutual assistance relationship with Malaysia, the treaty will cement that relationship and help ensure more effective cooperation between the two countries.

Extradition relationships with other countries are also an important part of the effective administration of criminal justice in Australia. Extradition relationships enable us to cooperate with partner countries to fight crime and prevent Australia from becoming a refuge and safe haven for persons accused of serious crimes in other countries.

Extradition in Australia is conducted under the provisions of the Extradition Act 1988. It sets out a number of mandatory requirements which must be met before Australia can make or accept an extradition request. Again, under this legislation Australia is able to make an extradition request to any country. However, where we have a treaty in place, the treaty partners have an obligation to consider Australia's requests. Again, as with mutual assistance, in the absence of a treaty the other country will determine whether it can accept the request in accordance with its domestic laws.

Countries that are defined in the Extradition Act as an extradition country can make extradition requests to Australia. This can include countries declared by the regulations to be an extradition country and can include countries with which Australia does not have a treaty relationship. This is different from mutual assistance, where Australia can receive mutual assistance requests from any country without the need for regulations or a treaty.

To facilitate extradition, Australia has concluded 34 bilateral treaties. Until the extradition treaty with Malaysia enters into force, the extradition relationship between the two countries will continue to be governed by the London scheme for extradition within the Commonwealth. The London scheme is an arrangement of less than treaty status which applies between most Commonwealth countries. The scheme is not consistent with the Australian government's no evidence policy for extradition, which Australia has now incorporated in most of its bilateral treaties.

The treaty before the committee with Malaysia is a no evidence treaty. The no evidence standard of information is in line with the international trend towards simplifying extradition

matters. It treats the determination of guilt or innocence as fundamentally a matter for the courts of the requesting country. This treaty will simplify and expedite the extradition process between Australia and Malaysia. It still requires, as do all bilateral no evidence treaties, the provision of sufficient information to determine that the person is sought in the legitimate pursuit of the enforcement of the criminal law of the country making the request.

Both treaties are consistent with Australian domestic laws governing mutual assistance and extradition. When the treaties enter into force, Australia will still be able to refuse mutual assistance or extradition requests for political offences, military offences, in circumstances where double jeopardy would apply, where the prosecution is found to be motivated by the person's race, sex, religion or political opinions, where there is no dual criminality and for offences which carry the death penalty. The government retains a broad discretion under both treaties to refuse a mutual assistance or extradition request.

In February 2006 the Malaysian government notified Australia that it had undertaken all domestic procedures in preparation for entry into force of the two treaties before the committee this morning. The Australian government looks forward to completing its domestic procedures so that both countries can enjoy the benefits of more effective international legal cooperation.

I conclude by mentioning that on 28 February the Attorney-General's Department briefed members of this committee on the current review of the Extradition Act which is being undertaken by the department. Since that review, we have now published an extensive range of information about mutual assistance and extradition. The information is available on the Attorney-General's Department website, but we have brought along this morning for the committee the published version of the packs, which I tender for your information. We are available to take your questions on these two treaties.

CHAIR—Thank you. Firstly, there was a meeting with the Joint Standing Committee on Treaties on 17 May 2006. Why was the treaty tabled in parliament before consultation with SCOT?

Ms Blackburn—I am sorry, I find your question just a little confusing. The information I have was that information on the negotiation of this treaty was included in the schedules of treaties sent to state and territory representatives in January 2006 for the SCOT meeting date on 17 May 2006.

CHAIR—Okay. Did any issue arise as a result of that meeting on 17 May?

Ms Blackburn—None of the states and territories commented on either of the treaties.

CHAIR—What state and territory cooperation is required for the successful operation of this treaty?

Ms Blackburn—State and territory cooperation is not specific to this treaty. I will take them separately. For outgoing requests from Australia under these treaties, those requests are in fact made by the Australian government on behalf of state, territory and federal law enforcement and prosecuting agencies. To that extent, it provides facilitation for state and territory and federal law enforcement and prosecuting agencies. For incoming requests for mutual assistance, as is evident

from both the act and face of the treaties, there is a range of assistance which can be sought. Depending on the nature of that assistance, it can require activity by state law enforcement or regulatory agencies and federal law enforcement and regulatory agencies to obtain the information which is being sought. That is the current system which is applied both for our treaty partners and for non-treaty partners, and these treaties do not add to that existing burden. For an extradition request, all activity in relation to executing an extradition request in Australia would be carried out by federal law enforcement agencies.

