



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Timor Sea treaties

TUESDAY, 8 OCTOBER 2002

CANBERRA

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JOINT COMMITTEE ON TREATIES

Tuesday, 8 October 2002

Members: Ms Julie Bishop (*Chair*), Mr Wilkie (*Deputy Chair*), Senators Barnett, Bartlett, Kirk, Marshall, Mason, Stephens and Tchen and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr Hunt, Mr King and Mr Bruce Scott

Senators and members in attendance: Senators Kirk, Marshall, Mason, Stephens and Tchen and Ms Julie Bishop and Mr Wilkie

Terms of reference for the inquiry:

Timor Sea treaties

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Committee met at 10.16 a.m.

CHAIR—I declare open this public hearing of the Joint Standing Committee on Treaties. The Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea Between East Timor and Australia, and the proposed Timor Sea Treaty between the Government of Australia and the Government of East Timor, were tabled and thereby referred to the Joint Standing Committee on Treaties on 25 June this year for review.

Preliminary evidence on the treaties was taken from representatives of the relevant Commonwealth departments at public hearings in Canberra on 12 July. It was clear, however, that the treaties would attract considerable public interest. The committee therefore called for submissions from interested parties by 31 July. To date, over 80 submissions have been received by the committee. A further hearing was held on 26 August in Canberra.

In properly reviewing the treaties, the committee considered it essential to take evidence in locations other than Canberra. In the last week, the committee has taken evidence in Perth, Darwin and Melbourne. The committee believes that it is important that a wide range of individuals and organisations have an opportunity to express their views on these treaties in the context of this review. We have heard from individuals, interest groups, industry and non-government organisations, and the hearing today will bring our schedule of public hearings to a close. We will begin this morning by hearing evidence from representatives of Deacons, the law firm representing Oceanic Exploration Co. Ltd.

[10.18 a.m.]

NATHANS, Mr Ron, Instructing Solicitor representing Oceanic Exploration Co. Ltd and Petrotimor Companhia de Petroleos SARL

WARD, Dr Christopher Scott, Barrister representing Oceanic Exploration Co. Ltd and Petrotimor Companhia de Petroleos SARL

IMLE, Mr John F., Energy Consultant representing Oceanic Exploration Co. Ltd and Petrotimor Companhia de Petroleos SARL

CHAIR—Welcome. In what capacity do you appear before the committee?

Mr Nathans—I am a partner with the law firm Deacons, Lawyers. I appear together with Dr Chris Ward and Mr John Imle on behalf of the interests of Oceanic Exploration Co. and Petrotimor Companhia de Petroleos SARL—it is a Portuguese incorporated company. Dr Ward is a coauthor of the joint opinion that is presently before the committee—the opinion of Professor Lowe, Mr Carleton and Dr Ward—and Mr Imle is a technical expert, a former president of Unocal Corp., with a depth of experience in the development of gas experts in emerging states.

CHAIR—Thank you. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant 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 the parliament. Mr Nathans, would you like to make some introductory remarks and then we can proceed to questions?

Mr Nathans—Oceanic and Petrotimor—I will refer to them by those abbreviations—are the grantees of the concession in 1974 of an area in broad terms that is similar to that of the proposed JPDA. The concession gave those companies rights of exploitation, development and the like in that area. The current status of the concession is, I think it is fair to say, still under discussion both in international and domestic law terms, but the interests of Petrotimor and Oceanic are synonymous and coincide with the interests of the Democratic Republic of East Timor. Oceanic commissioned, as I indicated, a joint opinion which, from my reading of the *Hansard* I have seen to date, has been before the committee and the subject of some debate, particularly with some input from Mr Pat Brazil. I have just handed to one of the officers of the committee a document that I sent the committee late on Friday afternoon—I apologise for that—in the nature of a rebuttal by Professor Lowe, Mr Carleton and Dr Ward to the position paper of Mr Brazil on the opinion.

In short, the Petrotimor position is that under customary international law the concession agreements suspended by force majeure from July 1975 until October 1999, when the United Nations effectively took over in East Timor, still subsists and that is so notwithstanding the fact that, as the committee is probably aware, there is present litigation before the Federal Court in which Petrotimor and Oceanic are plaintiffs in connection with that concession. It is the position of those whom we represent that East Timor as a successor state may under customary

international law take both the obligations and the benefits that flowed historically to Portuguese Timor from the concession agreement. We submit that East Timor is entitled to rely upon the acts of Portugal and at the same time Portuguese Timor in relation to the concession agreement in order to support the maritime seabed entitlements of East Timor. I think the best way to proceed to best utilise the committee's time is to ask Dr Ward, as one of the coauthors of the legal opinion, to address further the maritime entitlements issues as we see them.

Dr Ward—I assume I am correct in thinking that the joint opinion—if I can call it that—is before the committee.

CHAIR—The original Lowe opinion. Yes, it is.

Dr Ward—That opinion broadly dealt with two issues. The first is the potential entitlement of East Timor to seabed areas and the second is the potential effect of the Timor Sea treaties upon that potential entitlement. I will briefly summarise the view of that opinion in each of those issues. As to the potential entitlement to seabed boundaries, there are three boundaries that affect East Timor's potential entitlements: a north-south boundary, if I can describe it as that, and two lateral boundaries, western and eastern. As to the north-south boundary, international law as described in the opinion requires that a median line or something very close to it be adopted as the boundary between the seabed of Australia and the seabed of East Timor. The opinion makes clear that at least since 1985 concepts of so-called natural prolongation have absolutely no relevance to a seabed delimitation between states of opposing coastlines in circumstances where the two states are less than 400 nautical miles apart, and that is the case between East Timor and Australia. That position arises because the United Nations Convention on the Law of the Sea and customary international law entitle states to a distance based entitlement of 200 nautical miles of exclusive economic zone, which includes with it rights to seabed resources within that zone.

The historical position of Australia, which was based upon the existence of the Timor Trough feature as a geographic or geomorphological feature, is simply no longer of relevance—if it ever was. And I say in passing that it is not the case that it is certain that the Timor Trough represents, as a geological fact, the division between Australia's continental shelf and that of East Timor. There is in fact opinion to the contrary, but ultimately that is a legal question and one that would take quite a deal of determination were it to be resolved.

A continental shelf can also exist. Coastal states are entitled to a continental shelf under the provisions of UNCLOS—the law of the sea convention. That is also, under the convention, defined in terms of a strict distance based criterion for the first 200 nautical miles. States are entitled to a 200 nautical mile continental shelf. That is clearly to make the provisions synonymous or harmonious with the provisions relating to the exploitation of seabed resources in the exclusive economic zone area. The distinction is that a continental shelf can extend beyond 200 nautical miles in circumstances where that extension would not intersect with the resources or rights of an opposing state, as is the case here.

Each of Australia and East Timor has now declared exclusive economic zones of 200 nautical miles; those exclusive economic zones intersect. The decision of the International Court of Justice in Libya-Malta is the leading decision—if I can refer to it that way—on this point. It shows that the legal position is that of two states with intersecting exclusive economic zones

and, in those circumstances, the entitlement rule is relatively straightforward: each state is entitled to a point to the median line adjusted to provide an equitable solution where a median line is essentially inequitable on its face. The two-stage process, which I have there described, is something that has developed substantially as a result of the decision of the ICJ in *Libya-Malta* and it now represents, in my view, the accepted practice in intersecting delimitation proceedings.

The western boundary, if I could turn to that, is at the moment commencing from a point slightly to the east of a point known as the Moti Masin, which is essentially the mouth of the relevant river. The mouth of the river or the deepest point of the river channel forms the boundary between East and West Timor and that is the correct starting point for any western lateral line. The western line that is defined in the joint opinion is a coastal front bisector line, which is drawn in accordance with accepted international practice in circumstances where what is known as a median line would produce an inequity—as would be the result because of the convex nature of the East and West Timorese coastlines at that point.

Perhaps the main focus has been on the potential of the eastern lateral boundary—the boundary that at the moment bisects the Greater Sunrise resource field. The opinion provided a number of alternative possibilities for an eastern lateral line. It is not possible to predict which of those lines, with certainty, international law would require. The result would be a fairly complex question involving equitable analysis. It is the case that international law takes, if you like, a macro view of delimitation proceedings. It does not focus on micro features—if I can call them that. That is, it does not focus on small islands or on uninhabited islands; it focuses on the broad geographic and geomorphological sweep of a region to ensure an equitable result.

The lines described in the joint opinion represent the possible alternatives, taking into account such an equitable approach. They give what is known as ‘partial effect’ to the Indonesian island group of Leti, which is a group of islands lying in close proximity to the East Timorese mainland and constituting less than one-fifth of the area of the East Timorese land mass. Were the group of islands to be given a so-called ‘full effect’, a median line between East Timor and Indonesia would generate a result that looks approximately like the proposed JPDA boundary. A median line that is adjusted to give partial effect to the island group of Leti results in one of the three lines described in the joint opinion.

Professor Victor Prescott has noted that East Timor is in the position—and I think he describes it as the ‘unfortunate position’—of a state that is faced with a coastline, being the coastline of the Leti group of islands, that results in a narrowing of the lateral boundaries the further the boundaries go from the East Timorese coast. On its face, given the relative sizes of East Timor and the Leti group of islands and their proximity to East Timor, that is an inequitable situation, and it is a situation that international law in our opinion—and I speak for the authors of the opinion—would not allow to prevail. The fact that Indonesia is an archipelagic state does not affect that result. There are two parts to that submission. The first is that the treatment of Indonesia’s coastline by Indonesian legislation is not a matter that can affect East Timor’s entitlement to seabed at international law. It is a fundamental rule that domestic law does not affect international law entitlements. The second part to that submission is that the treatment of one state as an archipelago and the treatment of another state as a state that uses what is called ‘straight baselines’ to define its coastline is, on its face, a situation of disparity—that is, there is

not equality between states. Again, international law would adjust the effect of the Leti group of islands to generate something that had less than full effect for those islands.

The second issue that the joint opinion dealt with, broadly speaking, was the possible prejudice to East Timor as a result of ratification of the 20 May treaty. That prejudice arises in two possible forms. The first is that, although the treaty is expressed to be without prejudice to the right of East Timor and Australia to a permanent seabed delimitation, the fact that states accept for interim purposes certain boundary lines has been consistently held in international jurisprudence to be a matter that affects the equities in any subsequent delimitation proceeding and it is not certain that the ‘without prejudice’ clause would be sufficient to save East Timor from that fate in any subsequent delimitation proceeding. The second and possibly more serious issue is the effect of annexe E to the treaty. Annexe E, as is made clear in the opinion, does not, on its face, require either Australia or East Timor to actually enter into a reunification of the Greater Sunrise field following any seabed delimitation. It is entirely possible—and I note that Professor Triggs in a recent article agrees with this analysis—for Australia and East Timor to have an underlying seabed delimitation that places all or most of the Greater Sunrise field within East Timorese jurisdiction and for Australia to decline to enter into a reunification under the annexe E procedure. In those circumstances the net effect in practical terms to East Timor would be nil. I should note in passing that it would take, in my view, an extremely clear statement by Australia to the effect that it would not take that course before Australia could be said to have made a unilateral declaration to the effect that it would not rely on those potential rights under annexe E. So it follows, as is made clear in the opinion, that ratification of the treaty potentially affects East Timor’s seabed resource rights.

Mr Nathans—I have brought John Imle along on the basis of his experience with particularly pipeline issues in situations such as that presently under consideration. I think that his wealth of experience may assist in giving some insight into the possibility of a pipeline from the critical resource areas both to Darwin and to somewhere in East Timor.

Mr Imle—The connection between the development plan and the treaty ratification in my mind is that the urgency of development is being used as a reason to hurry up the ratification of the treaty on both sides of the Timor Sea. It is a pressure on you and on the East Timorese. I want to address what I think about that pressure. I have spent all of my career in the offshore petroleum industry, at the project level and later at the executive and board level, overseeing negotiations of long-term energy contracts between companies and states. I have learnt from that—the hard way, I might add—that the best resource agreements and development plans are those that honour the long-term national interests of the nations involved. What I see going together in the Timor Sea lacks that aspect: it does not, I believe, honour the long-term national interests of East Timor.

This morning I am raising an option for the development of East Timor gas that, unfairly, has not been considered before, although it is obvious to me as an energy professional that this option should be and should have been considered. The option I am talking about is for a pipeline for Timor Sea gas to be built to East Timor and for the LNG processing plants to be built in East Timor, rather than in Darwin, for the export of LNG to world markets. This is not a popular idea in Australia, I am sure. It is probably a little more popular in East Timor, which would benefit from the direct foreign investment of billions of dollars. Not only is such a plan technically feasible but also I believe it could be accomplished at a lower cost. This would make

Timor Sea gas more competitive on the world market to the benefit of all stakeholders—particularly East Timor, which would benefit as the host of that investment. I have no doubt that you have heard from others—probably from the Northern Territory delegations—of the positive impact of this type of investment in the Northern Territory. I submit that it would be at least as important, and probably several times more important, to the fledgling nation of East Timor.

Earlier this year, as an independent party I was asked by Oceanic and Petrotimor to look over the development plans for Timor Sea gas from the point view of what is in the East Timor national interest. When I reviewed the current plans to build a pipeline to Darwin and to build the LNG plant there, I was quite surprised. Darwin is twice as far from Bayu-Undan as East Timor. The pipeline would be twice as long. Looking closer, I found on the record public statements, including testimony to a Senate hearing in Darwin in 1999, that it is technically not possible to build pipelines to East Timor due to the deep water of the Timor Trench. I believe that this was incorrect then and is even more incorrect today. Apparently the governments of East Timor and Australia were misled on this point.

Pipeline options for Bayu-Undan gas have been studied by two world-class engineering firms, one as early as 1996. Both studies confirm that a pipeline to East Timor can be built economically. The most recent study was by Intech, which is a large global scale pipeline engineering firm. A desktop study was done in their Perth office, paid for by Oceanic and Petrotimor, to make the feasibility of building pipelines to East Timor a matter of public record. That study, by the way, is in your records. It was submitted as part of our submission.

The Intech study, as the previous one confirmed, shows that pipelines can be built to East Timor at a lower cost than pipelines carrying the same amount of gas to Darwin. I ask myself: if a pipeline to East Timor is feasible and cost effective, why was it not considered earlier? My opinion is that, during the years that these initial decisions were being made, East Timor was still in turmoil, independence was not assured, not even in the early part of 1999, and investing in East Timor would have been seen as politically risky. I do not quarrel with that. If that was the real reason, however, it should have been publicly stated as the reason. Now, thankfully, peace and independence have come to East Timor, and I believe this young nation deserves an opportunity to compete for and perhaps win major investments that would be so pivotal for their future. Instead, East Timor has been, and is still being, rushed to close the door once more by ratifying a treaty and agreeing to a development plan that takes the gas not to their shores but to Darwin.

East Timor has had very little experience in self-governance, international negotiation or business and no experience in offshore resource development. The leadership has had to accept the decisions of others without its own independent energy advice. They are still disadvantaged by the lack of such world-class expertise for this world-class project. I think the present plan of development is a classic example of an uneven deal reached by unequal counterparties. In my experience, this will eventually increase the political risk. The most urgent problem for East Timor at this moment is its lack of jobs. This is a huge risk in post-conflict nations. It is a risk that I have dealt with as a founding member of the Business Humanitarian Forum. In post-conflict situations, the initial issue is always that of jobs.

Tax revenue will be welcomed by East Timor for the Timor Sea resources, and there is a hope that that will trickle down to ground level in East Timor. Foreign direct investment is a bottom-

up form of wealth creation that I think will more rapidly benefit the broad base of population. Again, I think the decisions have been taken in haste and are still being taken in haste. Pressure is being applied to all parties to ratify treaties and get on with the development plans without consideration as to what is in the best national interest of East Timor. I would urge you to slow down the process and give East Timor the time to think about what they are doing, to have public hearings as you are having on the issue and to examine it with the benefit, I might add, of independent expertise.

CHAIR—Thank you. Mr Nathans, is Deacons representing Oceanic Exploration and Petrotimor in the Federal Court proceedings?

Mr Nathans—Yes, it is.

CHAIR—Are you able to inform the committee of the point these proceedings have reached?

Mr Nathans—Yes, I am. The proceedings are presently the subject of a reserve decision of the full Federal Court. There are three defendants in the proceedings: the Commonwealth government, the Phillips group of companies and the joint authority. The joint authority has not appeared and the Phillips and Commonwealth respondents brought an application—I think it was in April—to have the proceedings struck out on the basis that they were not justiciable. The very simplistic effect, or meaning, of that is that a determination by the court on such matters as this may impact upon matters of foreign affairs—relations with East Timor, Portugal, Indonesia and such—that really fall within the scope of the executive power of government and therefore outside the power of the court. That decision has been reserved since April and we have had no indication as to when a determination might be handed down. I think it is a safe bet that the loser in that aspect will seek leave to go to the High Court.

CHAIR—At what point had the pleadings reached prior to the application on the issue of justiciability?

Mr Nathans—It had not reached anywhere in the sense that none of the respondents has, to date, filed defences.

CHAIR—But a statement of claim has been filed?

Mr Nathans—A statement of claim was filed in August last year. There have been a number of interlocutory skirmishes, as I might term them, and no defences have been filed. It was agreed that this point should be determined, and it was of such importance as determined by Justice Beaumont that he referred it straight to a full bench.

CHAIR—Are you able to briefly summarise for us the nature of what is being claimed—for example, what compensation is being claimed and what specific aspects are being sought?

Mr Nathans—In absolutely simplistic terms, one of the claims is that as a consequence of the Commonwealth government's recognition of Indonesia and its subsequent entering into the treaty with Indonesia in 1989—which led to the joint authority being set up and to the zone of cooperation which ultimately led to concession agreements being granted to the various oil and energy companies—it appropriated, on other than just terms, the property interests of the

applicant in the proceedings, both Oceanic and Petrotimor, and they are seeking compensation for that. That is one leg of the case.

The other leg of the case is that the Phillips group of companies bid for and took their concession agreements in full knowledge, as did the joint authority in granting them, of the interests of Petrotimor granted in 1974 and that there are certain rights that flow from that. Also there are allegations that confidential information, the property of Petrotimor, came into the hands of the respondents, particularly the Phillips group, and they were utilised—the claims in the statement of claim—in order to enable them to determine which areas to bid for. Ultimately, it transpired that they had particular interest in the Sunrise area. The fact was that Petrotimor established an office and had an agent in Dili from late 1974 onwards. The agent and other people were forced to flee, firstly, during the Fretilin uprising that commenced in June 1975 and, subsequently, as a consequence of the Indonesian invasion. Documents, maps, charts and seismic work that had been done in the region by Petrotimor were left behind and never seen again.

CHAIR—So this will all be evidence, presumably, in the case—

Mr Nathans—That is a case we would need to make out on the balance of probabilities in the court.

CHAIR—So there are two limbs to the—

Mr Nathans—Broadly speaking.

CHAIR—Broadly speaking, there are two limbs to the plaintiffs' claim and both would result, if your clients were successful, in compensation presumably.

Mr Nathans—Yes.

CHAIR—Petrotimor is not seeking to be reinstated, if you like, in the place of Phillips?

Mr Nathans—No, the court would not have the power to do that. Amongst the relief sought is to have the recognition of Indonesia declared unlawful. It will be our submission that under international law it was unlawful for Australia to have recognised the occupation by Indonesia. I do not think there is any other aspect, is there?

Dr Ward—No.