CHAIR—Right now we can make extradition requests of Malaysia and Malaysia can make extradition requests of us, but they are governed by an older scheme, the London scheme. When we go back to our constituents, how can we explain to them that this is an improvement on what we have got already?

Ms Blackburn—The London scheme has two significant limitations in it. Firstly, it is based on the prima facie case requirement, so to make an extradition request it requires the production of an extensive range of material to meet the prima facie case requirement. Our experience in recent years is that few countries are able to meet that standard, and a number of countries that have contacted us in relation to the possibility of making an extradition request have in fact been unable to proceed with that request because the requirement to put together a prima facie case is a very significant burden.

Secondly, there is a limitation under the London scheme that extradition offences are offences which carry an imprisonment penalty of two years or more. The standard which is used in Australia and with all of our other bilateral treaty partners is that an extradition offence is one which carries a penalty of one year imprisonment or more.

CHAIR—How many of our 34 extradition treaties use the no evidence approach? I am happy if you take it on notice.

Ms Blackburn—I will clarify it, but the purpose for the bilateral treaties which have been negotiated over a number of years was in fact to implement the no evidence standard following the passage of the Extradition Act in 1988. The exception to that is the US has a slightly different standard which is generally accepted to fall somewhere between no evidence and prima facie.

CHAIR—So the model treaty under that Extradition Act 1988 is a no evidence one?

Ms Blackburn—That is correct. The model treaty is a no evidence treaty, and the basis of our bilateral negotiations has been to dramatically increase the number countries with whom we can in fact conduct effective extradition arrangements through using the no evidence standard.

Mr WILKIE—I imagine we would normally have extradition treaties with those countries we would expect people to get a fair trial from if they were extradited. So, under the no evidence approach, you would expect that someone there would be faced with the normal processes of courts that would treat people fairly in that environment. Would that be the case?

Ms Blackburn—I am not sure that I understand your question.

Mr WILKIE—We would expect, if they were extradited, they would be getting a fair trial. We would not extradite people to countries where they were not likely to get a fair trial? Would that be the case?

Ms Blackburn—The two issues essentially are not connected. The issue of no evidence is the basis on which Australia assesses whether the request is being made in the legitimate pursuit of the implementation of the criminal justice system in the country which is making the request. It is important to note that no evidence does not mean no information. The primary change is that in prima facie the country making the request actually has to provide to us all of the documentation, which is the evidence which would be put before the equivalent of a committal proceeding. Under no evidence, we do not require the country to actually give us the documentary evidence that would be used but we nonetheless require them to provide extensive information, which is set out in both the act and in the treaty, about the nature of the offences with which the person is charged, the law which governs those offences in that country and a comprehensive statement of the acts or omissions which the person is alleged to have done which form the basis for the charges which have been laid. So it is important to be very clear that no evidence does not mean no information.

Mr WILKIE—We have had that discussion before. I am not really talking about no evidence; I am talking about the country that we would be extraditing someone to and what guarantees we have that that country would provide the person we are extraditing with a fair trial.

Mr ADAMS—Right of appeal; all those normal rights.

Ms Blackburn—The Extradition Act itself includes a range of mandatory conditions which must be met before an extradition request will be granted. There is also a range of discretionary grounds upon which Australia can refuse to grant an extradition request. Underpinning all of that, the minister or the Attorney making the decision has a remaining broad general discretion to refuse to grant an extradition request. Within the mandatory and discretionary grounds for refusal are covered all of Australia's international obligations in relation to the death penalty, torture and enforcement of the ICCPR. The Australian government has made a decision that it is appropriate to negotiate this treaty with Malaysia and that all of the grounds of refusal—both mandatory and discretionary and the general discretion—will provide sufficient and appropriate safeguards in that relationship.

Mr WILKIE—Okay. To give you an example of what would be put to me in my electorate, where I have a lot of Malaysians, in talking about an extradition treaty with Malaysia: if Anwar Ibrahim had been in Australia at the time that they wanted to arrest him, take him back and try him—given that it was a criminal offence they had charged him with or wanted to charge him with—would he have been extradited to Malaysia to face the music? Obviously, in hindsight, we know there was a kangaroo court imposed on him. But would we have extradited him under these arrangements?

Ms Blackburn—It would be entirely inappropriate for me to express a conclusion on that. However, if you go to both the mandatory and discretionary grounds of refusal, there are a range of considerations which would have needed to have been taken into account. The issues that could have been looked at in that case would have been the question of whether he was being charged with a political offence as opposed to a criminal offence, whether the process was

triggered by reference to his race, religion or ethnicity and, similarly, whether the prosecution and trial against him would similarly be influenced by those conditions. They would have all been relevant factors for a decision maker to take into account.

CHAIR—And also whether the offence was an offence under Australian criminal law.

Ms Blackburn—Indeed. Dual criminality is a requirement.

Mr ADAMS—So basically we do not really care how a country operates its legal system, we will have other arrangements that we will deal with. I think a lot of legal people in Australia would have been pretty concerned about the case my colleague just mentioned and how that was dealt with in Malaysia. We are now talking about Malaysia applying to Australia to gain access to our citizens and take them back to Malaysia to go under the same judicial system, and you are recommending to us that we give this a tick. We need to be assured that that jurisdiction in Malaysia stands up.

Ms Blackburn—Australia already has an extradition relationship with Malaysia. We are presently able to extradite to Malaysia under the London scheme, as we are with all other Commonwealth countries.

Mr ADAMS—I do not get that worried about our end—I have faith in our jurisdictions—but I get a bit worried about Australian citizens being sent to other parts of the world, and I think that the United States does as well, which is why it will not sign up to the no evidence standard. The evidence this committee heard and the report brought down pointed out some of those issues.

Ms Blackburn—The US requirement of probable cause is driven by their constitution. However, to the contrary, all of the EU countries use the no evidence standard simply because civil law countries have no concept of prima facie case. That was a major shift in Australian policy in the late 1980s to facilitate Australia's engagement with civil law countries which do not understand the prima facie case and indeed are unable to comply with it. Similarly, as I explained earlier, there is a need in the world that we live in now to be able to effect extradition with a broad range of countries. But the propositions you are putting forward are in the nature of a hypothetical case, which we always resist the invitation to deal with.

Mr ADAMS—You may do that, but my constituents' children are the ones that I or my colleagues will be going before the minister about.

Ms Blackburn—The only response I can make to you is that the Extradition Act contains a range of safeguards which have been used over a number of years to refuse to grant surrender in some cases where one or more of those requirements have not been met. They have also been used to consider the terms and conditions upon which people will be extradited to another country. One of the difficulties with dealing with these kinds of systems—and lawyers are prone to it at all times—is to end up talking about the extreme cases.

Mr ADAMS—Of course.

Ms Blackburn—It is quite difficult sometimes to construct an effective system which is really designed to deal with the 95 per cent of cases which do not raise the extreme conditions.

However, I put to you that the Extradition Act has operated since 1988 and I am not aware of any claims that any person has been extradited back to countries under those arrangements with outcomes that have been fundamentally unacceptable to the Australian government.

CHAIR—You mentioned that the United States take a different approach—the probable cause. What approach do the United Kingdom and Canada take in their extradition agreements?

Ms Blackburn—The United Kingdom has very recently moved to a no evidence standard to enable it to participate in a new extradition regime operating in the EU, which will move to an even more streamlined approach that we use the label 'a backing of warrants scheme' for. The UK has moved to no evidence arrangements to allow it to participate in that. Canada, as I understand, has a requirement for a record of the case, which is a summary of the case which will be put forward, so it is still something less than a prima facie arrangement.

Mr ADAMS—The death penalty still applies in Malaysia. How do we deal with that when they ask for somebody to be returned to go to trial?

Ms Blackburn—Section 22(3)(c) of Australia's Extradition Act states that we cannot extradite a person for a death penalty offence unless we have an undertaking that the person will not be tried for the offence or, if tried, the death penalty will not be imposed or, if imposed, will not be carried out. All of our extradition treaties are negotiated against that backdrop. In this treaty, article 3 clause 2 has a specific requirement for consultation before any request is made for extradition of a person to face an offence which carries capital punishment. This clause enables Australia and Malaysia to come to an agreement as to the terms and conditions on which the person will be extradited, if at all. That enables us either to get an undertaking from Malaysia in accordance with the terms of section 22 of the Extradition Act or, alternatively, allows Malaysia to consider whether it wishes to change the charges for which it will seek the extradition to charges which do not carry the death penalty.

Mr ADAMS—What consultation was done in relation to this with the legal community of Australia?

Ms Blackburn—On the terms of the treaty?

Mr ADAMS—Yes.

Ms Blackburn—There is no public consultation on the treaty during the course of its development.

Mr ADAMS—You have not spoken with any law societies at all in Australia?

Ms Blackburn—We have not done that in relation to any of the existing 34 bilateral treaties, and we did not do it in relation to this treaty.