Mr Nathans—That is it in a nutshell.

CHAIR—What amount of compensation is being sought?

Mr Nathans—It has not been quantified.

CHAIR—It is damages at large?

Mr Nathans—Damages at large are being sought, but the numbers are substantial.

CHAIR—Give me a ballpark figure, if you can.

Mr Nathans—A ballpark figure—in the range of \$1 billion to \$2 billion.

CHAIR—It was in the context of preparing this case that the Lowe opinion was sought?

Mr Nathans—No, it was not. Deacons was also asked to advise the Petrotimor-Oceanic group in the context of negotiations and entitlements that they may have in East Timor apropos the new government in East Timor and how the concession agreement might stand in the context of a new political regime in East Timor. It was as a consequence of that inquiry that we procured that initial joint opinion.

CHAIR—Dr Ward, what is your role in the case? Are you counsel?

Dr Ward—I am one of three counsel in the Australian litigation.

CHAIR—Briefed by Deacons?

Dr Ward—I am briefed by Deacons. I am also retained by Deacons to advise separately on the international law questions.

CHAIR—So your role in the case will be as counsel, not as expert witness?

Dr Ward—As counsel, yes.

CHAIR—Can you explain the basis of the original boundary of what is now the JPDA that you say was granted to your clients by Portuguese Timor? What was the basis of that boundary delimitation?

Dr Ward—The short answer is that I think we do not know. My clients, or Mr Nathans's clients, were on one side of a commercial negotiation with the government of Portugal at that time and they were granted a concession with reference to a defined area. The basis upon which that defined area was generated by Portugal is not, I think, within Petrotimor's knowledge. One could hazard a guess, though, that it approximates a full effect median line at all boundaries. It is not going too far to suggest that, to the extent that the eastern boundary of the concession area closely approximates the proposed eastern lateral line of the JPDA, that is because the developments with respect to partial effect of islands have taken place substantially after 1974.

CHAIR—So the area that Petrotimor was granted was as a result of negotiations with the Portuguese Timor government?

Dr Ward—On the basis of information that I have seen, yes.

CHAIR—That subsequently became the JPDA area between—

Dr Ward—For reasons again that we can only guess at—and there are various descriptions of how those lines were generated, some of which seem to have quite good information—it appears that the boundaries of the zone of cooperation between Australia and Indonesia again closely approximated the boundaries of the Petrotimor concession.

CHAIR—And again, with the East Timor and Australian treaty before us today, the JPDA approximates the original area that you say Petrotimor was granted?

Dr Ward—That is correct.

CHAIR—How will Australia's ratification of this Timor Sea Treaty impact upon your client?

Dr Ward—That is probably a question better directed to Mr Nathans—

CHAIR—What would you say in your opinion as counsel?

Dr Ward—It would be difficult to see that it would have any particular immediate impact.

CHAIR—Would it have any impact on the Federal Court case?

Dr Ward—I think not. Again, though, Madam Chair, that is a question which probably deserves consideration. It is not a question with which I have been briefed.

CHAIR—I can come back to Mr Nathans. Can you outline again the interests of Petrotimor, the interests of your clients, with respect to the question of East Timor's boundary delimitation.

Dr Ward—The position can properly be summarised as Mr Nathans has. There is synergy between the interests of Petrotimor and Oceanic and the interests of East Timor in that, with the exception of the eastern lateral boundary, the concession area approximates the full entitlement of East Timor at international law. That is, if East Timor were to obtain its full entitlement, in doing so it is entitled to rely on the existence of the concession. Equally, that is a fact which of itself is consistent with the grant of the concession.

CHAIR—Let us take the eastern boundary that you mention. If the eastern boundary were to be moved eastwards, in accordance with one of the three proposals put forward by the Lowe opinion, how would that impact on Petrotimor's case, or its claim?

Dr Ward—I honestly could not answer that question; that is not a matter within my knowledge or expertise.

CHAIR—You are not suggesting that Petrotimor would stand to gain from the inclusion in the JPDA of Greater Sunrise, for example?

Dr Ward—I am not aware of any arrangements by which Petrotimor would necessarily stand to gain as a result of that inclusion, no.

CHAIR—So Petrotimor’s interest today is merely to see the interests of East Timor supported?

Dr Ward—I think that is a question more properly directed to Mr Nathans, as Petrotimor’s legal representative. As counsel, I have been briefed on specific questions. I think the answer to your question is yes, but it is a question that Mr Nathans should answer.

CHAIR—Mr Nathans, could you answer a couple of those questions as the solicitor for Oceanic and Petrotimor? How will Australia’s ratification of this treaty impact, firstly, generally upon your clients and secondly, specifically upon your clients’ case?

Mr Nathans—I will deal with the second question first. It will not impact on the litigation in any fashion that I can think of at short notice. The ratification by Australia would generally only impact upon the interests of Petrotimor insofar as ultimately, if East Timor chose to have the matter determined in some fashion, through arbitration or otherwise, then I apprehend, as I am advised, the boundary outcome may be different from that contemplated by the proposed JPDA area.

I know the treaty acknowledges that there may be an adjustment of boundaries, but our position is that, if there were an international law determination, it would put the boundary position differently as that contemplated by the treaty with the outcome that the unitisation arrangement might also either historically have been differently negotiated or in the future may be differently renegotiated.

CHAIR—And how would that impact upon your clients?

Mr Nathans—Not in any direct sense at all because my clients at this stage have no arrangements with the present government in East Timor in any commercial or legal way, other than historically East Timor, as the successor state, has certain obligations and benefits that are vested in it by virtue of it ultimately being the successor state to what was formerly the province of Portuguese Timor.

CHAIR—If the JPDA boundaries were to be changed in any way, it is not your clients’ intention, or you do not have instructions, to change the nature of the claim in the Federal Court to encompass the larger area?

Mr Nathans—Absolutely not.

CHAIR—Petrotimor’s claim is merely on the area as defined in its negotiations with the Portuguese Timor government?

Mr Nathans—Absolutely. The case is simply that this was our property and everyone, including the Commonwealth government, was aware of that at the time. The original zone of cooperation was created in 1989 and there is an entitlement to compensation. Nothing would flow from changing the boundary lines.

CHAIR—So what is your clients' interest with respect to the question of East Timor's boundary delimitations?

Mr Nathans—My client has a perceived interest that, if there were to be an international determination of these boundary issues with an outcome more favourable to East Timor, it would be able to utilise the concession agreement. There is a position at international law that the existence of the concession agreement is a significant matter that an international tribunal would take into account in determining the equities between two nations determining maritime boundary issues.

CHAIR—Could your client's claimed concession impact upon the negotiations between East Timor and Indonesia in relation to the eastern boundary of the JPDA?

Dr Ward—I will answer that. I think the answer to that question strictly would be yes, insofar as East Timor has lateral boundaries with each of Australia and Indonesia. It is probably an appropriate time for me to make the point that it is not the case that Indonesia is in any way a necessary party to East Timor's negotiations with Australia. That would be the case if it were not for the 1972 seabed agreement between Australia and Indonesia. In other words, in the absence of any binding agreement between Australia and Indonesia, there would be an unascertained tripartite boundary which would require the involvement of all three parties. As things stand, the 1972 boundary is binding. The better view is that—certainly it is my view and others that I have seen agree with that view—the 1972 boundary cannot be, to quote one word that has been used, 'unravelling' as a result of any action East Timor might take with respect to Australia. In those circumstances, if East Timor were to limit its negotiations with Australia to those areas south of the 1972 agreement between Australia and Indonesia, Indonesia simply would not be a necessary party. Your question, with respect, blurred those issues. The existence of the concession is a matter which affects the equities between the parties, just as, for example, the existence of concessions granted by Australia historically potentially affects the equities. That position prevails as well in any negotiation that may take place between Australia and Indonesia.

CHAIR—We have had evidence put to us that in order for the eastern boundary of the JPDA to be moved eastward—I assume nobody is suggesting that it would be in East Timor's interest to move it westward—there would have to be first an agreement or a renegotiation between East Timor and Indonesia with respect to the boundary between those two countries so that points A16 and A17 could be adjusted.

Dr Ward—With respect to those who promote that view, that view is not correct.

CHAIR—Why is that?

Dr Ward—So long as East Timor limited its claim against Australia or its negotiations with Australia to points south of the 1972 agreement there would be a disunity, unless the negotiations took place simultaneously with Indonesia, between the lateral boundaries against Indonesia and the lateral boundaries against Australia. But there is simply no need for Indonesia to be involved at all in those negotiations.

CHAIR—How would we find the starting point? What would be the reference points for moving the eastern boundary if Indonesia is not to be involved?

Dr Ward—The reference point is always the point of origin between the land mass of East Timor and the land mass of Indonesia—that is, between the islands of Leti and the island of East Timor. The fact that that line on a map may be generated vis-a-vis Australia from that point does not mean that that line would be binding against Indonesia in respect of points north of the 1972 treaty with Australia.

CHAIR—So you would have a line drawn between East Timor and Indonesia for the purposes of defining the eastern boundary of the JPDA but that line drawn between East Timor and Indonesia would have no impact on Indonesia—Indonesia can ignore it for its purposes.

Dr Ward—If, hypothetically, East Timor were to enter into negotiations tomorrow with Australia which resulted in one of the three joint opinion options in respect of its common area with Australia—that is, point south of the 1972 seabed agreement—and assuming no simultaneous negotiations with Indonesia, there would be a step in the line. The line would start on the currently existing proposed line, or something approximating it, to the point between East Timor and the 1972 seabed agreement and would then step eastwards in respect of points south of the 1972 agreement.

CHAIR—I am just asking the secretariat to get us a map so that you can show us the area.

Dr Ward—I refer you to the map that is next to the joint opinion.

CHAIR—Is it the map headed ‘1974 Oceanic Exploration Concession Area’?

Dr Ward—That is not the one.

Mr Nathans—No, that map shows the area of the 1974 concession.

CHAIR—How about the one headed ‘Admiralty’?

Dr Ward—Yes.

CHAIR—Its full title is ‘Law of the Sea Admiralty Consultancy Service’. It says at the top ‘Appendix C, paragraph 15 above’. If Australia and East Timor were to sit down tomorrow to negotiate another JPDA, could you tell me how they would fix the points?

Dr Ward—If Australia and East Timor were to do that, they would, for the purposes of international law, take as their starting point the position between the land mass of East Timor and the land mass of the Indonesian archipelago, being the Leti group of islands. That is the point at which there is a circle with the four very small spikes coming out of it, from which these lines are generated. Depending on whether half effect, three-quarter effect or full effect were given to those islands, a median line properly adjusted to give partial effect to the Leti group would result. In between the land mass of East Timor—if I can call it that—or the starting point of those lines and the 1972 treaty between Australia and Indonesia, which is represented

by the horizontal line that leads towards what is described as ‘zone C’, there would be simply no effect because Australia has no jurisdiction in respect of points north of the 1972 line.

But in respect of points south of the 1972 line, if the matter had gone to the International Court of Justice, the strongly held view of the opinion is that one of the alternative half or three-quarter effect median lines would be the result, and it would be the result in respect of points south of the 1972 seabed boundary. In other words, if it were the case that that boundary did not exist, there would also be a north-south delimitation between Australia and Indonesia and the points A16 and A17 would become highly relevant. But because of the existence of A16 and A17, and because of the 1972 seabed boundary being a fixed boundary, if East Timor were to choose to enter into separate negotiations with each of Australia and Indonesia, there would be no need for either Australia or Indonesia to be involved in the negotiations with the other party. I should perhaps add that that is a view also held by Professor Lowe.

CHAIR—I am not surprised. It is an interesting scenario to have an eastern maritime boundary determined on lines that originate from a boundary drawn between East Timor and Indonesia, yet not to have Indonesia’s input into it. I take it that Indonesia may well have a different view as to what ought to be the maritime boundaries between East Timor and Indonesia. Is that right?

Dr Ward—There are two things to say about that. The first is that I could not begin to hazard a guess as to what Indonesia’s currently held position may be, but it has in the past given partial effect to its islands in maritime delimitations. It is not an unusual thing and in fact—

CHAIR—So it supports the archipelagic—

Dr Ward—I cannot say anything more than that it has done it in the past.

CHAIR—Does it have a respectable argument—the archipelagic state baseline?

Dr Ward—I think not, because of the inequity that results—the fact that you are then placing a state that has an archipelagic baseline against a state that does not. That generates an inequitable result that has been described very well by Professor Prescott, who says that the lines converge as a result.

CHAIR—But Indonesia has not tested this in the International Court of Justice?

Dr Ward—Certainly not in relation to East Timor.

CHAIR—Or otherwise?

Dr Ward—Not to my knowledge, and certainly not in the International Court of Justice. I should make one small correction to my opening statement. At one point I referred to Professor Triggs as having made some statements in an article in respect of the unitisation of Sunrise and the reunification prospects. That was in fact Mr Brazil in his written submission, not Professor Triggs.

Mr WILKIE—Schedule 1 of your first submission refers, in the second dot point, to East Timor's exclusive rights to explore, develop and produce natural hydrocarbons. Is this a claim to or an assertion of an exclusive right, and in what sense do you mean exclusive?

Dr Ward—It is a right that is exclusive to seabed that falls within an exclusive economic zone. That is the short answer.

Mr WILKIE—Are you saying it is exclusive for your clients?

Dr Ward—Certainly not for our clients. I apologise—at that dot point, the exclusiveness is in fact in respect of Petrotimor. It is a right that arises contractually pursuant to the concession agreement between Petrotimor and Portuguese Timor.

Mr WILKIE—How would that then affect Phillips or Woodside?

Dr Ward—That is one of the primary questions that is the subject of the domestic litigation. I do not think I can give a better answer than that.

Mr WILKIE—Could you provide the committee with any details of petroleum related activity that occurred on the granting of concessions by Australia that occurred within this area at the time of the granting of concessions by Portuguese Timor?

Mr Nathans—No, we have not provided the committee with any of that material. Again, that is material that will ultimately, if litigation is able to proceed, be relevant to that. But we do have that material.

Mr WILKIE—Is that confidential information or could it be provided to the committee?

Mr Nathans—It is confidential information in that it has never been disclosed to anyone else, and it relates to proprietary drawings by Oceanic in the context of the location of, amongst other prospective areas, Bayu-Undan and Sunrise. It has not yet been discovered in the proceedings. I would need to take instructions on that. It may be that it can be provided in a confidential fashion.

Mr WILKIE—If you could do that, it would be appreciated.

Mr Nathans—Yes. I will take that on board and will get back to Mr Worthington.

Mr WILKIE—Thank you. A lot of the discussions obviously concern the maritime boundaries. Given that obviously those boundaries are subject to ongoing negotiation, and hopefully an agreement will be reached, what are your thoughts about further action that could be taken if negotiation is not reached, given that Australia is no longer a signatory to the International Court of Justice?

Dr Ward—There is a very short answer to that. As things stand today, East Timor has not to my knowledge signed or ratified the United Nations Convention on the Law of the Sea, so it is in the land of negotiation and ad hoc arbitration as to whether that can be agreed to. If it were to

sign and ratify UNCLOS, it would then have rights to compulsory conciliation pursuant to the treaty. Although it is a conciliation and not an arbitration, one could expect the conciliation to take place in a framework of international law.

Mr WILKIE—Thank you.

Senator TCHEN—Dr Ward, do I understand you to have said that, in the delimitation of a maritime border between two nations that have less than 400 kilometres between them, the only basis recognised under international law is equidistance—median distance?

Dr Ward—Not quite, but close.

Senator TCHEN—What other factors may be considered?

Dr Ward—It is nautical miles, not kilometres, which are substantially greater.

Senator TCHEN—I am sorry—nautical miles.

Dr Ward—States, both at customary international law and pursuant to the law of the sea convention were East Timor to ratify it, are absolutely entitled to an exclusive economic zone of up to 200 nautical miles. East Timor has in its domestic legislation, I understand, claimed that distance fairly recently. Australia and East Timor are less than 400 nautical miles apart, so the two intersect. The weight of authority and the weight of international practice in negotiations between states is to start at the point of drawing what is called a ‘provisional median line’, essentially dividing the two evenly, and then to undertake what are usually relatively slight adjustments to that median line effected by what can broadly be called the ‘equities of the situation’. Matters that go to the equity of a situation include the existence of historical concessions as a relevant feature, the relative wealth of the nations and the relative size of the coastlines from which the boundaries are generated. There have been suggestions that equitable treatment includes a consideration of large-scale geological features, and certainly the Timor Trough would fall into that category. That suggestion has not been accepted at any time by any international court or tribunal. My view and the view of my coauthors is that it would not be accepted in this instance. In other words, the Timor Trough is simply a feature which, although large, has no role to play.

Senator TCHEN—Nevertheless, it is a factor that could be taken into consideration?

Dr Ward—I cannot do more than to say that there have been suggestions by some commentators, Professor Triggs among them, that that is the case. My view is that that is not a correct statement of international law; it would not be a feature. Certainly, there has never been an example of an international court or a tribunal considering a deep geological feature to be a matter that affects the equities of a situation.

Senator TCHEN—But, as you say, neither view has been tested in court.

Dr Ward—Yes, there have been attempts before the International Court to rely on deep geological features. They have never succeeded as being a relevant feature. So there have been attempts in the past.

Senator TCHEN—Not a relevant feature at all or not a relevant predominant feature?

Dr Ward—Not a relevant feature to an equitable delimitation.

Senator TCHEN—What about other issues, such as pre-existing borders by customary practice?

Dr Ward—Pre-existing borders are a relevant feature, yes.

Senator TCHEN—What about the claim for archipelagic states, which I understand is a factor to consider under UNCLOS?

Dr Ward—Certainly the law of the sea convention has a very detailed regime in relation to archipelagic states and makes express provision for them to be able to draw baselines that enclose their islands. That is a factor that is relevant to the starting point for these zones for the 200 nautical mile limits. In other words, the limits then start from that baseline that results. It is not a matter that is relevant in any way to a delimitation between states, particularly between adjacent states. In fact, for the reasons that I have given, to rely on an archipelagic baseline in that way is an inequitable thing to do and would not be accepted by a court.

Senator TCHEN—But it could be a factor that may be given influence?

Dr Ward—Not in my opinion, no.

Senator TCHEN—But, because of its clear existence in UNCLOS, it should be reasonable to hold a contrary opinion.

Dr Ward—I think not, Senator, with respect. The authority is to the effect that an archipelagic state may not use the fact of its archipelagic nature as a matter which affects a delimitation with an adjacent state such as East Timor. The archipelagic regime under UNCLOS is designed to ensure that an archipelagic state is not disadvantaged when faced with claims by opposing states such as Australia and Indonesia in this case. It is simply not relevant to a determination or a delimitation between adjacent states such as Indonesia and East Timor.

Senator TCHEN—That is interesting. In answer to the question from the chair, Dr Ward, you said that point 16, as a point on the boundary between Australia and Indonesia, is fixed.

Dr Ward—I do not think it is fixed. I think it is not relevant to the delimitation between Australia and East Timor.

Senator TCHEN—Obviously I do not have a law background, but it is interesting that we can start delimiting a boundary between two states, in this case East Timor and Australia, from an essentially imaginary point—assuming the equitable delimitation of boundaries between East

Timor and another country—when the actual delimitation between two countries, in this case East Timor and Indonesia, is actually quite different.