Senator TROOD—Is there anybody in contemplation on either side who might come under the province of this treaty for extradition? Are there any individuals at the moment?

Ms Blackburn—We have had past relationships under the existing scheme with Malaysia for the provision of both extradition and mutual assistance. This treaty will come into operation at some point in the future. There are no current requests with us that depend upon this treaty for extradition or mutual assistance between Australia and Malaysia.

Senator TROOD—We have made no requests at the moment? There are no pending requests to Malaysia?

Ms Blackburn—I am sorry, Senator, we do not disclose the details of either mutual assistance or extradition requests.

Senator TROOD—Are the proposals that you are discussing in relation to a revision of Australia's extradition regime going to affect the nature of this treaty at all?

Ms Blackburn—At one level, that is an impossible question to answer because the review is not yet finished, nor has the government made decisions on the outcome of the review. However, as you would appreciate, there is a significant difference in levels of specificity between treaty language and domestic law language. At this stage we are negotiating treaties well aware that the review is under way but in the expectation that the language of the treaties will be broad enough to encompass the possible outcomes which could come from the review. I think the important thing is that the review of the domestic law is primarily going to be concerned with the way in which we deal with requests which come into Australia, whereas the treaties, from our perspective, are much more important to assure the way in which another country will respond to and deal with a request made by Australia.

So, yes, there are always some complexities in running parallel processes. However, the time line for the review is such that we would not expect new legislation to be in place before 2008, at the earliest, and in our view it is really not possible to simply put our bilateral relationships and indeed our international legal cooperation relationships on hold while we do that. However, my expectation at this stage is that the treaty language is broad enough to accommodate the range of changes presently under consideration, as set out in the discussion paper which has been released for the extradition review. Of course, if in the end the government decides to make changes to our law which would require changes to the treaties—one or more of them—then we would seek to renegotiate the relevant parts of those treaties.

Senator TROOD—Presumably we would feel obliged to inform the countries with whom we have treaties that we were to make these changes.

Ms Blackburn—If we wanted to make any change to the treaty it would have to go through a formal treaty negotiation process much the same as the one which produced this.

Senator TROOD—I am sorry, I meant that, having changed our arrangements, even if we assume that the treaties are not affected by those changes, we would presumably feel obliged to inform those countries with which we have treaties of that fact that we have made these changes.

Ms Blackburn—We have, as part of the review, been consulting with our major treaty partners, have provided them with copies of the discussion paper and, indeed, have sought their input. I had discussions with both the US and the UK ministers and officials over the last two

weeks—in part, on the review and on the possible outcomes from it—and I encouraged them to look at what we are doing and ensure that we are aware of any possible impacts from that review on our relationships with them. That would obviously be a very important input into the decisions that are made on possible changes to the law arising from the review.

Senator TROOD—At this stage you have not had any advice that countries are concerned about the changes?

Ms Blackburn—No. Some of the proposals which are in the extradition discussion paper are controversial and we have had some very interesting comments, particularly from our UK and US partners, who are asking: 'Do you really think you'll get that through?' We are saying, 'At this stage, we are not sure'—and they are terribly interested in whether we might. So both of them are looking at what we are doing for possible further changes to their own systems.

Senator TROOD—Where are we in the extradition review process? What is the next step? You have a discussion paper out there. What is the next contemplated development?

Ms Blackburn—We had a discussion paper out. From memory, the period for public comment on that discussion paper finished on 7 April. We received approximately 35 submissions. We are now well advanced in preparing a submission to government based on the discussion paper, the responses to it and our consultations with a range of federal and state agencies and our international partners. We expect to put some proposals to government later this year. I should mention in that context that we are also undertaking a review of the Mutual Assistance Act and we have a discussion paper in an advanced state of preparation which we expect to put out for public consultation some time in the second half of 2006. So the reviews are at different stages, and we expect recommendations to go to government for consideration before the end of 2006 on both reviews.

Senator TROOD—In relation to the mutual assistance treaty specifically—

CHAIR—I was going to deal with the extradition and then move on to the mutual assistance treaty. Are there any further questions on the extradition treaty?

Mr WILKIE—Have we had any applications to Malaysia for extradition rejected? Has Australia ever asked for anyone to be extradited to Australia and had that application rejected?

Ms Blackburn—I will have to take that question on notice.

CHAIR—I understand there is a list on your website which deals with extradition requests.

Ms Blackburn—We publish statistics in the department's annual report which are also on the website. These provide information on successful requests to and from both countries and the offences for which those requests were granted.

Mr WILKIE—Could you please look into that one on Malaysia and, if there have been any applications rejected, outline why the applications have been rejected?

Ms Blackburn—I will take the question on notice as to whether we are able to provide that information to the committee.

Mr WILKIE—If it is public knowledge, why wouldn't it be available to the committee?

Ms Blackburn—You are quite right—if there had been an application made and a determination made not to surrender the person, then that information would in fact be in our published information.

Mr WILKIE—I asked this question before but in a different form, and I do not know if I necessarily got an answer to it. When negotiating an extradition treaty with another country, are considerations such as human rights, due process and an independent and transparent judiciary taken into consideration? It is the last point I was concentrating on previously. In other words, is a formal review undertaken and are there minimum standards a country must meet for Australia to negotiate an extradition agreement?

Ms Blackburn—No.

CHAIR—So there are no countries that we would not consider negotiating an extradition agreement with?

Ms Blackburn—The current Australian government policy is that we will consider treaty relationships with countries which are regarded as of strategic importance to Australia's international legal cooperation requirements. We also have, as I mentioned in my opening statement, the provision to declare countries by regulation to be extradition countries without benefit of treaty, and that also is done by reference to Australia's strategic and international legal cooperation interests.

CHAIR—As there are no further questions on the extradition agreement, we will move to the mutual assistance agreement.

Senator TROOD—Is there much mutual assistance taking place between Australia and Malaysia at the moment?

Ms Blackburn—Under the current arrangements, the information I have is that we have made four completed requests to Malaysia in the past 10 years. There have been four completed mutual assistance requests made to Malaysia. Completed means we made it and Malaysia responded to that request. My information is that we have had no completed incoming requests from Malaysia.

Senator TROOD—You cited changes in the international environment et cetera. Is there now an expectation that perhaps those requests are likely to increase each way?

Ms Blackburn—We would expect the conclusion of this treaty to enable both parties to now, with confidence, make mutual assistance requests to each other under the terms of the treaty.

Senator TROOD—Can you clarify this for me: is it now necessary for agencies to make agreements or arrangements with counterpart agencies as a result of this? Does this obviate that

particular need? For example, the Australian Federal Police cooperating with its counterpart in Malaysia: do they need to make a special arrangement, or does this preclude that occurring?

Ms Blackburn—As I mentioned in my opening statement, the mutual assistance arrangements are entirely separate from other informal arrangements which may be made for assistance between police agencies or customs agencies or financial intelligence units or, indeed, corporate regulators and banking supervisors. They are totally separate arrangements. The primary distinction is that the mutual assistance arrangements allow governments to make requests to another government for that government to exercise coercive powers to obtain evidence or information for the purposes of an investigation or a prosecution. The range of other agency-to-agency relationships, which are usually done in the form of a memorandum of understanding—they are not treaty-status documents—are for essentially the voluntary exchange of information. None of those arrangements can include arrangements for the use of coercive powers.

CHAIR—One issue that is coming up with a range of treaties is what obligations the states and territories have under these treaties. I would guess that the interaction would be between the Federal Police and the Malaysian equivalent, but do states and territories under this treaty have obligations to pass on evidence or information to Malaysia?

Ms Blackburn—The treaty itself and the mutual assistance act do not impose any direct obligations on state and territory governments or agencies. However, it is absolutely true that if we have a mutual assistance request from another country for information which is held by state or territory law enforcement agencies or regulatory agencies then we would go to those agencies and ask them to assist us with completing that request. So to that extent they can be involved in and required to devote resources, but the Australian government in that circumstance can only request. We do so politely and we put a great deal of effort into maintaining good relationships with those agencies, as does, obviously, the AFP with the state police forces who are sometimes involved.

The thing to look at also is that from a state and territory perspective it is entirely facilitative in their pursuit of the investigation and prosecution of state crimes. We process a considerable number of mutual assistance requests on behalf of states and territories who are seeking to investigate and prosecute crimes under state laws. Also, we have made requests for the extradition of persons to face prosecution for state crimes. From that angle, it is entirely facilitative for the states and territories.

CHAIR—But it is done in a cooperative way; it is not that there is an obligation imposed on the states and territories.