Dr Ward—I must, with respect, correct you. At this stage there is no delimitation between East Timor and Australia. One must keep in mind at all times the fact that the proposed lines of the JPDA are simply that—they are proposed lines that, essentially, as Madam Chair quite rightly analysed, are derived historically from the zone of cooperation lines which were the result of negotiations between Australia and Indonesia. In other words, the generation of those points has not involved either Portuguese Timor or East Timor at any stage.

Senator TCHEN—In that case—you will have to excuse the lack of legal discipline in my mind—shouldn't it therefore follow that any delimitation decision on the boundary between East Timor and Australia should in fact take effect after East Timor and Indonesia have made the decision about their boundaries?

Dr Ward—It does not matter. The order of any delimitation proceedings would not matter. At international law, there is only one correct starting point and that is the point between East Timor and Indonesia, and there is perhaps only one range within which the partial effect median lines were run and that is the range of lines given in the opinion.

Senator TCHEN—I will have to think about that. Dr Ward, can I go to one particular point in the additional submission which Deacons provided. I assume that you have knowledge of that.

Dr Ward—I do.

Senator TCHEN—In point 11, your rebuttal of Mr Brazil's comments about the border, you said that at first glance the view he expressed about whether laterals should be drawn seemed to be persuasive but that he has taken a microgeographic rather than a macrogeographic view of the delimitation problem.

Dr Ward—Yes.

Senator TCHEN—So, in your view, if he had taken the macrogeographic view, the eastern lateral should be shifted eastward, depending on how you take the importance of the Pulau Letis. Looking at the western lateral, to the naked eye the line proposed by the legal opinion makes a very acute angle from what appears to be the generalised coastline of East Timor. Surely that does not take the macrogeography into account.

Dr Ward—In fact, the western boundary line is what is known as a 'coastal front bisector line'. It is a technical description for the line that is generated in that way. A coastal front bisector line is a line that has significant support in the practice of states faced with coastlines that broadly resemble the coastline at the point of the intersection between East and West Timor and is also a line that has been applied in arbitration decisions. So it is a line that has quite some support in international law.

It does in fact seek to overcome what could otherwise be described as an inequity that results from the curvature of the West Timor coastline. If I could refer to the word used by Mr Brazil,

there is no element of ‘contrivance’ at all in the generation of these lines. These are the lines that the authors of the joint opinion believe, as a legal matter, would be likely to result in any third party independent arbitration proceeding.

Senator TCHEN—Perhaps you can explain to the committee how the western lateral was decided.

Dr Ward—Again bearing in mind that, as it stands, it is a proposed line and not an existing line, it is what is broadly seen as a full effect median line. But it is a median line that is—

Senator TCHEN—Is it a median line between Australia and East Timor?

Dr Ward—It is a median line between East and West Timor but one which is affected by the existence of the termini of the 1972 seabed agreement between Australia and Indonesia. In other words, at that point the proposed western boundary line is effected by the existence of the terminus of that treaty and also, as is made clear in the opinion, by the fact that it seems to start—very slightly—from the incorrect position on the landmass of East and West Timor. Were the starting point to be moved to the west in accordance with the opinion and in accordance with international law, and were the line to travel in a coastal front bisector direction, the result is the one which appears in the opinion.

Senator TCHEN—Thank you for clarifying that. Mr Nathans, can you tell us when Petrotimor first lodged its interest in the potential gas and oil deposits in the Timor Sea?

Mr Nathans—With Portugal or the Federal Court?

Senator TCHEN—With Portugal.

Mr Nathans—Negotiations started in the late 1960s. An application was made in 1971-72 with a decree being granted by the government of Portugal in December 1974, and a concession followed.

Senator TCHEN—The reason I ask is that the committee was told by Woodside—it was not given in evidence; it was just information provided—that, as far as the deposit at Greater Sunrise in which Woodside has an interest is concerned, Woodside proved the existence of the reserve in the sixties, well before any interest from Petrotimor. It seems to me to be logical that, in an area of disputed sovereignty, any proposed project could go to either of the sovereign authorities. But surely, when the time comes to settle the dispute, the date of first interest would have a bearing on whose claim has greater validity and it seems to me that Woodside’s interests in the Greater Sunrise area predates any interest displayed by Petrotimor.

Mr Nathans—I do not know what Woodside have said, but it certainly would be a matter for debate as to who actually first identified the prospectivity of Greater Sunrise.

Senator TCHEN—That is fine, that is all I wanted, as I was not sure whether it was a valid point. In regard to the Oceanic Exploration and Petrotimor case before the Federal Court, is one

of the factors in your compensation claim that Australia's dealings with Indonesia were unlawful?

Mr Nathans—Yes.

Senator TCHEN—Who should Australia have dealt with then—Portugal?

Mr Nathans—Yes, if Indonesia had not invaded and assumed government and control and authority in East Timor. We would submit a position at international law that the Indonesian invasion and occupation was unlawful and that the consequences that flow from that do not have any validity at international law. That does not mean to say that anyone thinks that there is any realistic prospect of undoing any of the existing concession agreements—that is naive in the extreme.

Senator TCHEN—But Indonesia's incorporation of East Timor was recognised by Australia, rightly or wrongly. Given that, I put it to you that, notwithstanding their long occupation of East Timor, Portugal occupied East Timor as a colonial power in that the East Timorese had no citizenship rights in Portugal and enjoyed no constitutional rights and no legal rights as Portuguese citizens; therefore Portugal, all this time, occupied East Timor as a military power. How does that differ in international law from Indonesia's occupation of East Timor?

Mr Nathans—I do not know. I will ask Dr Ward to address that.

Dr Ward—With respect, I do not think that it is entirely necessary for the purpose of this discussion to analyse the respective legitimacy of the Portuguese and Indonesians. But I can say that there is a distinction between the decolonisation process that was likely to take place in the absence of Indonesian occupation and the process that has resulted. Because I think this might be where some of your questions are leading, I should also say that the legal analysis of the status of the Petrotimor concession does not of itself depend on the legality of the Indonesian actions. That is certainly referred to in the statement of claim in the Federal Court proceedings, but it is not a central feature.

The central feature is that, no matter what the arrangements made between Australia and other states are, the existence of the Petrotimor concession, as a contractual concession and licence, is a matter that was within the knowledge of all states concerned, particularly Australia, and their dealings which did not respect the existence of that concession were dealings which have various legal consequences for the purposes of Australian law. In a nutshell, that summarises the arguments that will be raised in any substantive hearing in the Federal Court proceedings.

Senator TCHEN—I was not trying to pre-empt the Federal Court's decision; I was just curious about Petrotimor's concern about Australia's dealing with Indonesia. Mr Imle, you said that building a pipeline from the oil and gas field into East Timor across the Timor Trough is technically and economically feasible. Do you know of any similar projects that have been constructed in the world?

Mr Imle—There have been no pipelines laid in that water depth. There are several designs that are complete for greater water depths. An example is that there is a design for a 3,500-metre

water depth pipeline between Iran and India for the transportation of natural gas. That project has not moved ahead not because of the technical problems of laying a pipeline or the costs but the length of the line and the absence of firm gas buyers in India. I will readily admit, and you should know, that the record water depth today for deepwater pipelining is about 1,650 metres. The pipeline from Bayu-Undan to East Timor would be 2,500 metres. That is a leap, but it is not a leap across a technological barrier. The pipeline design is simple. There are two things to consider: the hoop strength of the steel and the power of the tensioners on the lay bars to hold the pipe. You could not build a 36-inch pipe from Bayu-Undan to East Timor; you can build 28-, 26- or 24-inch pipelines.

Senator TCHEN—In that case, would it not limit the production from the Bayu-Undan field?

Mr Imle—A 26-inch pipeline from Bayu-Undan to East Timor would carry as much natural gas as a 32-inch pipeline from Bayu-Undan to Darwin because the distance to Darwin is twice as far. It is the square of the diameter that matters. A 36-inch pipeline is equal to two 26-inch pipelines, which is what was pointed out in one of these early engineering studies.

Senator MARSHALL—Mr Nathans, in section 5.2 of your submission you seem to be saying that the ratification of the Timor Sea Treaty has a direct bearing on the international unitisation agreement negotiations. Given that the IUA is a separate treaty action that has not yet come before the committee, could you explain how you see the ratification of this treaty impacting on those negotiations?

Mr Nathans—The negotiations between Timor and Australia?

Senator MARSHALL—Yes, in respect of the international unitisation agreement.

Mr Nathans—Those are in the nature of a contractual arrangement and, irrespective of how the boundaries move, the parties—the two states—may still be stuck with that contractual arrangement. It does not necessarily follow that, if the boundary moves such that, for example, a larger part of Greater Sunrise came within the territorial jurisdiction of East Timor, the unitisation arrangements would change in East Timor's favour.

Senator MARSHALL—In East Timor being the successor state in your argument to Portuguese Timor, you said that East Timor should be able to rely on some of the benefits of the previous agreements. You went on to talk about the obligations that they would also inherit. What sorts of obligations are you referring to there and how would they impact on this issue?

Mr Nathans—If it were ultimately determined that the concession agreement still existed one way or another, then, if you like, there is a grantor, which was originally Portugal for the benefit of Portuguese Timor, and there is a grantee, which was Petrotimor and, under the concession arrangements, there are obligations on the part of the grantor to maintain certain things. One would need to look at the agreement. Take, for example, a lease: while most of the obligations are on the tenant to pay the rent and keep the property in good repair, there are still obligations on the landlord to provide quiet enjoyment of the premises and to allow the tenant to subsist. It was more or less that which we had in mind, but mostly obligations under that concession agreement fall to Petrotimor and there is an obligation on Petrotimor and, in the

concession agreement, Petrotimor is contractually bound by the decree of Portugal to grant a 20 per cent interest in the paid-up capital of Petrotimor with the government of Portugal for the benefit of what was then Portuguese Timor and, consequently, is now East Timor. Theoretically—and by reference to that concession contract—East Timor has an equity interest in Petrotimor.

Senator MARSHALL—You have said in your submission that your interests also benefit East Timor.

Mr Nathans—Absolutely.

Senator MARSHALL—Does East Timor share that view?

Mr Nathans—You would have to ask the representatives of East Timor that. I think it is the position of the Petrotimor-Oceanic interest that, as John Imle said, they should not be forced by the speed of this process to forgo the opportunity to get appropriate legal and technical advice in respect of their entitlements. Part of our interest is to do what we can—that that opportunity is given that things are not set in stone so as to deny our clients the opportunity to enhance what is theirs and also to give East Timor the opportunity to take advantage of any legal entitlements that it may have.

Senator MARSHALL—But you are not actually taking that position on behalf of East Timor?

Mr Nathans—We have no authority whatsoever to take that position on behalf of East Timor.

Senator MASON—Senator Marshall has raised some interesting points. He has inspired me, but I will be quick. While you do not claim to be representing East Timor, you have very much tied your arguments to two things: firstly, Dr Ward's legal opinion, which I think in effect says that at international law East Timor is potentially getting a raw deal; and, secondly, in the medium term at least it is not in the national interest of East Timor. Mr Imle said that before and I think, Mr Nathans, you said that in your covering memo to the opinion. They are the two arguments that you raise. To keep it simple, what you seem to be suggesting to this committee is that it is in Australia's national interest—and that is what we have to look after—that Australia renegotiate this treaty with East Timor to give East Timor a better deal.

Dr Ward— If I could answer that, because that is a question to which I have turned my mind. My answer to that is quite simple and that is that what is in Australia's national interest is a matter for this committee to determine. Speaking now personally and not as a representative of the Oceanic interests, my motive, if you like, apart from the representational one of providing these submissions today—and I think Mr Nathans would be able to answer a substantial part of the motive of the Oceanic interests as well—is to put a view as to modern international law before the committee. What the committee does with it is clearly a matter for the committee in terms of national interest and otherwise. I do not seek, on behalf of my client, to put any position as to what the national interests may or may not be. That goes to matters that go beyond strict financial matters in any event.

Senator MASON—The national interest of whom: Australia or—

Dr Ward—The national interest of Australia.

Senator MASON—We have to make that assessment. Your argument is based on the fact that East Timor is getting a raw deal and that East Timor's national interest will not be best served by ratifying this treaty.

Dr Ward—The concerns are fairly accurately summarised there, but the concern in respect of the ratification of the treaty arises substantially because of the concern with respect to annexe E, not necessarily the treaty as a whole.

Senator MASON—We have been through this before, but I do not know whether your opinion is right on and would be endorsed by the International Court of Justice. Frankly, I do not really care, because we are here to protect Australia's national interest. It does not matter whether it is right or wrong. The other point that you raised about East Timor's national interest only worries me, or this committee, so far as it concerns Australia's national interest. Why is it in our national interest that the East Timorese national interest should be given greater priority in the short term?

Mr Imle—I can make a suggestion. The stability of East Timor depends very much on early job creation to give these former militia people something productive to do. Jobs are the No. 1 issue for a post-conflict nation. It is in Australia's national interest, as the superpower of the region and the guarantor of security in East Timor, as you have been before, to see a stable East Timor. What I fear happening is that in a few years from now the new generation of leaders who are thinking about this issue right now will be asking, 'Why are these jobs in Darwin and not in East Timor?' That is in your interest to consider.

Senator MASON—That is a point well made. The question for the committee is whether the best vehicle for the pursuit of the East Timorese national interest—and, as you say, our national interests are tied in—is with changing this treaty or not ratifying it or with some other mechanism like trade and a whole basket of issues like humanitarian aid, job creation schemes, security arrangements and so forth. I am not saying that you are wrong. I am wondering whether arguing that this treaty should not be ratified is the wrong way, or not the best way, of getting the best public policy outcome.

Mr Imle—My issue is less with the treaty than it is with the use of the project to supercharge the whole issue and cause things to happen. The project is on the rails, it is moving ahead and it would take a lot of courage to slow down and say, 'Time out; let's review where this gas should go.' There are also some economic reasons for doing this work in East Timor that have been eclipsed by the fact that it was too politically risky when the decisions were made. If we were looking at it freshly today, the outcome could be different for many, many reasons that I would love to get into but I do not think you have time for. It could make that gas lower cost and more competitive than Australian LNG—which is not the world's lowest cost LNG—and Australia and Australian companies would benefit from that.

Senator STEPHENS—I would like to pursue that issue one step further. In relation to the employment issue that you have raised, several submissions to the committee have raised concerns about the absence of preferred employment for nationals in permanent residence in Australia. What is your take on that issue, in the absence of that in the—

Mr Imle—I am sorry, I did not hear you. Some have raised the issue of what?

Senator STEPHENS—They have raised the issue of the absence of preferred employment for nationals in permanent residence in Australia.

Mr Imle—My own opinion about that is that agreements for preferred employment are not worth a lot. There is a natural flow of employment to projects, and that depends on the siting of the project. I know that there are certain undertakings about the hiring of East Timorese to work offshore—and maybe even to work in Darwin; I am not sure. That could not, in any way, replace what would happen for a project built in Darwin, where the first level of work would be unskilled labour, taxi drivers and cooks. Darwin would receive that benefit, not East Timor. The companies have pledged something like \$100 million to a project like this for Bayu-Undan—a project with lifetime investment in employment and training for East Timor. I would face that off against billions of dollars of foreign direct investment.

CHAIR—Thank you for your time this morning. Would you also thank your clients for assisting with the submissions.

Mr Nathans—Could I correct one thing for the record. I said that the proceedings in the Federal Court were commenced in August 2001. It was in fact April 2001.

[11.47 a.m.]

GLANVILLE, Mr Wesley Jon, Manager Legal, Santos Ltd

KELEMEN, Mr Stephen Gyula, Manager Northern Australia Development, Santos Ltd

LAWRY, Mr Michael John, Manager Group Taxation, Santos Ltd

PRICE, Mr Michael, Manager Commercial (Northern Business Unit), Santos Ltd

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant 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 the parliament. Mr Glanville, perhaps I could direct this to you first. Your submission is marked confidential. At this stage of the public hearings, all of the evidence we have taken has been public, including that from oil and gas companies. Is there any submission you wanted to make to us about the confidentiality or otherwise of the submission?

Mr Glanville—We asked that the submission be confidential because we had included information, the commercial sensitivity of which we believed was significant to the company. On that point we wanted to make certain points to the committee so that you could understand more fully the issues pertinent to Santos not only as the sole remaining Australian company with an interest in the Bayu-Undan field but also as a Bayu-Undan participant. However, I do have an opening statement that may, at least for your purposes, put certain things on the public record.

CHAIR—I will ask you to go to your opening statement in a moment. If you want any aspects of the written submission to remain confidential, we would ask you to draw them to our attention; otherwise, the committee's preference is for the evidence to be made public and also to be posted on its web site. The transcripts of the proceedings will be made public unless we go in camera. If you have any submission in relation to that, perhaps now is the time to let us know.

Mr Glanville—The sorts of matters that we would seek to have addressed in camera relate to the understandings that you are aware of—that is, Santos's taxation position and matters pertaining to the transfer pricing and joint venture issues.

CHAIR—Have you read the evidence that was given to the committee last week in Perth by Phillips?

Mr Glanville—I actually attended that public hearing.

CHAIR—I thought you looked familiar.

Mr Glanville—I understand that Phillips's position was that there were certain matters that were commercial-in-confidence that were not divulged at that public hearing. We certainly would take the same position here.

CHAIR—You can come back to me about the written submission. Shall we proceed on the basis that it is all public, but if we get to a question that you believe would require you to give commercially confidential information we can deal with it at that point?

Mr Glanville—Certainly, Madam Chair. It was my understanding that at the point of a question being asked I would raise with you the matter of it being commercial-in-confidence.

Mr WILKIE—If people refer to your submission, they may inadvertently ask a question relating to something which you do not want divulged. If there is anything in the submission that you do not want divulged, I suggest you let us know before we start asking questions so that we do not refer to it.

Mr Glanville—Our position is that the matters pertaining to the understandings, which deal with the Bayu-Undan fiscal terms—

CHAIR—Are there any particular paragraphs? I guess that is what we are coming down to.

Mr WILKIE—That is what we are asking.

CHAIR—Are there any particular paragraphs in your submission that you would like to be kept confidential? If we can deal with them, the questioners can take that into account when asking questions.

Mr Glanville—Madam Chair, I direct your attention to section 5, which deals with commercial prerequisites. There may be matters that you will raise that relate to that issue.

CHAIR—You are not suggesting that the paragraphs themselves be confidential but that if we delve deeper into those issues it might require you—

Mr Glanville—Yes, Madam Chair.

CHAIR—So we can accept that paragraphs 5.1 and 5.2 be public but that you alert us to the fact that if we try to ask questions behind these statements we might be going into commercially confidential areas?

Mr Glanville—Yes, Madam Chair. I do apologise for not being as prepared as I could have been in anticipating your questions in relation to the submission. Insofar as there are comments on commerciality in the sections that I have identified, I would like the opportunity to clarify with the committee subsequently that we would not want those issues put on the public record. I say that insofar as going through this section by section I may not be able to clearly identify certain parts of the submission.

CHAIR—Perhaps somebody can do that—or is that your task? The committee would prefer to proceed on the basis that it is a public hearing, so it would be the exception rather than the rule for something to be confidential.

Mr Glanville—We have attended today on the assumption that whatever we say, except those matters that we identify as matters we would like dealt with in camera, would go on the public record. But, as I mentioned before, there are four major items that we consider to be matters that should be dealt with in camera. They pertain to the understandings, the transfer pricing arrangements, the taxation issues and joint venture matters.

CHAIR—Given that this is the last day of hearings and we have heard from a number of other parties, I cannot imagine that questioning will delve into those areas such as to cause you concern. It will not be so specific. Shall we proceed with your introductory statement and then see how we go?