Mr WILKIE—Mr Adams asked a question about the extradition treaty which related to extraditing someone where they might face the death penalty, and clearly that is covered in the extradition treaty. In relation to mutual assistance, I will use as an example the recent case of the Bali nine—the nine Australians arrested and convicted of drug smuggling in Indonesia, two of whom have been sentenced to death—which has highlighted some difficulties with the provision of information where the death penalty is involved. What are Australia's obligations in providing assistance to Malaysia which may lead to the imposition of the death penalty?

Ms Blackburn—Australia has no obligations under this treaty to provide mutual assistance to Malaysia otherwise than in accordance with the requirements of section 8(1A) and section 8(1B) of the mutual assistance act.

Mr WILKIE—Which say?

Ms Blackburn—The sections are dealing with circumstances both pre charge and post charge. Section 8(1A) of the mutual assistance act requires that a request for assistance must be refused if it relates to the prosecution or punishment of a person charged with a death penalty offence unless the Attorney-General or the minister is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

Section 8(1B) applies to the circumstance where the person has not yet been charged with or convicted of an offence, and it provides that a request may be refused if the Attorney-General or the minister believes that the provision of the assistance may result in the death penalty being imposed and, after taking into consider the interests of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted. I should mention there that special circumstances, which is the condition under which assistance can be granted under section 8(1A). There have been three categories where circumstances have been regarded as special circumstances. These are where an undertaking has been given by the country in relation to the imposition or carrying out of the death penalty, where the evidence or information to be provided would be or could be exculpatory, or where the information to be provided goes to the impact of a crime on the victims.

Mr WILKIE—Do these obligations differ depending on whether it is government-to-government assistance being provided or police-to-police assistance?

Ms Blackburn—The provisions which I have advised the committee on this morning relate only to the making of mutual assistance requests in accordance with the requirements of the mutual assistance act.

Mr WILKIE—Would that cover police and government or just government?

Ms Blackburn—The provisions which I referred the committee to relate only to government-to-government mutual assistance requests.

Mr WILKIE—What is the Australian Federal Police's policy in providing assistance where charges have not been laid?

Ms Blackburn—The Australian Federal Police operate under guidelines, and my understanding is that those guidelines are published.

Mr WILKIE—Even though we are signing an international treaty that commits Australia to the guidelines that you have just talked about with regard to mutual assistance, and even though the AFP is a federal department, it is not bound by the provisions of that treaty? Is that what you are telling me?

Ms Blackburn—The AFP does not provide mutual assistance. The AFP cannot provide assistance which requires the exercise of coercive powers. This was the distinction I was drawing earlier. The mutual assistance act enables a country to request the gaining of information or evidence by the use of coercive powers, and that can only be requested and provided in accordance with the provisions that I have referred to. Police-to-police assistance is essentially information sharing between police agencies done of the basis of cooperation and cannot involve the provision of information or evidence gained by the use of coercive powers. The police, in undertaking that relationship with their counterpart agencies, do so under the terms of bilateral MOUs that they have with a variety of police forces throughout the world and in accordance with the guidelines which I referred to earlier.

Mr WILKIE—I might come back to that. When we were talking about extradition treaties Senator Trood asked a question about whether any applications had been made for mutual assistance by Malaysia to Australia and vice versa, and you made the comment that you could not answer that. I do not think Senator Trood was actually asking for the details of those requests, merely if any requests had been made or received. I cannot see how that could hinder any operations that would either be pending or current.

Ms Blackburn—As I mentioned, we do publish statistics on requests which have been received and completed. I apologise if I misunderstood your question. I indicated that I could not and would not comment on any current requests that we might have. I also indicated that, on the statistics I have, we had four completed MA requests which we made to Malaysia and we have not had any completed mutual assistance requests from Malaysia to date.

Mr WILKIE—Thank you.

CHAIR—In a judgment from January 2006, Justice Finn in the Federal Court commented that the minister for justice and the commissioner of police need to review AFP procedures and protocols when providing overseas assistance in death penalty cases. Has a review of this kind been undertaken?

Ms Blackburn—That would be a review which would be conducted by the AFP and would not involve the Attorney-General's Department since they are guidelines relating to operational policing matters. However, I understand that, in accordance with their regular review processes, the AFP have reviewed the guide to ensure it is current and clearly reflects government policy on police-to-police cooperation.

CHAIR—As there are no further questions, thank you again for coming. As you can see, there is a lot of interest in extradition treaties and mutual assistance treaties. I advise the representatives of DIMA and DFAT that we will be unable to take evidence on the amendments to the International Organisation for Migration Constitution done at Geneva.

Resolved (on motion by **Mr Adams,** seconded 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 12.26 pm