Mr Glanville—Certainly. Firstly, I would like to say that Santos Ltd appreciates the opportunity to appear before the committee today to bring to its attention those matters which the company believes are pertinent to the committee's deliberations in respect of the ratification of the exchange of notes and the Timor Sea Treaty. As I have mentioned, as we come to matters that we would like to deal with in camera, I will raise those.

From the outset, let me say that Santos firmly supports the early ratification of the exchange of notes of 20 May and also the Timor Sea Treaty, which was done in Dili by Australia and East Timor on the same date. Like Phillips Petroleum Co., representatives of which appeared before the committee in Perth on 2 October, Santos is surprised that certain organisations, corporations and individuals have submitted to the committee that the Timor Sea Treaty and the exchange of notes should not be ratified until such time as the seabed boundaries between Australia and East Timor have been delimited and, secondly, until such time as Australia and East Timor have agreed to the international unitisation agreement in respect of Greater Sunrise. Delaying the ratification of the Timor Sea Treaty pending the Sunrise international unitisation agreement would be against the terms and spirit of the 20 May exchange of notes and memorandum of understanding.

Political and sovereign risk in the Timor Gap has been a major concern for the oil and gas industry over the past 34 months, during which time companies investing and undertaking operations in the Joint Petroleum Development Area have been required to do so under transitional or interim arrangements. Whilst the Timor Sea Treaty was signed by both Australia and East Timor in Dili on 20 May 2002, it is obviously well known that it will not come into force until such time as Australia and East Timor confirm with each other that the Timor Sea Treaty has been ratified by their respective parliaments. Once ratified, the Timor Sea Treaty will relate back to and take effect from 20 May. Until that time, companies are required to continue to commit to significant expenditures under interim arrangements. The 1989 Timor Gap Treaty established the ground rules for sharing tax and royalties from Timor Gap oil and gas production between Australia and East Timor as the then contracting states and served as a solid regime under which petroleum exploration and exploitation companies could commit to undertaking petroleum operations, notwithstanding the unresolved claims between Australia and Indonesia as to sovereignty over the seabed.

The Timor Sea Treaty, when ratified by both Australia and East Timor, and the adoption of a new petroleum mining code and satisfactory production-sharing contracts incorporating the Bayu-Undan fiscal terms, as set out in the understandings, will similarly establish a solid regime under which petroleum operations can be conducted. None of the Bayu-Undan participants would deny that they have a commercial interest in the early ratification of the Timor Sea Treaty and the exchange of notes. Clearly, the early ratification of these treaty documents will take the Bayu-Undan parties a crucial step closer to being able to commit to the development of the Bayu-Undan gas resource via the proposed LNG project. Whilst the Bayu-Undan parties are committed to the gas recycle project—and you might have heard that more commonly referred to as the ‘liquids project’—they are resolved that they are unable to proceed with the significant LNG project until such time as the Bayu-Undan fiscal terms are in place, which will in turn necessitate the issue of replacement production-sharing contracts encompassing the requisite fiscal arrangements. The Bayu-Undan fiscal terms, however, will not be agreed and replacement PSCs—production-sharing contracts—will not issue until such time as the treaty arrangements are ratified. The existing interim or transitional arrangements under the exchange of notes are not in themselves sufficient to permit the second phase of the Bayu-Undan project—that is, the LNG project—to proceed as those arrangements do not deal with the necessary fiscal arrangements relating to gas. There can be no commitment to significant LNG project expenditures, which are in the order of \$US1.5 billion, until such time as the commerciality of the project is secured. To expect otherwise is nonsensical.

Should these matters not be addressed, the Bayu-Undan participants, as well as Australia and East Timor, will lose the resulting benefits that will accrue from the development of the Bayu-Undan gas resource. To the Bayu-Undan parties this will mean in part the loss of a development opportunity, the loss of an ability to enhance the recovery of the liquids, the prospect of having stranded gas, and the loss of additional revenue which would have enhanced the overall project returns. To East Timor, this means that it will lose out on significant revenue returns—revenue it could otherwise make available to be deployed to the development of its economy and for the benefit of its people—as well as substantial employment and other development opportunities. For Australia, the loss will result in the loss of revenue but, more importantly, there will be a resulting loss of downstream development onshore in Darwin, together with all the additional development and employment opportunities that could potentially be realised in Northern Australia.

The ratification of both the Timor Sea Treaty and the exchange of notes is therefore instrumental to the future economic viability of East Timor and to laying the foundations of further Northern Australia developments and employment opportunities. The purpose of the Timor Sea Treaty and the exchange of notes is to facilitate the joint exploration and exploitation of the petroleum resources in the Joint Petroleum Development Area, which we all know as formerly area A of the zone of cooperation. The Timor Sea Treaty does not seek to delimit the seabed boundary between Australia and East Timor in East Timor’s favour, as a number of submissions to the committee suggest. In entering into the Timor Sea Treaty, both Australia and East Timor have done so on the basis that it is without prejudice to their respective claims of sovereignty over the disputed Timor Gap. Article 2, paragraph (b) of the Timor Sea Treaty makes that abundantly clear. The Timor Sea Treaty is therefore a mechanism by which Australia and East Timor can, to their mutual benefit, progress the commercialisation of the petroleum resources in an otherwise disputed territory.

Many of the submissions to the committee express the view that the agreed 90-10 split in favour of East Timor is either overly generous to East Timor or prejudicial to what some perceive as East Timor's legitimate claim to 100 per cent of the Joint Petroleum Development Area and beyond. Except to the extent that, in the absence of a favourable agreement on the Bayu-Undan fiscal terms, the 90-10 split has an adverse taxation consequence to the Bayu-Undan parties, the agreed 90-10 split is a state to state matter between Australia and East Timor. Apart from addressing the tax consequences, which we would seek to do obviously in camera, Santos does not propose to offer any opinion on the fairness or otherwise of those arrangements.

An unintended consequence of the agreed 90-10 split in favour of East Timor, however, was to subject all PSC contractors to a higher tax liability by virtue of East Timor's application of a significantly higher tax rate to 90 per cent rather than 50 per cent of the Joint Petroleum Development Area production revenues. This potentially had a significant impact on the commerciality of the Bayu-Undan liquids project and proposed LNG development. This impact will be ameliorated by proposed changes to income tax by East Timor and proposed PSC changes that require approval by both Australia and East Timor.

For any development of the Bayu-Undan gas resource to proceed, it is imperative for the Bayu-Undan fiscal terms as set out in the understandings to be agreed by Australia in so far as they relate to PSC changes and by East Timor. These are approvals required by Australia and East Timor that are in addition to ratification of the treaty. As a practical matter, unless the fiscal changes outside of the treaty are approved, the economic development of the Joint Development Petroleum Area will be significantly reduced, which in turn reduces the significance of the treaty, in our view. The Bayu-Undan fiscal terms do not have a unilateral application to the proposed LNG project; rather, they apply to the combined liquids and LNG project and, by ensuring a rate of return for a combined project is commercial, they will enable the significant LNG project to proceed. If the Bayu-Undan fiscal terms are not agreed, the LNG project will not proceed.

I will now briefly address the suggestion that the ratification of the Timor Sea Treaty should be dependent on Australia and East Timor concluding the international unitisation agreement in respect of Greater Sunrise. The memorandum of understanding relating to Greater Sunrise, which was done in Dili also on 20 May this year, does not prevent Australia and East Timor agreeing upon an international unitisation agreement before or concurrently with the entry into force of the Timor Sea Treaty. However, nowhere in the MOU, the Timor Sea Treaty or the exchange of notes is it stated that the international unitisation agreement is a condition precedent to the Timor Sea Treaty.

In fact, the MOU provides that Australia and East Timor agree to work expeditiously and in good faith to conclude an international unitisation agreement by 31 December this year, whilst reinforcing their respective commitment to cooperate in the development of the petroleum resources in the Timor Sea in accordance with the Timor Sea Treaty, which will not apply if not ratified. Furthermore, the MOU provides that the conclusion of an international unitisation agreement is without prejudice to the early entry into force of the Timor Sea Treaty. Until recently, the position that had always been conveyed to the company and industry participants was that the Timor Sea Treaty needed to be signed and in place by the time of East Timorese independence, at which time the transitional treaty arrangements that were agreed between Australia and UNTAET were to terminate. Also, to the extent that the Timor Sea Treaty would

not be in effect, further arrangements would need to be effected between Australia and East Timor to avoid any legal, fiscal and regulatory vacuum.

The Timor Sea Treaty itself provides that Australia and East Timor agree to unitise Greater Sunrise and that any negotiations are to be without prejudice to a permanent delimitation of the seabed. Any move to delay the ratification of the Timor Sea Treaty, the reaching of an agreement with respect to the Bayu-Undan fiscal terms, the issue of replacement production-sharing contracts or, lastly, the finalisation of all pertinent regulatory administrative issues will only serve to adversely impact on the viability of the development of the Bayu-Undan gas resource and, therefore, the development of further Northern Australia opportunities. This can be to the benefit of neither Australia nor East Timor.

As a company with an interest in another production-sharing contract within the Joint Petroleum Development Area in which the Jahal and Kuda Tasi discoveries are located, Santos is concerned that the Timor Sea Treaty does not adequately address the company's and, indeed, other PS contractors' security of tenure over such interests. There is, therefore, a need to confirm and document the production-sharing contractors' rights in relation to what we call the non-grandfathered PSCs. As previously intimated, the replacement PSCs for the Bayu-Undan parties embodying the Bayu-Undan fiscal terms also need to be issued to provide security of tenure.

The petroleum mining code and other administrative guidelines and regulations which must apply for the life of the project also need to be agreed so that all industry participants and the designated authority have a set regime within which to work. Each of these need to be effective without delay, as without them the requisite regulations and processes for the conduct of efficient operations will be missing. Santos, as we believe do other companies with interests in the Joint Petroleum Development Area, seeks to be consulted in relation to each of these matters and, notwithstanding that greater administrative responsibilities are to be transferred to East Timor via the designated authority and joint commission, remains of the strong view that the regulatory arrangements should not be subject to change without Australia's agreement after due consultation with industry. Madam Chair, this is probably an appropriate place for me to stop to allow you and other members of the committee to ask us questions.

CHAIR—Thank you. I will start by asking you about Santos's overall position, which you have summarised and is also contained in the submission. When you say that Santos supports the ratification of the exchange of notes on the Timor Sea Treaty but on certain conditions or without prejudice to certain requirements, are you talking about requirements that you want to see in place in due course, not prior to the ratification of the treaty?

Mr Glanville—It is merely to highlight the fact that, during the negotiations, given that the current production-sharing contracts do not go so far as to deal with matters pertaining to a gas development, we highlighted with the negotiating team for Australia that there were certain issues that did need to be dealt with.

CHAIR—As between Australia and East Timor?

Mr Glanville—At that point we believed that the arrangements pertaining to gas certainly did need to be dealt with between Australia and East Timor. These matters went to the transfer

pricing issue and to having the fiscal arrangements, particularly in respect of gas, dealt with in the production-sharing contracts. Our concern in that regard was that there could be a hole in the process that would prejudice us and the other parties in Bayu-Undan in proceeding to capture opportunities for the development of the gas resource. That is still the position.

CHAIR—You are not suggesting that there be amendments to the terms of the treaty?

Mr Glanville—We are not suggesting that at all. We are merely highlighting that, in the context of entering into this arrangement with East Timor, our position as conveyed to the Australian negotiating team was that there were certain issues that did need to be in place, notwithstanding the terms of the Timor Sea Treaty, to enable the process to proceed. It had been put to us that, once the Timor Sea Treaty was in place, effectively there would be no real impediments. However, at this stage there are impediments to proceeding.

CHAIR—So the position that you set out in paragraph 12 and in the summary that you have just provided in the conclusion of your remarks are matters that you want to highlight to the Australian government?

Mr Glanville—Yes. They are matters that we believe are pertinent in the overall framework of the treaty arrangements.

CHAIR—So these are other matters that, once the treaty is ratified, will have to be concluded quickly in order to give Santos the legal and fiscal security that it is seeking—or that the joint venturers are seeking?

Mr Glanville—They are. The Timor Sea Treaty, as you are aware—and to use the term that has been used—grandfathers the Greater Sunrise and Bayu-Undan production-sharing contracts, which are instrumental to the Bayu-Undan participants—insofar as they relate to Bayu-Undan—being able to proceed with the development. It just so happens that there are issues pertaining to those PSCs which were crucial to the Bayu-Undan participants being able to proceed. So, even though the Timor Sea Treaty might be ratified shortly, it still does not necessarily put in place the necessary frameworks within which the companies can proceed.

CHAIR—How will a framework that is to the satisfaction of Santos be put in place?

Mr Glanville—I defer to Michael Lawry, who is more cognisant of those issues.

Mr Lawry—From the Australian perspective the principal agreement that needs to be settled is the new production-sharing contract. Its terms will affect the sharing of revenue between Australia, East Timor and the contractors.

CHAIR—Is that a three-way negotiation?

Mr Lawry—It is between the joint authority and the contractors.

CHAIR—Are those negotiations under way?

Mr Lawry—I believe that there are some negotiations that Phillips as the operator is conducting. I think it might be dealing with the governments of East Timor and Australia rather than through the joint authority at this stage.

Mr Glanville—My understanding of the agreement, although it will be the designated authority that is entering into the production-sharing contracts with the contractors as such, is that the PSC terms nonetheless need to be agreed between East Timor and Australia. Previously, annexed to the 1989 Timor Gap Treaty was a model production-sharing contract that set out the terms that one could expect in entering into a contract with the then joint authority. However, that is not the case with the Timor Sea Treaty. We understand that there is obviously a different process being pursued in respect of the non-grandfathered PSCs. However, as we understand it, the overall terms would need to be agreed between Australia and East Timor.

CHAIR—Other issues, such as the avoidance of double taxation, would be agreed?

Mr Lawry—That issue is dealt with under the treaty but there are some practical issues that we are concerned with. That would be a tripartite agreement between East Timor, Australia and the contractors. The third issue concerns some changes that East Timor has proposed to its own tax legislation, as a unilateral act.

CHAIR—Are they the proposed changes that were referred to by Phillips in their evidence before us?

Mr Lawry—I would imagine so. They are included in the understandings.

CHAIR—In relation to the tax rate that would be applied?

Mr Lawry—Yes; that is the principal change.

CHAIR—On the requirement by Santos that Australia agree to the terms of the fiscal arrangements to apply to Bayu-Undan, first as agreed between Phillips and East Timor and subsequently submitted to Australia by East Timor in December 2001, does Santos expect the Australian government to make an agreement with Phillips-Santos—a memorandum of understanding? What is it you are looking for?

Mr Lawry—The understandings cover a number of matters, principally the changes to the East Timor revenue. It is up to East Timor's parliament to pass that legislation. The principal agreement that involves Australia is the new production-sharing contract terms, and there are changes to the provisions in the existing contract. If that were to apply in any case it would need to be amended. That is the principal agreement that Australia has to negotiate with East Timor and with the contractors. Another issue is that, in our view, in effect East Timor and Australia need to agree on what the transfer price of gas will be for PSC purposes and for East Timorese and Australian income tax purposes.

CHAIR—Do all these matters have to be agreed before the joint venturers can move to the next phase?

Mr Lawry—That is correct.

CHAIR—Do all these matters depend upon the ratification of the treaty rather than the exchange-of-notes scenario?

Mr Lawry—The PSC needs to have the force of law. I think the treaty would be required to give us that comfort.

Mr Glanville—At the moment we are operating under the old production-sharing contracts. As I mentioned in my opening statement, those production-sharing contracts do not adequately deal with gas. Obviously, the Bayu-Undan LNG development deals with the development of the gas resource. Until the Timor Sea Treaty is ratified we cannot get to the next step, which is to have the arrangements agreed between Australia and East Timor in respect of the fiscal issues which will then, as we understand it, be incorporated into the replacement production-sharing contracts. In the interim period we are still operating under the transitional interim arrangements which keep in place those arrangements that were effected as at 19 May, which was the date preceding the signing of the Timor Sea Treaty. Essentially, the current arrangements do not deal with the sorts of assurances that the joint venturers require to proceed with the project. In those circumstances we could not possibly commit to the expenditures that would be required.

CHAIR—In other words, there was a sufficient level of security for the joint venturers to go to the first stage but now that you are moving to the second stage, which includes gas production, the joint venturers require greater legal and fiscal certainty?

Mr Glanville—That is correct.

Mr WILKIE—The Bayu-Undan gas comes on stream in 2006. There is the dispute going on at the moment about certainty for Phillips and yourselves, and that is why you need the treaty ratified. We are hearing the other argument on behalf of Woodside: they want unitisation to go through at the same time as ratification so that they are guaranteed some security. Given that Phillips already has an understanding with East Timor regarding taxation arrangements—in which I imagine you would be included as part of that development—and given that all those things will actually take place when ratification occurs, why wouldn't we combine the two and deal with them together? Even if that delayed ratification until the middle of next year, wouldn't that guarantee certainty for the development of both Bayu-Undan and Greater Sunrise? I am not putting that as a case; I am just arguing it as something that I want to get your opinion on. It has been put to me that without the unitisation of Greater Sunrise that field may never be developed. We could end up with a situation where Bayu-Undan was being developed but nothing was happening in Sunrise, and of course that would be against the national interest. I am interested in your comments.

Mr Glanville—The reality is that Bayu-Undan and Greater Sunrise are at different levels in the process. The gas development was always going to enhance the liquids development in any case; it was a matter of being able to get to that point. Greater Sunrise still has not resolved what its development process will be. To delay the ratification of the Timor Sea Treaty would prejudice commercially an existing, advanced development in Bayu-Undan.

Mr WILKIE—Can you expand on that? In what way would that cause problems, given that there are already undertakings in place that once the treaty is ratified—given taxation arrangements and other measures in place—you would have that certainty?

Mr Price—There are two issues in relation to the timing. There is the absolute timing of deliveries of LNG. As part of the HOA, our agreement is to start delivering LNG in the first quarter of 2006. To meet that timing, we really have to start making commitments on the project immediately. The difficulty with the economics of the project is sorting out some of the issues that remain outstanding between East Timor and Australia, such as the transfer pricing agreements and the PSCs in relation to how the prices are calculated between upstream and downstream. We are looking for certainty on an agreement between various segments of the Australian government and the East Timorese government on what is going to carry forward. Once those are ratified, we will be in a reasonable position to form a view regardless of where some of the other considerations stand. But today there is too much uncertainty about whether we would be exposed to that double taxation liability. That is one of the major impediments to the project proceeding.

Mr Glanville—I can further clarify it. My understanding is that Greater Sunrise would need to effect whatever fiscal arrangements need to be effected in their own right on that portion of Greater Sunrise that falls within the Joint Petroleum Development Area. That is another issue that they will have to deal with in isolation once they have got to their development concept—I understand they have not at this point—and once the unitisation agreement is effected. I have heard witnesses asking why there is no prejudice if these things are going to happen, and they will happen once the Timor Sea Treaty has been ratified. But the issue essentially gets back to the situation that there is no agreement that I am aware of between Australia and East Timor which finalises the fiscal arrangements. I am aware only of Phillips and East Timor having agreed to or entered into the understandings, and of East Timor having submitted those understandings to Australia. Unless Michael Lawry can clarify this for us, I am unaware that there is an undertaking that those fiscal arrangements will actually be in place.

So the way that we see this is that, as part of a joint venture which is being asked to make a significant expenditure commitment for an LNG project, we cannot do that until we have the certainty that is required. The Timor Sea Treaty is the first stage of setting in place the requisite regulatory and administrative certainty effecting the changed arrangements between Australia and East Timor, particularly in regard to the day-to-day functions. Falling alongside that, or underneath it, are the fiscal issues that need to be in place in order for any company to commit to such a significant expenditure. That cannot take effect, as far as we understand it, until such time as the treaty is ratified. On top of that, you have a whole series of processes that still need to be effected and put into place, including the replacement production-sharing contracts, which are crucial to our having secured contractual rights, and the petroleum mining code, which I understand is in the process of being negotiated between East Timor and Australia. There are a range of issues that are crucial to our being able to make a commitment now to proceeding. So time is of the essence. We do not believe that it is just something that we should be expected to do and then just let everything fall into place afterwards.

Mr WILKIE—Some of the issues that you have talked about cannot be finalised until the treaty is ratified. Have negotiations already commenced to resolve some of these issues?

Mr Glanville—Negotiations have commenced in respect of production-sharing contract arrangements. As I understand it, there are negotiations happening this week between East Timor and Australia. Take the production-sharing contracts as an example. We know that they have been grandfathered. We know that they are to be reissued in substantially the same terms, although we are told that they have to deal with the consequential amendments—if I can call them that—that are required by virtue of having the different contracting states involved and slight variations on the old Timor Gap Treaty. They are also, as far as Bayu-Undan is concerned, required for phase 2 of the project and they need to deal with the pertinent issues relating to that project. Those things will not happen unless the Timor Sea Treaty is ratified. So we always see the Timor Sea Treaty as the first base to being able to move on. Until that happens, our understanding is that we continue to operate under exchange of notes, which is an interim arrangement which does not deal adequately with the sorts of issues that need to be dealt with for a gas development.

Mr WILKIE—The evidence was originally that the Bayu-Undan development needed the process of ratification to be completed—that is, have the treaty, signed, sealed and delivered—by November so that work could commence in accordance with the wet season. Given that the treaty probably will not be ratified until after that time, how does that affect plans to proceed with that development?

Mr Glanville—Like all major developments, long lead times are required in order to meet a projected end date, and that would be the sale arrangements. It is like farmers, I suppose. Every delay actually does cause problems because you need to be able to commit to significant contracts that pertain to that development. Obviously, the wet season is not an insignificant issue, as some would have us believe; it does cause problems with petroleum operations throughout the area. I understand that in evidence it has been suggested to you that perhaps that is not issue. But it is an issue, and I defer to Mr Kelemen to explain why that is an issue for the petroleum industry.

Mr WILKIE—I am not arguing, by the way, that it would not be an issue. To put that into perspective, if the overall treaty process were delayed by nine months in order for unitisation to be finalised at a similar time to ratification, what problems would that cause for the joint venturers? That is probably a question that could be put to Phillips, but they are not here, so I am asking you.

Mr Kelemen—One of the major issues is that the construction window to construct the LPG plant and do the necessary pipeline and offshore work is 36 to 37 months. The HOA has an expiry date of—

Mr Glanville—We are probably getting horribly close to getting into some in camera evidence.

CHAIR—Is there some way around it? Can you answer the question without going into that?

Mr Lawry—The short answer to this question and the previous question is that they were premised on there being just Bayu-Undan but no Sunrise. There is a certain stage where there may be no Bayu-Undan and no Sunrise. The agreement that we have will not wait forever for all of the arrangement prerequisites.

Mr WILKIE—Obviously, that could be the problem. For us, as a treaty-making or negotiating body that has to make recommendations to government, one of the key areas that we are looking at, I would argue, is that we either recommend ratification now or we recommend ratification alongside unitisation. I think that is one of the critical areas of argument that have been presented to the committee. I want to make sure that we get that right. You are suggesting that we could have a situation where we have no Bayu-Undan and no Greater Sunrise. I want to know how realistic that is.

Mr Glanville—If I heard you correctly, you mentioned nine months.

Mr WILKIE—It has been argued that unitisation may be finalised by the middle of next year. It may not be.

CHAIR—It was meant to be finalised by the end of this year.

Mr WILKIE—That is right.

Mr Glanville—Assuming that the time frame is nine months, I would have to say that that would more than likely result in the loss of a project. That timing is of such crucial importance to the Bayu-Undan parties, insofar as it relates to a gas development, that it could prejudice and cause the loss of that project, with all the resulting losses. That includes the enhancement of the recovery of liquids under the liquids project.

Mr WILKIE—I would like to see evidence to support that statement, even if it were made confidentially in a written form. I think that would go some way towards answering some of those questions.

Mr Glanville—We could certainly provide that in camera or confidentially.

CHAIR—Obviously, there is an end date where the joint venturers have contracted to supply gas to the Japanese. There is an end date, is there not?

Mr Lawry—There is an end date for the prerequisites to be satisfied.

CHAIR—So it is a question of working backwards to see how late one could leave the ratification of this treaty before you commence the second stage. What we are trying to understand is: realistically, what is that point?

Mr Price—Technically, it is November.

CHAIR—As in next month?

Mr Price—Yes. As Mr Kelemen said, there is a delivery commitment under the LNG HOA. Based on the construction period we need, the critical path starts next month. It might move a few weeks either way, but it will not move a few months.

Mr Kelemen—You heard before from Mr Price that the requirement is to deliver LNG cargoes in the first quarter of or early in 2006. I mentioned that at best call today there is a 37½ month construction window. That puts us at starting the work now or very close to now. With regard to the wet season in Darwin in the early part of the year, two to three months could be lost because you cannot get access to sites to start building the foundation work for the LNG plant. If you do not start work before the wet season to get the roads and the infrastructure in to do that, you lose until about March, April or May, in which case the 37-month construction window puts you past the first quarter of 2006.

Mr Glanville—As you would expect, in any commercial negotiations of this significance there are certainly conditions precedent to the arrangements with the LNG purchasers which, if not met, will ensure that the project does not proceed. I do not need to leave it to your imagination as to what those conditions precedent might be, but certainly they pertain to having in place all the necessary arrangements that would allow us to proceed as a joint venture.

Senator KIRK—In section 8 of your submission you refer to regulatory certainty. It carries on from what you have just been referring to. In section 8.4, you say that you are:

... prepared to accept East Timorese control of the Designated Authority and the Joint Commission on the basis that that they are empowered to administer the Joint Petroleum Development Area solely within the confines of a jointly agreed regulatory regime, which cannot be amended in the future without the consent of Australia.

You say that this is because of the uncertainties that there might be in relation to changes in the law. I wonder about the nature of that agreement that you are referring to there and whether or not any negotiations have commenced in relation to it.

Mr Glanville—I understand that there have been negotiations proceeding in respect of the regulatory arrangements. We are not certain about the extent to which they would be life-of-project arrangements. There have been some intimations, and I understand that the initial evidence that was given by various members of the Department of Foreign Affairs and Trade, the Department of Industry, Tourism and Resources and the Attorney-General's Department was that there is reliance upon reverting to a ministerial council in the event of a dispute. Subsequent to that submission, I have had cause to speak with certain officers and I am now of the understanding that companies would have the right to make submissions to the Australian representative of the joint commission should it be that there were issues pertaining to the administration of interests and operations by the designated authority which were causing concern. So to some extent those concerns may have subsided.

Nonetheless, as you would expect, for projects of this nature life-of-project assurances are required. Certainly, we could not have a situation where the regime under which we have committed to a significant project ultimately changed. That would ultimately render the project to be either uncommercial or not viable, because of interference of some nature et cetera.

Senator KIRK—So, in effect, in order to proceed with that certainty you would really need to have a life-of-project assurance in relation to whatever arrangement is put in place. Is that what you are saying?

Mr Glanville—That is correct. Life-of-project arrangements lead to the certainty that is required but, as I said, I understand that there may be recourse available to us in making

submissions to the Australian member of the joint commission should the administration of the area be causing difficulties.

CHAIR—Can you confirm that Santos is not a party to the Petrotimor Federal Court case?

Mr Glanville—No, we are not.

CHAIR—Thank you very much for coming along today. I do not think we have got into any area that is going to cause us concern but please go through your submission and if there is any particular paragraph that you want to remain confidential please contact the secretariat and let us know. We would like to hear from you sooner rather than later, because the transcript will eventually be posted on the web site and made public.

Mr Glanville—Certainly, we will do that.

CHAIR—Thank you for your time and your submission.

Proceedings suspended from 12.40 p.m. to 12.58 p.m.

ATWELL, Ms Julie-Anne Maree, Senior Legal Officer, Office of International Law, Attorney-General's Department

CAMPBELL, Mr William McFadyen, First Assistant Secretary, Office of International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Assistant Secretary, Public International Law Branch, Office of International Law, Attorney-General's Department

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, Department of Foreign Affairs and Trade

RABY, Dr Geoffrey William, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

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

BARTLEY, Mr Scott William, Manager, Resource and Environment Tax Unit, Business Income Division, Department of the Treasury

WALKER, Mr Ian James, Manager, Timor Sea Team, Resources Division, Department of Industry, Tourism and Resources

CHAIR—I welcome witnesses from the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Department of Industry, Tourism and Resources and the Department of the Treasury. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant 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 the parliament.

Dr Raby, as you are in a central position at the table, I will direct this question to you, on behalf of the other representatives here today. We have taken evidence from this group previously on 12 July. We have also taken evidence on 26 August in Canberra which was essentially legal evidence. Then, last week, we took evidence in Perth, Darwin and Melbourne, which was from a mixture of individuals, companies, legal bodies, NGOs and the like. Have you had the opportunity to read the *Hansard* transcripts of any of the hearings?

Dr Raby—I have not read any. Has anyone else read them?

Mr Campbell—I have read the transcripts of the hearings up until the Perth hearing, which was available yesterday.

CHAIR—Was that including Perth?

Mr Campbell—That was including Perth but it did not include Melbourne or Darwin.

CHAIR—I had not quite taken into account the public holiday yesterday, nor some of the problems with accessing *Hansard*. I am sure there are issues that arose in both Darwin and Melbourne that we would specifically want you to consider. What I have in mind is that we deal with as much as we can today. I assume that you have had the opportunity to read the submissions that have been lodged. If, as a result of your considering the transcripts of the last two days and this morning's evidence, there are matters that you feel should be addressed—likewise, if there are matters on which we would want to hear from you—we may need to reconvene next Monday, when parliament resumes. It could be for an hour or something like that in the morning. Would that be a convenient course to take?

Dr Raby—That would be fine.

CHAIR—Have you got some suggested arrangement as to how we should proceed this afternoon? Does somebody want to start addressing a particular area?

Dr Raby—We do not have an opening statement. We are in your hands.

CHAIR—Quite a number of issues have been raised—the unitisation agreement; specific aspects of the treaty, including the employment preference clause and the like; fisheries management and the like; taxation concerns; and others. But perhaps we could start with this whole issue of delimitation. We have had various legal opinions put to us—essentially the Lowe opinion, the statement from Mr Brazil, Mr Bialek and Deacons. Other opinions are also available in the form of articles and other commentary.

Mr Campbell, would you be able to give us a summary on a couple of aspects of the general delimitation question? What does the Australian government believe the scenario would be should this treaty be ratified—which would, under annexe A, have the boundary defined? What would be the likely scenario in terms of negotiations between Australia and East Timor, East Timor and Indonesia or a tripartite negotiation over a further delimitation of the maritime boundaries between the three countries?

Mr Campbell—The first point I make, which is probably an obvious one, is that the Timor Sea Treaty itself is a provisional agreement under article 83.3 of the United Nations Convention on the Law of the Sea. I think it has been mentioned before that that does not settle the boundaries—there being the need for a further maritime delimitation agreement at some stage between East Timor and Australia—although the need would not in our view be absolutely urgent if the Timor Sea Treaty was brought into force, given that that would deal with the exploration and exploitation of the resources of the seabed.

In terms of the sequence of it, the position of the Australian government is that it already has a number of maritime delimitation treaties with Indonesia—the most relevant being, I suppose, the 1972 seabed boundary agreement, which abuts either side of the Joint Petroleum Development Area. It would be the fundamental position of the Australian government that that treaty should remain in force and that the seabed that is delimited by it and allocated to Australia would remain Australian.

CHAIR—That has not been ratified?

Mr Campbell—This is the 1972 seabed boundary agreement, which has been ratified. The first stage in any maritime delimitation negotiation is for each side to set out what its claim is, and the first step in doing that is to pass legislation which establishes a country's maritime limits. Both countries have now done that—that is, East Timor has passed its maritime legislation setting its maritime limits; ours is in the Seas and Submerged Lands Act. Then it would be for each country to make its claims based upon that legislation. We have made a claim in terms of the continental shelf, to the centre of the so-called Timor Trough, which is the top of area C under the treaty. I do not think we have heard a formal statement of East Timor's claim in the actual area of the Timor Sea but—

CHAIR—What did its legislation say?

Mr Campbell—Its legislation states, just as ours does, that it establishes a continental shelf of at least 200 nautical miles, or further where the natural prolongation of the continental shelf extends beyond 200 nautical miles. But normally a country would apply its legislation—actually state to the other country what its claim is—based upon the legislation in the particular area. If one were taking the legislation by itself now, we would say that the area of overlap is defined by Australia's claim to the centre of the Timor Trough and East Timor's claim to 200 nautical miles, and then it would be a matter for the countries to begin negotiations. As to the engagement of three countries in negotiations, I think we would see it as a bilateral negotiation at this stage, albeit there might be a need to engage Indonesia on certain trilateral points. Obviously, Indonesia will have its own negotiations with East Timor in relation to the area to the north of East Timor and to the area south of Timor—for example, in relation to the territorial sea and at least to the centre of the Timor Trough, where we have no claim.

CHAIR—It has been put to us on a number of occasions by a number of people on various bases that the JPDA ought not be considered as the appropriate boundary area between East Timor and Australia, essentially because it is founded on the agreement between Australia and Indonesia, which, it is alleged, is an illegal agreement. So it has been put to us that, in some circumstances, we ought to ignore the current boundary of the JPDA and renegotiate a different boundary with East Timor. It has been put to us that the most appropriate boundary change would be that contained in the Lowe opinion, which means the western boundary would alter and the eastern boundary, most particularly, would move eastward. Three variations of how that could occur have been put to us giving a half effect, a three-quarter effect and the like to the Indonesian state lines, if you like. Are you able to respond to those propositions as contained in the Lowe opinion? How do you see it affecting the negotiations generally? We were given one legal opinion that East Timor and Indonesia would first have to define their boundaries before one could even consider what happens between East Timor and Australia. Then this morning we were told that Australia and East Timor can define their boundaries without regard to what Indonesia would or would not want.

Mr Campbell—I think from the Australian government perspective, as I said earlier, it would seek to maintain the maritime delimitation agreements that it already has with Indonesia. In this case it is principally the 1972 seabed agreement and—I suppose to a degree if one was going to the east and the west—the 1997 delimitation treaty, which is signed but has not yet entered into force. The Australian government would not want to negotiate the areas to the east and west of

the zone of cooperation as currently defined because, in 1972, we agreed that there was a line there and that the areas below that line were areas of Australian seabed jurisdiction. Since then, and even before that time, there have been permits issued there and there have been operations going on in the areas to the east and the west, so we would resist the reopening of those particular areas.

CHAIR—Even if this treaty were to be ratified in its current form and negotiations then commenced over maritime boundaries with East Timor, what would Australia's position be vis-a-vis East Timor and those negotiations?

Mr Campbell—It is difficult to say with certainty what our position would be because that would have to be a matter for the government to decide. It could well be that the position would be that the negotiations should be confined to the area—the sides of which are defined by the Joint Petroleum Development Area in the east, west and south—and that it should go to the centre of the Timor Trough. I imagine East Timor would say that it should go down to at least 200 nautical miles. That would be what we would see as the area of negotiation.

CHAIR—The Australia-East Timor negotiation would still be over the Timor Gap?

Mr Campbell—That is exactly right. I imagine that would be what the Australian government position would be.

CHAIR—Wherever the gap begins and ends though.

Mr Campbell—We would say that the gap begins at point A16 and ends at point A17. I am not saying that East Timor would necessarily accept that. There are a number of points that could be made in relation to the Lowe-Carleton opinion. I do not know whether you want me to address those. There are some general points that ought to be made in relation to that opinion.

CHAIR—It would be useful, if you could and if it is convenient for you to do it now.

Mr Campbell—I am sure a number of these points have occurred to the committee. The first is that the opinion was commissioned by Oceanic Exploration and Petrotimor. Petrotimor is seeking and claims to have an interest in the area, so it is very much, I would say, an opinion that pursues their interests. There seems to be some confusion in some of submissions to the committee and in articles I have read that say that the Lowe-Carleton-Ward opinion is actually the position of East Timor, although I do not think that is correct. It was commissioned by Petrotimor, so it is not—or it will not necessarily be—the East Timorese position.

CHAIR—It has been presented at a seminar in Dili, has it not?

Mr Campbell—It has been presented at a seminar in Dili. It is widely available on the Internet but, so far as we are aware, it is not an opinion for the East Timorese government in the sense of having been commissioned by them. The second thing I wanted to mention—and I think it has already been mentioned this morning—is that Petrotimor and Oceanic Exploration have commenced proceedings against the Commonwealth and Phillips and the joint authority in the Federal Court. A strike-out application was made by the Commonwealth and Phillips before the full Federal Court and the decision on that is pending. I understand that it may have been

said to the committee this morning that these are two separate issues—the court case and the opinion—but in our view they are not two separate matters. It could well be that matters that are raised in the opinion could well be raised in court at a later stage. Obviously this causes us a little bit of difficulty in dealing with the Lowe-Carleton-Ward opinion since the issues are still before the court.

CHAIR—I did ask Dr Ward whether he was counsel in the case or an expert witness and he indicated that he was counsel in the case. But I am assuming, rightly or wrongly, that the opinion would be tendered in some form as expert evidence in those proceedings.

Mr Campbell—I should defer to my colleague, Rebecca Irwin, who is also counsel in the case for the Commonwealth, but I am not sure that that opinion has actually been tabled in the case. But it is available on the Internet.

CHAIR—There have been no defences filed, so there has been no discovery I take it, Ms Irwin?

Ms Irwin—No, not at this stage.

Mr Campbell—The third point I wanted to make is that that opinion is very much directed towards what the outcome of a permanent maritime boundary negotiation would be. The Timor Sea Treaty, as I mentioned earlier, is not dealing with a permanent maritime boundary delimitation. It is a provisional agreement under article 83(3) to enable the exploration and exploitation of the area pending a permanent maritime boundary delimitation.

CHAIR—I would like to pick up something at this point. It has been put to us that international law may well recognise states' practice as an issue to be taken into account in final determinations of boundaries, and a concern has been raised that should East Timor agree to these boundaries, notwithstanding the without prejudice nature of this treaty, in some way it will be bound by precedent and be estopped—I do not think anybody said that, but I am using the word 'estopped'—from claiming a different Joint Petroleum Development Area.

Mr Campbell—That certainly is a point that has been made in that opinion. It is also a point which was made in the letter to members of the East Timorese parliament, I think, when that opinion was conveyed. There are two things I will mention. The first is that while it is easy, perhaps, for Petrotimor to dismiss it—and I think wrongly—there is a without prejudice clause in the Timor Sea Treaty. I think it is article 3(2) or something like that, which says that the whole agreement is without prejudice to the permanent delimitation of the boundary. Our view is that that should be taken as read. That is what it says.

CHAIR—Is there a tendency, though, in international maritime disputes for states' practice, including an adoption of a particular boundary area, to preclude them from claiming other boundaries?

Mr Campbell—I think that a court, an arbitrator or whomever—bearing in mind that is not what we are dealing with here; we are talking about doing a boundary by agreement in this particular case—will look at the history of what has gone on but also at the fact that there is a without prejudice clause in the Timor Sea Treaty. The other thing—and I am not sure whether it

has come up before an international court or tribunal before—is the very terms of article 83(3), which states that the parties should enter into a provisional arrangement pending permanent delimitation. I think that just reinforces the effect of the without prejudice clause.

CHAIR—Thank you. Do you want to proceed?

Mr Campbell—There are a couple of other things I wanted to draw attention to. The first is that there are a number of critiques of the Lowe-Carleton-Ward opinion. I am aware of one by Mr Pat Brazil, which is a supplementary submission to this committee. You mentioned Dean Bialek before. There is a recent article by Professor Gillian Triggs and Dean Bialek in the *Melbourne Journal of International Law* Volume 3, which deals with the whole Timor Sea history and the current treaty in some detail. It also looks at the Carleton-Ward-Lowe opinion. That is an example of an article, which is a very good article and which sets out various principles, that does seem to say that the Lowe opinion is the opinion of East Timor, which, as I mentioned before, is not quite correct. The other article—a copy of which we can provide later to the committee—is a paper given by Emeritus Professor Victor Prescott at the recent JPDA conference in Melbourne. In that paper he criticises the boundary aspects of the Lowe opinion, and that might be useful to the committee.

CHAIR—Mr Campbell, that would be a useful document. I do not think we have that.

Mr Campbell—We can provide a copy of that to the committee. It does say ‘Copyright Victor Prescott’ at the top, but I am sure Victor Prescott would not mind.

CHAIR—There is one copy in Mr Walker’s hands.

Mr Campbell—Without going into great detail about the Lowe opinion, fundamentally the Commonwealth does not agree with a lot of the reasoning nor the conclusions that are made in that opinion. Its description of the boundaries, or the history and the reasoning behind the boundaries of the old zone of cooperation and to the extent that it has carried through to the JPDA, is incorrect. I think that is adequately documented in that article by Victor Prescott and also in the critique that is given by Mr Brazil.

CHAIR—By the way, Mr Campbell, there has also been a late submission from Deacons replying to the further submission of Mr Brazil. It would be useful if you had a look at that as well before next Monday. It is a sort of reply to the reply.

Mr Campbell—Notwithstanding that, I will take my chance and reiterate that a lot of the comments made in those two articles and the opinions I mentioned earlier the Commonwealth would agree with. Certainly, we believe that the Lowe opinion really understates not only the effect of a longstanding claim to an extended continental shelf that Australia has made but also the possible effect in international law of a trench which is some 3,500 metres deep as opposed to a trench—I forget the name of it—which is mentioned in the article which is some 600 metres deep.

CHAIR—So you would disagree with the view that was put to us this morning that natural prolongation no longer has relevance in international law?

Mr Campbell—We would disagree with that view. I suppose there are two reasons for that. The first is what Mr Brazil might refer to in his article as the separate opinion of Judge Sette-Camara in the Libya-Malta case where he makes specific reference to the Timor Trough as being the only significant geomorphological feature used as a maritime boundary, or something like that.

CHAIR—The governing feature?

Mr Campbell—Yes. The second issue is that even if one were to go and use the equidistance as a starting point—and I am not saying that a court would—the courts then go on to take into account circumstances specific to the area in question. Our view would certainly be that a circumstance specific to the area in question would be the Timor Trough and the longstanding claim that Australia has made to that area. Without going into more detail, we would simply reiterate that the Timor Sea Treaty is a provisional arrangement under article 83(3) of UNCLOS. It is not a permanent maritime boundary delimitation. It is an agreement that both the Australian government and the East Timorese government support. What may or may not happen in relation to a permanent maritime delimitation in the future is, in a sense, peripheral to this interim arrangement, which will enable immediate exploration and exploitation of the zone to the benefit of both countries.

CHAIR—The 1972 agreement did anticipate further delimitation or ‘adjustment or adjustments ... as may be necessary in those portions of the boundary lines between points A15 and A16 and between points A17 and A18’. So the 1972 agreement does anticipate potential further negotiations over the boundaries.

Mr Campbell—I think it anticipates that there might need to be some form of minor readjustment—I think it refers to ‘adjustment’—in relation to points A17 and A16. It is not abnormal to include such a provision in an agreement where you actually have not engaged the third party—in that case it was Portugal—at the time. Points A16 and A17 were intended to be points equidistant from Indonesia and the then Portuguese Timor. It may have been anticipated at that stage that there may be some slight disagreement from Portugal about where that point of equidistance might be, and that article provides for an adjustment of it.

CHAIR—If there were to be such an adjustment, would the Australian government anticipate that Indonesia be included in redefining the boundaries of what is essentially the Timor Gap?

Mr Campbell—I do not think the whole of the Timor Gap is relevant to Indonesia—

CHAIR—Say points A16 and A17.

Mr Campbell—Certainly points A16 and A17 are points that Indonesia would have an interest in. That is why the provision is in that 1972 seabed agreement.

CHAIR—So if there were to be any adjustment to points A16 and A17, on anyone’s version of the boundaries, would it be the Australian government’s position that Indonesia would need to be included in those negotiations?

Mr Campbell—All I can say is that they are a point where three jurisdictions meet. I cannot say what the Australian government's position would or would not be on that. Could I make a couple of other points about those adjustments? As I said, maritime boundary agreements frequently have specific provision for where third countries might be involved. If two countries are negotiating a bilateral agreement, there are a number of ways to make a provision in relation to the possible interest of a third country. That particular matter is one of the ways of doing it. I can give the committee 1½ pages which set out that that is quite a standard thing to do. To the extent that the committee might be interested, those points were actually used again in the 1989 Timor Gap Treaty with Indonesia, and were also used in the 1997 delimitation agreement with Indonesia.

CHAIR—Just on that point: we have had explained to us the concept of nonencroachment, and of nonencroachment in international law terms. Again, this was in the context of points A16 and A17. It has been put to us that they may have the effect of limiting the full shelf entitlements of East Timor. The concept of nonencroachment requires that maritime boundary agreements must be limited to a geographical area in which there are no third party claims. Would that support the contention that, if you are dealing with any renegotiation of boundaries between East Timor and Australia, Indonesia must be considered so that there is no encroachment on their claims?

Mr Campbell—If we are dealing with areas within the old zone of cooperation under the Timor Gap Treaty and confining a negotiation within those areas then I do not think there would be a need to engage Indonesia in those areas.

CHAIR—Unless you are going to move points A16 and A17.

Mr Campbell—As I stated earlier, the Australian position for a negotiation has not been set yet, but I think the Australian position would be that it would stand by where A16 and A17 are.

CHAIR—Has the Australian government consulted with the Indonesian government on the Timor Sea Treaty proposed?

Dr Raby—No.

CHAIR—There has been no reason for it to?

Dr Raby—No reason to.

CHAIR—Do we have any indication of the Indonesian government's attitude toward its maritime boundary with Australia, the 1972 boundary?

Dr Raby—No, it has not expressed a view on that that I am aware of. Certainly, the negotiation with East Timor is seen as a matter between Australia and East Timor.

CHAIR—Is the Australian government aware of any negotiations between East Timor and Indonesia in relation to their boundaries?

Dr Raby—Not that I am aware of. In political meetings there has been reference to boundary issues but not a negotiation over the boundary, as far as I am aware.

Mr Campbell—I would like to add to that. There was some comment made by Dr Djalal at the JPDA conference in Melbourne. I was not there, but I think he—

CHAIR—Who?

Mr Campbell—Dr Djalal, from Indonesia, used to be involved in the law of the sea negotiations but he is not a government official at the moment. I think he might have expressed the opinion that the 1971 and 1972 agreements should stay where they are. More importantly than that—and I think we said this on the last occasion—we had an agreement negotiated in good faith with Indonesia in relation to the 1971 and, more importantly here, the 1972 maritime delimitation agreements. We would expect those agreements to stay as they are and not change.

CHAIR—What do you say to the contention that the 1972 agreement was an illegal agreement because Australia should not have recognised—

Mr Campbell—The contention from East Timor was that the 1980 Timor Gap Treaty with Indonesia was an illegal treaty. We do not accept that that is the case.

CHAIR—I do not think that is the argument in relation to the 1972 agreement.

Mr Campbell—No, it is not.

CHAIR—A number of witnesses have given evidence in relation to the ultimate question of maritime boundary disputes and how they ought best be resolved by resorting to litigation or to negotiation. I think on the last occasion you were here, Mr Campbell, you indicated it was Australia's preferred position to negotiate maritime boundary disputes rather than litigate. Presumably, the action that the Australian government has taken subsequently in relation to the International Court of Justice would bear that out. Could you comment specifically on that issue, about the risks inherent for East Timor as well as Australia in going to a litigated outcome as opposed to a negotiated outcome? It has been put to us that a 'winner takes all' scenario could occur—that is, in litigation Australia could win its continental shelf claim in totality, in which case East Timor would get nothing.

Mr Campbell—I saw that evidence in Perth that—

CHAIR—I think it was in Darwin and Melbourne, but that is the line—

Mr Campbell—There are two things I would reiterate from the last occasion. First, from the point of view of ongoing relations between the countries, in an area of such importance as this it is far better to negotiate a boundary by agreement than to have one set by a court and to have some lingering nonsatisfaction by one or both countries with the opinion that has been given by the court.

Second, I think I might have mentioned an instance which involved an arbitration between Canada and France in relation to the islands of St Pierre and Miquelon, a French possession very close to the Canadian coast. My understanding is that neither government was really satisfied with the outcome of that arbitration, which gave France a corridor—I think 10½ nautical miles wide and 200 nautical miles long—which was not good in terms of being able to regulate fisheries and things like that. If you go to a court, it may well be that one country or both countries will not be satisfied with the outcome.

CHAIR—Is it also the case that the court may well deal with black letter law issues—insofar as you can have black letter law in international maritime law—and come up with an outcome, whereas in a negotiation one can take into account socioeconomic, political, cultural, and a whole range of issues?

Mr Campbell—That is a very good point, because there are certain factors which courts and the International Court of Justice have said are relevant in deciding maritime boundaries—for example, proportionality between the length of the facing coastlines and the area being given to either party is a test that is applied, as is the location of resources and issues like that. The history of the particular area is also a relevant consideration. But there are other considerations which they say are not relevant to the delimitation of a boundary by a court or a tribunal. These include things like the relative wealth of the countries—

CHAIR—The relative bargaining power.

Mr Campbell—the relative bargaining power of the countries, the size of the landmass of a country, and the sort of social factors you were alluding to. They are not strictly relevant to the delimitation by a court or tribunal, whereas those are factors which can be taken into account if the parties negotiate. And they are taken into account by some countries, but I do not think they will be taken into account by a court or tribunal.

Dr Raby—There is another point and that is the question of time. Going through a court process can take a very long time. Certainly I doubt if companies would commit to any development in the region whilst there was a case outstanding with uncertain outcomes. I think the point to not lose with the Timor Sea Treaty is that it is a pragmatic arrangement between two states to enable commercial development to proceed. There are other issues to be resolved at a later date, but I think both states want to see commercial development proceed, and we see that very much in the interests of East Timor, to get revenue flowing, and that makes the time issue quite relevant.

CHAIR—It has been put to us that in these negotiations Australia had East Timor over a barrel, to put it bluntly, because no-one—the committee for a start—could offer any serious alternative source of revenue for this fledgling nation other than the revenues that were likely to come out of the Timor Sea Treaty. What does the Australian government say in response to the statement that there was such inequality in bargaining power, given that East Timor was starting with nothing, that they would agree to virtually anything?

Dr Raby—Those who participated in the negotiations would have a different view on how the negotiations were conducted. They certainly did not feel like a negotiation conducted from

positions of great inequality. Certainly the whole United Nations team supported the East Timorese on this.

CHAIR—Could you expand on that point? I ask this for the following reason, and you will see it in the evidence over the last couple of days: it has been put to us that Australia negotiated in bad faith; it has been put to us that East Timor was under duress; and it has been put to us by various parties that Australia has taken advantage of East Timor—that this treaty is not in East Timor’s national interest, but it is most certainly in Australia’s national interest. This committee is here to consider what is in Australia’s national interest, but you get the gist of the sort of evidence that has been put before us. Could you perhaps explain in a little more detail the process involving the United Nations or whomever by which this point was reached?

Dr Raby—On the East Timor side, their negotiating team consisted primarily of UN funded negotiators—very skilful and able international negotiators—and they still continue to draw on those negotiators. Their capacity to conduct the negotiations was resourced by the UNTAET—the provisional administration under the United Nations. But I think there is a more fundamental point here, and that is that it is Australia that made it possible for East Timor to realise its independence ambitions. We have a very large and expensive military presence in East Timor to underpin that act of independence. We are, if not the largest, one of the largest aid donors to East Timor. In fact, in terms of our own interest, getting revenues flowing to East Timor as quickly as possible and in as fair and reasonable proportions as possible is what really serves Australia’s interest. We need a stable, prosperous, viable East Timor, otherwise we will continue to carry a very big burden on our aid budget and other budgets. So the argument seems a little bit inverted that this is an unfair agreement that somehow we extracted out of East Timor.

CHAIR—I hasten to add that this was not a submission from the East Timorese government.

Dr Raby—No, and that is the next point I wanted to make. The East Timorese government on independence signed the agreement and welcomes it. It is a sovereign state that has done so and it has fought hard for independence for a very long period. I find it inverted logic for people to suggest that, when ultimately we will be one of the main guarantors of the survival and stability of East Timor as an independent state.

CHAIR—I know other people have lots of questions, so maybe I will just ask one more and then we will go around the table. Could somebody explain how we reached the 90-10 split, given that the previous treaty recognised a 50-50 split, which I think everybody could understand? How was 90-10 arrived at?

Dr Raby—The 50-50 split was, if you like, the starting position. From an Australian point of view that seemed a fair and reasonable split, but it was evident in the context of the negotiations that we were unable to maintain the position of a 50-50 split and we had to work to a compromise. We would see 90-10 as quite a substantial concession by Australia, which also underscores the point that the negotiations involved a partner that had influence and weight in those negotiations. So it is a compromise that emerged out of the negotiations—one, though, that we are sure will provide East Timor with substantial sources of revenue to underpin their economic development. It is one that came out of the negotiations through a period of hard and difficult bargaining, but one that at the end of the day we think we can justify in terms of Australia’s national interest—if you refer to the previous answer I gave—in terms of providing

a revenue stream to East Timor which will underpin its viability, and that is very important for Australia's own security.

CHAIR—So it could be taken to be in recognition of East Timor's needs and how those needs would impact on Australia in any event, in terms of its fiscal stability.

Dr Raby—But you need to understand that it was a negotiated outcome. It came out of the course of the negotiations through long and difficult bargaining sessions. We can, I think, justify it in Australia's national interest as being a split which provides East Timor with the sort of revenues that it needs to establish a viable, stable and secure economic setting.

CHAIR—One last hypothesis: if Australia had been negotiating with, say, an economic power of the status of the United States in the place of East Timor, do you believe that the split would have been 90-10?

Dr Raby—I cannot say; it is hypothetical, but I know the point of your question. All I can say is that—

CHAIR—We heard a lot of evidence on the disparate bargaining power of Australia and East Timor. I think Oxfam and the Uniting Church did not want the treaty ratified at all—unless some amendments were made. I think the Uniting Church did not want it ratified at all on the basis that East Timor was getting a raw deal from it. I was trying to establish from them whether they were talking about the treaty per se or whether their concern was about the different bargaining positions between the two countries. They were suggesting that Australia ought to give away claims to the continental shelf or give away this, that or the other. I asked if they would take that view if, in fact, the other party were an economic super power, and I put that to you.

Dr Raby—It is an interesting proposition.

CHAIR—What was driving this treaty?

Dr Raby—Our preferred position was 50-50. We did not get 50-50; we got 90-10 in favour of East Timor.

CHAIR—But surely that must have reflected our understanding of what East Timor was going to face over the next—

Dr Raby—That was the point I was trying to make. At the end of the day, that was the best we could get for ourselves in terms of revenue sharing, but it is an outcome which we can justify in terms of what it means for East Timor's development. But it was not our opening position; it was not our preferred position.

Mr Campbell—I want to reiterate something from the perspective of somebody else who was involved in the negotiations—

CHAIR—You were both involved in the negotiations?

Dr Raby—At different stages, yes.

Mr Campbell—I do not think anybody in the delegation ever felt, nor could it be said objectively, that we had East Timor over a barrel—if that was the way it was put in Melbourne. That simply is not the case.

CHAIR—I do not know if they were the words that were used, but that was the effect of what they were saying.

Mr Campbell—As I mentioned earlier, there is a whole range of factors that one can take into account if one is negotiating something by agreement, and in doing so one should include the relative social wealth and the need of countries. Those are two factors.

CHAIR—Does anybody have any other points they want to make on that? I ask the deputy chair to take over because I have monopolised your time for too long.

Mr WILKIE—I am not going to touch on the issue of maritime boundaries; I think they have been done to death. I do not think anyone in their submissions submitted that litigation should be the preferred choice of dispute resolution, only that they were disappointed that it was not a final option if, in fact, negotiations failed. I think it is worth making that point. In a lot of the evidence that we received, people talked about the unitisation agreement and ratification. There are those who would like to see the two linked, obviously. There are those who believe we should ratify the treaty as soon as possible and get on with life. I am curious from the departments' perspective how closely linked do the relevant departments see both the unitisation agreement and the treaty?

Dr Raby—There is not a legal linkage in terms of a document.

Mr WILKIE—I am not necessarily talking about a legal linkage.

Dr Raby—We have the Timor Sea Treaty and it contains annexe E. Annexe E is an integral part of the Timor Sea Treaty and it says that there shall be an International unitisation agreement. At the same time that the treaty was signed on 20 May, a memorandum of understanding was signed between the two governments that a unitisation agreement would be completed by 31 December this year. I think that perspectives on the treaty and the process of ratification of the treaty would be influenced by perspectives and perceptions of the progress being made on the International unitisation agreement.

Mr WILKIE—It has been suggested that Australia has been using ratification as a bit of a stick towards getting unitisation agreed to. How would you respond to that?

Dr Raby—I would note that the East Timorese have not moved to ratify the treaty, either.

Mr WILKIE—Meaning?

Dr Raby—Meaning that one would assume that, if there was leverage, the leverage would only apply once East Timor itself had ratified the treaty.

Mr WILKIE—I was of the understanding that East Timor wanted the treaty ratified as quickly as possible and that they had made that comment.

Dr Raby—The Australian government does as well. It also wants an international unitisation agreement to be completed as quickly as possible.

Mr WILKIE—How closely should the two be linked, then? Should ratification occur prior to the unitisation agreement being agreed to?

Dr Raby—That is a policy decision for government to make. All we would note there is that, ideally, the resources in the area should be able to be developed in tandem. There is significant interest in Bayu-Undan for East Timor and there is significant interest in Greater Sunrise for Australia.

Mr WILKIE—Are the negotiations at the moment proceeding down the path of the two occurring at the same time?

Dr Raby—Within the framework of the memorandum of understanding that the International unitisation agreement would be completed by 31 December, we are hopeful that that can happen.

Mr WILKIE—Unfortunately, we have not been privy to the IUA, but I understand that some of the companies that are actually working in the region have seen that agreement and the comment has been made to me that the position of East Timor and that of the companies in relation to that IUA are far removed from each other and that the likelihood of reaching an agreement by the end of December is extremely unlikely. Therefore, it could take until the middle of next year before unitisation occurs. Obviously, the unitisation agreement would have to come back to us for any recommendation, based on the fact that it has treaty status. That would make the process go out even further. Therefore, I am wondering on what basis we are looking at the two together when we have to deal with them separately.

Dr Raby—At this stage all I can say is that we are hopeful that we can conclude by 31 December. It is worth recalling that the companies doubted very much whether we would be able to conclude the Timor Sea Treaty by 20 May. It is fair to say that it was a near-run thing and that there was a lot of political involvement in the last 10 days or so of that exercise, but we made it. At this stage, from point of view of officials, all we can say is that we are working as hard as we can to ensure that the IUA is completed by the end of the year.

Mr WILKIE—Why was the unitisation not made a part of the treaty originally?

Dr Raby—It is in annexe E of the treaty.

Mr WILKIE—But it is referred; it is not actually part of the treaty itself.

Dr Raby—It is part of the treaty as annexe E and it says that there shall be an IUA.

Mr WILKIE—But it is not part of the agreement. What I am saying is that we could ratify the treaty without actually ratifying the IUA. Why were the two not combined?

Mr Walker—I might take that question. One of the things that we would always liked to have seen was these two things actually coming through in parallel. In practice, it has not been possible. One of the issues in all of this is East Timorese resources for negotiations. While they have hired some very high-powered experts to provide advice on this, these experts are of course not continually available. There have never been enough resources for both sides to bring these things together in parallel.

Mr WILKIE—Is it your understanding at the moment that a very great disparity exists between what the companies and East Timor want in terms of what is currently in the unitisation agreement draft? How practical is it that we suggest that that will be agreed to by end December? I am after an opinion if you can give one.

Dr Raby—There is a larger point behind your question, and I think it is a very good point and it is one that the committee will have to come to grips with at some stage—that is, if it turns out that it is not possible for us to conclude the International unitisation agreement, the committee will need to take a view, I should imagine, with respect to how you deal with the treaty and how you deal with the International unitisation agreement. That is something that we as officials cannot offer an opinion on, but otherwise—

CHAIR—Why does the committee have to do that? Doesn't the committee just have to recommend to the government to ratify the treaty or not? Then it is over to the government; it is a government problem as to whether it does or does not ratify in a particular time frame.

Dr Raby—But I understood the deputy chair to be suggesting that he would want to see the IUA at the same time.

Mr WILKIE—Based on the evidence and submissions that we have received, some people are putting forward that we should ratify as quickly as possible and deal with the International unitisation agreement later, as is provided for in the treaty arrangements, and another train of thought is that the committee should be recommending that ratification should not occur until such time as unitisation is finalised. That is why, when making that determination as a committee, I believe we need to have some basic information as to which way we should go in making that recommendation.

CHAIR—Essentially, we want a response from you. At the end of the day, it is not actually the committee's problem. We can make any recommendation we like, but whether or not the government takes it on board is another question. The deputy chair is looking for an argument to support the recommendation that ratification await the finalised IUA.

Mr WILKIE—Yes. A part of that very clearly is the time frame for the International unitisation agreement. If December is practical, it may be a reasonable case to argue that we should defer it. If it is going to be a lot longer than that, based on best available evidence at this stage, it may be a case where we say, 'It is taking too long; let's get on with ratification and deal with the IUA separately.'

CHAIR—If we are to take into account the evidence of Phillips and Santos, is Bayu-Undan in jeopardy if this treaty is not ratified sooner rather than later?

Mr WILKIE—That was going to be another question: how realistic would that submission be? But we can touch on that later.

Dr Raby—I was just acknowledging that point. I think it is a very good point and a very difficult issue. All I can say at this stage, though, is that we are hopeful that it can be done by the end of the year. Whether or not it can will depend obviously on how we deal with a couple of threshold issues. We have a revised draft of the IUA, which we have presented to East Timor. We are going to Perth tomorrow to have the fourth round of discussions on the IUA. I will be in a better position if we meet again next Monday to give you perhaps a sense of that.

CHAIR—That might be a good idea.

Mr WILKIE—That would be good.

Dr Raby—Again, we see the IUA as being integral to the whole exercise in that it is an annexe of the treaty that there will be an IUA and that a memorandum of understanding was signed at the same time as the treaty was signed that an IUA would be completed by the end of this year, which we saw as a reasonable time frame to do the whole lot.

Mr WILKIE—At this stage, the government sees the two occurring together?

Dr Raby—That is the preferred position of the government—that is, they could move on parallel tracks to conclude at the same time.

Mr WILKIE—What, then, of the view that the International unitisation agreement has to come back to this committee for further consideration, public submissions and comment before it can be agreed to, which would then draw out that process? Whether the IUA is agreed to between Australia and East Timor at the end of December or at the end of June, at some point it has to come back to this committee for consideration and recommendation to the executive before they can go down that path.

Dr Raby—Surely, if we reach agreement on the IUA, you could take that into account in your recommendations on whether or not to ratify the treaty.

Mr WILKIE—I would have thought that if we had been able to see it, but we have been told we cannot see it until it has been agreed to.

Mr Campbell—One of the difficulties with that is that the IUA is still under negotiation between East Timor and us, and it is not complete yet.

Dr Raby—If we were able to report in December that we had concluded, to our satisfaction, an IUA with East Timor, I think it would be very relevant in terms of the recommendations you may wish to make on the TST.

CHAIR—Our time frame is such that, apart from hearing from this group next week, it will be the end of the public hearings, essentially. We will then be in report mode and in a position, I hope, to table the report in the parliament by November—the House of Representatives sits only one week in November—or maybe in the first week of December. It may well be the case that, because of our work schedule, you will not have negotiated the IUA by the time we make a recommendation on the terms of this treaty. What then?

Mr WILKIE—And under the current arrangements we have to deal with it separately, anyway. It has to come back. If we are waiting to ratify before the IUA, firstly, they should have been considered together, rather than separately, if they are going to be dealt with as one item and, secondly, where does that put players like Phillips, who want to have the whole treaty ratified so that they can get on with their work in the Bayu-Undan field? One of their submissions is that they should be separate. That makes it very difficult. How realistic is the submission put by Phillips and others that if the treaty is not ratified, at least, say, by November—obviously it will take a bit longer than that—they will not be able to proceed with the development of the field at Bayu-Undan to get it onstream?

Dr Raby—Our advice on that is no different from yours. We have the same submissions, I am sure, from Phillips, as you have received. We have to take them at face value. As I said, Bayu-Undan is of great interest to East Timor and Phillips, and the Greater Sunrise field is of much greater interest to Australia and Woodside and the other partners involved in that.

Mr WILKIE—What about the view that, if the treaty is ratified prior to the International unitisation agreement, the Greater Sunrise field will never be developed? That has also been put to the committee. Does the government have a view on that?

Dr Raby—I am aware of that view. Again, we recognise that there is a risk. There is a view that has been put there, and we take note of that view.

Mr WILKIE—What is your opinion about whether or not it is a valid view?

Dr Raby—These are ultimately commercial decisions for the companies to make, both with respect to Phillips and to Greater Sunrise.

Mr WILKIE—Given the income flow to Australia, I would have thought it would be in our national interest to consider that in determining whether to ratify prior to or after unitisation. I do not believe that the government has not considered that, given the amount of money concerned. I am wondering whether there is a view or whether a view has been developed but is not public.

Dr Raby—You are making a very good point. That is why we have made the point that Greater Sunrise is of tremendous interest to Australia, and that is why we have also sought to set a time frame around the conclusion of the International unitisation agreement by the MOU that we have signed with East Timor.

We clearly have no interest—and it is certainly not in Australia's interests—for the IUA to be an open-ended negotiation that may go on for many years. The MOU is not there by accident; it is a very deliberate attempt to set a deadline for the negotiations—one that both governments

have agreed to—to ensure that what we regard as a very necessary agreement between us and East Timor is concluded expeditiously, as both governments have agreed it should be done.

Mr WILKIE—Based on the Woodside submission, which is that Greater Sunrise would not proceed unless unitisation occurred at the same time as ratification, should we ratify before unitisation?

Dr Raby—In making a recommendation on that I would go back to my previous point: the status of the IUA is a very important element in forming a view on whether we should ratify.

Senator MARSHALL—I want to follow-up on the IUA and the fact that it is still being negotiated and is still being treated as confidential. Why was it that Woodside was able to see a draft copy of the IUA and we were not?

Dr Raby—They are a commercial partner.

Mr Walker—Basically, East Timor and Australia both agreed, after Woodside requested, that we would show them the drafts, bearing in mind that an international unitisation agreement will be useless if it is not acceptable to industry.

Senator MARSHALL—Was the same request made to them on our behalf when we made the request to see it? A committee member requested to see the draft IUA and was told that it was strictly confidential and that the committee would not be able to see it, but for commercial reasons there seems to be an exemption for Woodside to see it. Has anyone else seen it?

Mr Walker—No, not that we know of.

Senator MARSHALL—Only Woodside.

Dr Raby—It was provided on a commercial-in-confidence basis. I think the view of the minister is that agreements in the process of negotiation are work-in-progress documents and should not be provided to the committee.

Mr Campbell—There is a general practice amongst countries in negotiating bilateral agreements that the content of the negotiation is confidential to the parties until the agreement is actually signed. In this particular case the unitisation agreement needs to take account of private unitisation arrangements at a different level between the companies, so obviously there is a link between those two things. It really is an application of a principle that is generally recognised internationally: bilateral agreements are confidential to the parties until they are actually signed. And we still are negotiating.

Dr Raby—An East Timor agreement has been made available to Woodside.

Senator MARSHALL—Was the draft agreement made available to Woodside prior to the request of the committee member? Your response to the committee was that it was strictly confidential. If Woodside had already seen it, it was not really the appropriate response—it is strictly confidential unless there is a good reason to show it to other people. No-one else would

have seen it but then we find out that Woodside have seen it. I understand what you are saying now but I am just trying to work out the timing. Was our request before or after Woodside had requested to see it?

Dr Raby—We will have to take that on notice and check it.

Mr Walker—I am not sure when your request was made.

Mr WILKIE—It was after.

CHAIR—Are you giving evidence?

Mr WILKIE—I asked for it—there is no secret about that—and then after we saw the submission from Woodside where they actually referred to the fact that they had seen it. So clearly—I do not think you need to run away and waste your time doing that—it was after.

CHAIR—So the current position of the government in relation to the IUA is that it is a confidential document between East Timor and Australia. In the usual course of treaty negotiations, it would remain confidential. In this instance, you have shown a copy of it to the operator—the private company involved—because you require their input as to whether it is a practical agreement.

Mr Walker—Yes.

CHAIR—Otherwise, if you negotiated with East Timor and then presented it to Woodside, they would say, ‘Sorry, can’t do.’

Dr Raby—Exactly.

Mr Walker—That is what we hope to avoid.

Senator TCHEN—Mr Campbell, when you attended this committee in July this year I think you told the committee—I am bringing you back to this delimitation issue—in referring to the 1972 treaties with Indonesia, that the major two side boundaries, the eastern and western laterals, represent a point of equidistance between East Timor and Indonesia. Do you have any a priori documentary material which explains how those two lateral boundaries were decided? I do not mean things like Professor Prescott’s work or Professor Triggs and Mr Bialek’s work; these are post facto analyses. There must be some way to say how you decide on this.

Mr Campbell—In other words, do we have any sort of any sort of travaux preparatoire of the actual negotiating documents.

Senator TCHEN—Yes, to explain the principles and mechanism of how it was decided.

Mr Campbell—I do not have them to hand, but there are articles that were written soon after—I know I am referring to articles again—the treaty was negotiated indicating that the major part of the two side boundaries was the point of equidistance between—

Senator TCHEN—Yes, but do you have anything to explain the principal and mechanism of how it was arrived at?

Mr Campbell—They are reflected largely in what Professor Prescott and Mr Brazil had to say. This is the side boundaries, the point of equidistance.

Senator TCHEN—In the Lowe-Carleton opinion they set out why they think the boundaries should be a particular way and go in a particular direction, but what we have here is that the existing boundaries are based on a simple bare statement—that is, equidistance.

Mr Campbell—On the sides. But the simple fact of the matter is that we would say it is the point of equidistance between the relevant points on East Timor and the relevant points on Indonesia. If you are talking about whether we are going to take into account particular islands and things like that, then I suppose that is a point of disagreement with the Lowe-Carleton opinion.

Senator TCHEN—But at that time there must have been some agreement to say that this line is equidistant between Indonesia and East Timor.

Mr Campbell—What normally happens in a maritime delimitation negotiation is that the parties will agree on the application of a principal to a particular boundary and then they will go and ask the cartographers in the negotiations to go away and represent that in terms of the metes and bounds definition and in terms of any diagram that is done with it. But most maritime delimitations—although not all—simply refer to that metes and bounds definition, which is the latitudinal and longitudinal points, without detailing the basis upon which it is being done. But it is quite evident that those are done on the basis of equidistance.

Senator TCHEN—And you believe that was the situation with the 72 treaty.

Mr Campbell—In relation to the 72 treaty, the two points that are equidistant—and I think Professor Prescott said ‘near equidistance’ or something—are points A16 and A17. But the other points clearly on the edge are closer to Indonesia than East Timor.

Senator TCHEN—I understand that. I was using shorthand. I mean points 16 and 17. You also said at that time in July that you believed that the seabed boundary between Indonesia and Australia was an agreed boundary and we would expect it to stay where it is, and you repeated that today. Taking account of what Mr Raby expressed about a preference to define borders by negotiation and consultation—consultation is my word—would it not be good-neighbour policy to at least consult with Indonesia on any of these negotiations between Australia and East Timor, especially after the Indonesia foreign minister, Mr Wirajuda, stated earlier this year that Indonesia would like to be involved?

Mr Campbell—I think I have already stated that they would have some interest if some move was made to relocate points A16 and A17, because they are a point where three jurisdictions might meet. But, as I said, to the east and west of those I would anticipate that the Australian government position would be that we have an agreement with Indonesia and that that agreement should remain in place.

Senator TCHEN—In a worst case scenario, negotiations might break down over a maritime delimitation boundary. If that happens, is there anything to stop East Timor from granting petrol exploration and development permits in those areas which East Timor considered to be within its claim?

Mr Campbell—East Timor could purport to do that if it wanted to. Then the companies which received those would have to consider the question that they would be acting contrary to Australian laws that might cover the particular area. For example, if East Timor purport to give a licence that was in an area of Australian jurisdiction under the 1972 seabed boundary agreement—that is, south of that agreement—and that is an area where the Petroleum (Submerged Lands) Act of Australia applies, and I believe there are criminal penalties for doing things without a permit there, they might well be prosecuted in an Australian court. I am not sure whether that is a criminal example, but action might well be taken under the Petroleum (Submerged Lands) Act in relation to that.

Dr French—I just mention in the broader context that there are a number of situations around the world where countries have granted exploration-exploitation licences in areas of overlapping jurisdiction where the boundary has not been settled. Invariably it leads to an unstable commercial environment, and companies look at such situations usually very carefully before they consider investing even one dollar.

Mr Campbell—Could I add, though, that that is obviously not the ideal situation—

Senator TCHEN—I understand. I did say that was a worst case scenario.

Mr Campbell—and we would hope that the Timor Sea Treaty governs the relationship between the parties in the Timor Sea and then we have a negotiation over the permanent boundaries.

Senator TCHEN—The committee heard earlier from Dr Ward, counsel for Oceanic Exploration in their Federal Court case and also the joint author of the Lowe-Carleton documents. I think I have got it right that his view is that, in international maritime boundary delimitation, the overriding principle under international law is equity, that is, equidistance and taking into account the resources of the participating nations. He says that issues such as the natural prolongation of geomorphological features, past government practices and past agreements have no effect. Assuming that I have got it right, do you agree with that?

Mr Campbell—No, I do not. I think I stated earlier today that we still regard natural prolongation as having a relevance in maritime boundary delimitation, and I think I stated the two reasons why that would be the case. More particularly, I think I have also stated that I regard that Lowe-Carleton-Ward opinion as clearly understating the continued effect of an extended continental shelf based on natural prolongation, which is referred to as one of the two bases for claiming a continental shelf under article 76 of the convention.

Senator TCHEN—Thank you. Earlier, I think both Dr Raby and Mr Campbell assured the committee that, during the negotiation for the Timor Sea Treaty, Australia definitely did not get East Timor over a barrel. Given that Australia started with a position of 50-50 and finished up

with a position of 10-90, I might put the opposite case and say that the East Timorese negotiators were actually more determined and more skilful. Would you agree with that?

Mr Campbell—Speaking personally, no.

Dr Raby—That is characterised by previous comments about not having us over a barrel. It just served the course of the negotiation. There are a lot of things at the end of the day that one needs to consider, including how long one wishes to hold up commercial development in the region.

Senator TCHEN—The 10-90 split leads to a couple of other issues. I am not sure whether you agree that existing practice or an existing agreement would give precedence over future negotiations. There may be some concern that, as we have an agreement with East Timor in the Joint Petroleum Development Area, the split of the resources is 10-90. In future negotiations over maritime borders between us, would that give an indication that we are prepared to concede 90 per cent of the advantage to East Timor?

Mr Campbell—No.

Senator TCHEN—I know there is a no-prejudice clause.

Mr Campbell—Yes, I will mention the without prejudice clause, which is there for a purpose. The second point I would make—which I made before—is that the law of the sea convention itself recognises that these are provisional arrangements. That in itself reinforces the without prejudice clause in the treaty.

CHAIR—So you are saying that these interim arrangements have no precedent value?

Mr Campbell—As I said before, this is a share of production we are talking about. We are not talking about boundaries ‘in the provisional arrangement’; we are talking about a share of production from the area. We are not talking about a geographical split up of the area. We would not see that as providing any sort of precedent.

CHAIR—So the 90-10 split, being a share of revenue production, if you like, would not be a matter of consideration by any arbitration on maritime boundaries—would not set a precedent?

Mr Campbell—I cannot say that nobody would take that into account, but we would point to the without prejudice clause and we would point to the provisional nature of the agreement as reflected in the law of the sea convention. There would be little point in having that ‘agreements of a provisional nature’ provision in the convention if it were to be held against a party for having entered one of those provisional agreements.

Senator TCHEN—That question was very well put, Madam Chair. I was struggling with the legal terms. What about the implication of our preparedness to take 10 per cent of the seabed resources? What is the implication of that to the resources within the water column above the seabed—that is, the fishing right?

Mr Campbell—At the present time we are dealing with a provisional arrangement which purely relates to the oil and gas resources of the seabed; we are not dealing with the water column. In terms of where current claims are in the water column, Australia asserts jurisdiction to the bottom of the JPDA. I assume East Timor asserts jurisdiction over the EEZ. We are not sure yet but it might well go past that point—but it goes at least to that point. All I am saying is that in that agreement we are dealing not with fishing but with oil and gas resources. In our own maritime delimitation agreements in the past in this particular area, with Indonesia and also with Papua New Guinea, we have actually come to arrangements where the water column jurisdiction can differ to the seabed jurisdiction—in other words, there can be an overlap occurring between the two.

Senator TCHEN—That was one issue that a commercial fishermen's association in Western Australia brought to this committee. I must confess I do not quite understand how they all work because they are different jurisdictions—state, Commonwealth and Indonesian jurisdictions—over particular water. Apparently this is causing considerable problems. I invite you, Mr Campbell, to have a look at the transcript.

Mr Campbell—I have read the transcript.

Senator TCHEN—You can probably understand it better than I can.

Mr Campbell—I was not quite sure of the concern they had because the Timor Sea Treaty does not purport to deal with jurisdiction over fisheries resources.

CHAIR—But, Mr Campbell, you would have seen in the transcript of that evidence that the fisheries people were concerned about the Perth agreement—the 1997 agreement between Australia and Indonesia.

Mr Campbell—They mentioned the 1997 agreement.

CHAIR—Does that impact on fisheries management?

Mr Campbell—That 1997 treaty with Indonesia actually sets out the whole of the water column boundary between Australia and Indonesia.

CHAIR—But that has not been ratified.

Mr Campbell—That has been before this committee. This committee has recommended that it be brought into force, but we are still awaiting action from Indonesia.

CHAIR—So the Australian government has ratified that treaty?

Mr Campbell—We have not ratified it yet because we are waiting for the Indonesian action.

CHAIR—I guess that was my point. Can you tell us where it is up to? I know where it was up to in this committee, but where is it up to out there?

Mr Campbell—There needed to be an amendment to that treaty to take account of the fact that East Timor no longer forms part of Indonesia, because the 1997 treaty actually had an exclusive economic zone boundary in it that was at the bottom of area A.

CHAIR—Yes.

Mr Campbell—In July last year we put to Indonesia an amendment to the treaty which would excise that particular part of the boundary, and we are awaiting—

CHAIR—That amendment to the 1997 treaty has been through this committee?

Mr Campbell—It has not been through this committee yet.

CHAIR—That has not?

Mr Campbell—That has not. One of the reasons for that is that that particular amendment has not yet been agreed to by Indonesia.

Senator TCHEN—I will get off the delimitation issue. I want to ask about taxation issues. Mr Bartley, can you explain the overall taxation regime that applies within the JPDA? I understand that article 4 specifies that the two party states can treat the JPDA as their own taxation zone. Is it article 4?

Mr Walker—Article 5.

Senator TCHEN—Can you explain how the regime works?

Mr Bartley—In the taxation code it is a disputed area and it is treated as being under the jurisdiction of both countries; so we can apply our tax regimes and East Timor can apply their tax regimes. What the taxation code does is provide certainty about how the taxes apply in that area by defining what activities are covered—and it relates to petroleum related activities—and the types of taxes that can be levied in that area. Those taxes are outlined in article 4. It is not possible for other taxes to be imposed on the petroleum activities in that area under this tax code unless you have agreement between the two countries to change the scope of article 4.

Senator TCHEN—What about GST and excise because I understand that those indirect taxes usually apply only to the national borders and that beyond that they do not apply?

Mr Bartley—Yes, that is correct. Article 4 allows us to apply GST in the area. The GST zone, as I understand it, is defined by the customs zone which treats the JPDA as being outside the taxable area. As it currently operates, GST will not apply in the JPDA. But the treaty has got that built in—that if in the future we were to change the customs boundary or the GST boundary it could apply.

Senator TCHEN—So this treaty allows the Treasury to extend the indirect tax zone?

Mr Bartley—It would be possible to levy GST in that area if that area were included by either the GST boundary being redefined or the customs boundary being altered to include it.

Senator TCHEN—That does not help at all the position of people who supply goods and services to the exploration companies, does it? They have no certainty as to whether they will be liable for GST and custom duties for taking things into the Joint Petroleum Development Area. Has the Treasury given any thought to that?

Mr Bartley—As the law currently stands, those goods moving into the JPDA would not be subject to GST in that area. They would basically be treated as being exported into the area. To actually change that there would have to be an act of legislation.

Senator TCHEN—Thank you. So at the moment it cannot be done through executive action; it has to be legislation?

Mr Bartley—Yes.

CHAIR—Mr Bartley, on the tax issue, I would appreciate it if you would have a look at the evidence of BP Australia from the Melbourne hearing on Friday. They raised quite a number of tax concerns, some of which they said they had put to Treasury. For next Monday, the committee would appreciate your consideration of the tax issues raised by BP on Friday and Santos today.

Senator TCHEN—I am not sure to whom I should put this question on preferential employment.

CHAIR—Maybe to Mr Walker.

Senator TCHEN—Article 11 provides for preferential employment of national permanent residents of the Timor Sea Treaty. The Timor Gap Treaty provides for nationals and permanent residents of both nations; the Timor Sea Treaty provides preferential treatment only for East Timor nationals and residents. Could you explain to the committee why there is one-way preference?

Mr Walker—In some ways this is about sharing the employment opportunities between Australia and East Timor. However, I should note that, in the old Timor Gap Treaty, 50-50 was in fact never achieved. Over the period from January 1992 to November 1999, the total person days—this is on joint authority figures in the old ZOC—were Australia 52 per cent, Indonesia 33 per cent and others making up the remaining 15 per cent. That imbalance was seen as being at least partially due to the lack of suitably trained people—and that includes English-language-speaking Indonesians. This constraint is obviously of much more concern to East Timor. So the objective in the treaty here is to try to provide some sort of development incentive to the East Timorese. So it is not so much about trying to share it up but more about trying to pursue the development aspects.

I should put this into perspective a little. Total employment for the Bayu-Undan project when it is in its operational phase is expected to be 120, with a given of about 80 persons offshore—that is, actually on the facility—at any one time. That is just to put the employment numbers in

perspective. Obviously, there are some little peaks and things—they are actually not such little peaks—that go on during construction phases, but they are quite short-lived and a lot of these people are associated with mobile construction equipment, big construction barges and things that come in.

To try to give some sort of effect to this employment preference to East Timorese, a petroleum education and training steering committee has been established. It is chaired by Mari Alkatiri. The committee was formed in 2000 and has representatives from the Commonwealth, East Timor, previously UNTAET, the Northern Territory, the joint authority and, most importantly, from both Woodside and Phillips, which are the major operators there. These companies are showing a lot of commitment to the training of East Timorese—I should say education and training, because the first point in all of this is about bringing people to a point where they can actually apply for a job. I can go into some of the activities of the committee in a little more detail about, if you need me to.

Senator TCHEN—No; that is fine, thank you. If there are certain groups of Australians who suffer handicaps similar to the ones that the East Timorese suffer, shouldn't the preference be extended to them as well? I specifically refer to the Indigenous Australian population. I understand that a company involved in the bauxite operation in Weipa has an employment preference for the Indigenous community. Can something like that be built in here?

Mr Walker—This is basically a treaty about sharing and developing petroleum resources in an area of overlapping claims. My view is that trying to separate out different groups of Australians in such a thing is way beyond the scope of this treaty. It is a matter of broader social policy, not a matter for a Timor Sea Treaty.

Senator TCHEN—Yes, but that domestic social policy can only be possible if the treaty provides for preferential treatment of Australians as well. It is up to the Australian government domestically to direct the preference to particular groups.

Mr Walker—As I said, I believe this is a matter of social policy, but, if the Australian government wished to try and place any particular group of Australians, it is a matter for appropriate education and training programs which are quite independent of the treaty.

Senator TCHEN—I understand that. I am not talking about part (b) of article 11; I am only talking about part (a), which allows for preferential employment opportunities. Even if, within Australia, we directed employment opportunities to people from Indigenous communities in the vicinity, that provision of the treaty would actually preclude us from doing that.

Mr Walker—It does not exclude us in any way from having whatever internal preferential treatment we might want for any group in our population.

Senator TCHEN—But if our people generally do not get preference, the East Timorese could potentially fill 100 per cent of the employment under the provision here.

Mr Walker—Yes, but that is unrealistic.

Senator TCHEN—But it is possible.

Mr Walker—Not in the foreseeable future. I really do not believe that that anything even approaching 100 per cent could happen in the lifetime of the existing production-sharing contracts. I would suggest that, even in the lifetime of the existing production-sharing contracts, 50 per cent is most unlikely.

Senator TCHEN—Related to that is the following article, article 12. Article 12 provides that the occupational health and safety standards of either nation can be applied. But we understand that East Timor does not actually have any occupational health standards at the moment, so why provide for something that can be applied when they do not have any? The possibility is that East Timor, as has been described before, is under certain stress and it may well be that East Timor, when it does develop its occupational health and safety standards, would do it in a much less satisfactory manner than the existing Australian one.

Mr Walker—Firstly, with regard to article 12, I draw your attention to the words in approximately the middle of that paragraph which prescribe standards:

... that are no less effective than those standards and procedures that would apply to persons employed on similar structures in Australia and East Timor.

That is one part of it. The next part of it is that this is a negotiated outcome, but there is nothing in here that precludes adoption of Australian law. In fact, what we actually have operating at the moment is very close to Australian law.

Senator TCHEN—Yes, I understand that, but what happens when East Timor establishes its own laws which might be seen by Australian standards as substantially less stringent than Australian laws, for example? Any operators in the area would have the option of applying the putative East Timor laws rather than Australian laws.

Mr Walker—The regulations that will apply will be those of the designated authority. Australia has a say in what the designated authority adopts.

Mr WILKIE—Following on from that: would it be realistic to include a clause which would say ‘whichever is the superior legislation’?

Mr Campbell—I saw that particular evidence given—I think it was in Western Australia—that there should be a clause in that.

CHAIR—I think it was the Maritime Officers Union.

Mr Campbell—But then you get into a question about what is superior. There would be an argument over that particular item. The other thing is that, to be realistic in the negotiation and the outcome of the document, I do not think it would have been realistic to have on the face of the document for East Timor that Australian laws will apply to occupational health and safety. The East Timorese simply would not have agreed to that, although that might well be the outcome.

Senator TCHEN—Surely, Mr Campbell, so many East Timorese government representatives have stayed in Australia, and so many of them who have spent some years in Australia would

realise the richness and comprehensiveness of Australian occupational health and safety laws and they should have no problem in adopting them.

Mr Campbell—They may well have no problem in adopting them. All I am saying is that it may well have been difficult for East Timor to accept something on the face of this document which says, ‘Australian occupational health and safety laws will apply.’

Senator TCHEN—On the other hand, they would probably realise it would relieve them of certain pressure from potential employers to encourage them to adopt less stringent standards.

Mr Campbell—Yes, but as my colleague has said, ultimately the standards will have to be agreed to by Australia in any case.

Senator TCHEN—Do you mean that we have a veto right?

Mr Campbell—Ultimately it can get to a stage where there can be some sort of arbitration between us about which occupational health and safety laws—

CHAIR—If there is a dispute with what the designated authority has determined.

Mr Campbell—If there is a dispute about it. The only other point to note is that I think that the provision in article 12 is almost identical to what is in article 25 of the existing Timor Gap Treaty, which seems to have operated satisfactorily, albeit with a different country.

Senator TCHEN—In that case, I will accept your assurances, Mr Campbell.

Senator KIRK—I have a question also in relation to the timetable for the ratification of the treaty. We have received a number of submissions from various joint venture participants saying that they need the treaty to be ratified quickly so they can meet contract time frames and the like. In relation to the current arrangement that is place—that is, the exchange of letters dated 20 May—on what aspects does the treaty add clarification and therefore perhaps deliver certainty on top of what is already in existence? How much clarification does the actual treaty provide on the matters that are dealt with in the exchange of letters?

Mr Campbell—The exchange of notes is intended to continue the situation that was in place prior to the exchange of notes for the period between the signature of the treaty and the actual entry into force of the treaty. It is there for the purpose of providing some continuity and certainty in respect of commercial arrangements. Companies have said that they cannot be absolutely certain about having the Timor Sea Treaty as a basis until it actually enters into force. I did not quite catch the end of that question.

Senator KIRK—That is what I was asking. To all intents and purposes, the exchange of notes, or whatever it is called, in effect is a reflection of what is in the treaty. Is that what you are saying—that there is not a great deal of difference between them?

Mr Campbell—Not absolutely. Under the exchange of notes, certain things will still be shared 50-50. For example, the royalties will be shared 50-50. Once the treaty enters into force,

it will be taken to have entered into force at the time it was signed, and everything will be adjusted as if it entered into force at the time it was signed.

Senator KIRK—So there is no real benefit, then, in continuing on with the exchange of notes in that way and putting off the ratification of the treaty?

Mr Campbell—I think it is very good to have the exchange of notes because it avoids a vacuum, however long that vacuum might be between signature and ratification of the treaty. It avoids that.

Senator KIRK—But because it has that retrospective effect in the way that you have described, there is no real advantage in that period, and so the 50-50 split—

Mr Campbell—It does not have any financial advantage, but I think the point made by the companies is that they do not want to do these long-term investments until they see the Timor Sea Treaty itself in force.

Mr Bartley—I would like to make a clarification. My colleague said that, under the exchange of notes, royalties continued to be shared on a 50-50 basis; they actually move to a 90-10 basis, but the extra 40 per cent is held in an escrow account until such time as the treaty is ratified.

CHAIR—Why was it done that way? Why was the 40 per cent of the JPDA resources, which East Timor would be entitled to on entry into force of the treaty, not made available to East Timor upon the exchange of notes?

Mr Campbell—Because the question of implementing legislation arose. If all the arrangements had been made 50-50 from the time of entry into force of the treaty, we would have needed legislation changes to do that.

CHAIR—And East Timor would have?

Mr Campbell—East Timor would have as well. This way, the legislation can be passed and applied so as to cover that period retrospectively.

CHAIR—So the escrow account commences from when?

Mr Campbell—From 20 May. I should have made that point clearer before. It will be held in an escrow account.

Mr WILKIE—One submission that we received referred to article 17 covering petroleum industry vessels. We have been provided with a number of statements from people who believe this is nothing. Is it the case that all vessels working in Australian and international waters are required to comply with manning certificates, crewing operating standards and safety rules of their flag state? We are getting down to flags of convenience issues here.

CHAIR—Who knows about flag state issues? Mr Walker?

Mr Walker—I am afraid it is a total mystery to me.

Mr WILKIE—Maybe this is something we can look at on Monday.

CHAIR—This was the evidence given by the Australian Maritime Officers Union in Perth.

Mr WILKIE—That is right, and probably you would not have access to that at this stage because it was late last week that we received it. The other question that would flow on from that submission which you could possibly look at on Monday is: Is it also true that not a single vessel operating in the Bayu-Undan gas and petroleum field is flagged in Australia or East Timor, thus making the enforcement of international conventions reliant solely on the goodwill of the flag states?

One of the reasons for asking from my perspective—and maybe it could be referred to on Monday as well—is that if we have vessels of a substandard nature operating in that area and there is an accident and they do not have to comply with relevant Australian legislation, particularly if they are tankers or petroleum type vessels, how do we know that those vessels are actually operating to a solid international standard, thus protecting our waterways? It probably also relates to the fishing industry. They did not put in a submission but, for example, in Western Australia a few years ago, we had a tanker running up the coast and the front fell off the tanker. We were lucky to avoid a major environmental catastrophe. I want to ensure that the vessels operating in these waters comply with reasonable international standards to ensure that we are limiting the possibility of that sort of event happening. Normally how you would get around that is that those vessels have to call into an Australian port, and the Australians inspect them to ensure that they are complying with relevant standards even though they might not be flagged in Australia. I do not believe that there are any of those standards that will apply to vessels which will be calling in to operations here in the fields in the JPDA.

Mr Campbell—Reading article 17, the second sentence, it does actually say:

Vessels with the nationalities of other countries shall apply the law of Australia or East Timor depending on whose ports they operate, in relation to safety and operating standards, and crewing regulations.

That picks up the port point that you made; that is, if they come into port then they will be subject to those particular—

CHAIR—The point that was being made to us was that the vessels currently operating in Bayu-Undan are not calling in to Australian ports.

Mr Campbell—I understand that, and that is picked up by the final part, which says that if they:

... do not operate out of either Australia or East Timor under the law [they] shall be subject to the relevant international safety and operating standards.

Mr WILKIE—That was what was being pointed out by the officers. It is fine to have that statement made but, unless you have an enforcement procedure in place, it is not going to happen. The only way that it occurs now is when those vessels call into port and they are

inspected in port to ensure that they comply. It is fine to have that in the treaty, but how are we going to make sure that it actually occurs in practice?

Mr Campbell—There is a question of the interrelation between this treaty and the treaties that we are a party to like SOLAS and MARPOL and things like that that have been adopted under the auspices of the International Maritime Organisation. These are multilateral treaties which we have obligations under as well. There are obligations under that and certain limitations in relation to what we can do. I am not an expert, but it is not simply open to us to go and inspect and apply, under those conventions, our standards to a vessel which is operating beyond our territorial waters and to say that there has to be an inspection out there. What I am getting to is that there could well be a question of obligations under this agreement vis-a-vis our obligations under a multilateral agreement.

Mr WILKIE—Could we look into that—if it is possible between now and Monday?

Mr Campbell—I would hate to dob in colleagues on this, but the experts in this particular area are from the department of transport and the Australian Maritime Safety Authority.

CHAIR—They would not have been involved in the preparation of the national interest analysis or this treaty generally to date, would they?

Mr Walker—We have liaised with them during the preparation of the treaty. There is a very wide range of departments involved and they have been involved as well.

CHAIR—There might be something they could add to this issue. If you look at the evidence that was given in Perth on Wednesday, there might be something the department of transport can add to that issue.

Mr WILKIE—Obviously the departments across the table from me prepare the national interest analysis. For Monday, could you look at the national interest implications of ratifying the treaty prior to finalisation of the unitisation agreement, so that we can look at the implications of that based on the evidence and on what would be in Australia's national interests? Given the government's view that both unitisation and ratification should occur in a similar time frame, I am also very interested in finding out what the government's position would be if the time frame for unitisation were extended past December 2002. We cannot liaise with the government in relation to this but the departments can, so I would like to find out from you what the government's position is on that matter.

CHAIR—Dr Raby, I am not quite sure whether you can answer this now; if not, you can take it on notice. In relation to the criticisms that were levelled at the government by certain NGOs last week, one of the submissions made this point:

... Australia has reduced its overseas development assistance to East Timor by 12.7% in the 2002-2003 budget ...

Do you know whether that is the case or whether there are any other circumstances of which we should be aware? It was put to us as a statement of fact leading to other criticisms and was put forward as evidence indicating the Australian government's attitude to East Timor. Can you answer the question now?

Dr Raby—No.

CHAIR—Would you take it on notice to let us know on Monday the circumstances relating to that claim and perhaps our overseas aid position with respect to East Timor generally.

Dr Raby—I think that point might have been made in the Uniting Church's submission.

CHAIR—It could have been the Uniting Church's submission, but it was definitely made on Friday in Melbourne.

Unless there is anything you wish to add at this point, we will adjourn until Monday, when we will try to wrap up any loose ends relating to statements, allegations or submissions that have been made in the last three days and today, so that we can have the government's response to any outstanding issues. If the members of the committee have any specific questions, we will try to get them to you before Monday, but I would appreciate it if you could also look at the evidence of the last four days in particular to see if there is anything further that you wish the committee to take into account. I thank all of the witnesses for attending today and look forward to seeing you again on Monday.

Resolved (on motion by **Mr Wilkie**, seconded by **Senator Marshall**):

That this committee—subject to any response from Santos in respect of their written submission—authorises publication, including publication on the electronic parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 2.58 p.m.