Report 46

Treaties tabled 12 March 2002

House of Representatives
Joint Standing Committee on Treaties

June 2002
Canberra
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Membership of the Committee

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The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;

b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the Committee by:
   (i) either House of the Parliament, or
   (ii) a Minister; and

c) such other matters as may be referred to the Committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.
Proposed Pacific agreement on closer economic relations (PACER)

Recommendation 1
The Committee supports the Pacific agreement on closer economic relations (PACER) and recommends that binding treaty action be taken. (Paragraph 2.15)

A Status of Forces Agreement with the Kyrgyz Republic

Recommendation 2
The Committee supports the Agreement concerning the Status of Australian Forces in the Kyrgyz Republic and recommends that binding treaty action be taken. (Paragraph 3.16)

Proposed treaty to amend an existing agreement with New Zealand on joint food standards

Recommendation 3
Protocol to the Double Taxation Agreement with the United States of America

Recommendation 4
At this stage, the Committee declines to support binding treaty action on the Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, pending the receipt of further and better particulars concerning its net benefit to Australia. (Paragraph 5.32)

Recommendation 5
The Committee recommends that the Australian Tax Office, in consultation with the Australian Treasury and other interested parties, take immediate action to develop an effective methodology to quantify the economic benefits of double tax agreements.

The Committee further recommends that the ATO report back to the Committee on the methodology developed before the Committee is required to recommend action on further double tax agreements. (Paragraph 5.33)

Proposed Agreement on customs law with the Netherlands

Recommendation 6
The Committee supports the Agreement between the Commonwealth of Australia and the Kingdom of the Netherlands on mutual administrative assistance for the proper application of customs law and for the prevention, investigation and combating of customs offences and recommends that binding treaty action be taken. (Paragraph 6.20)

Proposed Agreement with France on employment of dependents of mission officials

Recommendation 7
The Committee supports the Agreement between the Government of Australia and the Government of the Republic of France on employment of dependents of agents of official missions of one of the two states in the other state and recommends that binding treaty action be taken. (Paragraph 7.13)
Social security agreements with the USA and New Zealand

Recommendation 8

The Committee supports the Agreement between the Government of Australia and the Government of the United States of America on social security and recommends that binding treaty action be taken. (Paragraph 8.13)

Recommendation 9

The Committee supports the Exchange of Notes amending the agreement on social security between the Government of Australia and the Government of New Zealand and recommends that binding treaty action be taken. (Paragraph 8.24)

Promotion and Protection of Investments Agreements with Uruguay and Egypt

Recommendation 10

The Committee supports the Agreement between Australia and Uruguay on the Promotion and Protection of Investments and recommends that binding treaty action be taken. (Paragraph 9.31)

Recommendation 11

The Committee supports the Agreement between Australia and Egypt on the Promotion and Protection of Investments and recommends that binding treaty action be taken. (Paragraph 9.32)

The Child Protection Convention

Recommendation 12

The Committee supports the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and recommends that Australia ratify the Convention. (Paragraph 10.23)

Convention on the recognition of higher education qualifications

Recommendation 13

The Committee supports the Convention on the recognition of qualifications concerning higher education in the European region and recommends that binding treaty action be taken. (Paragraph 11.19)
Convention for the suppression of terrorist bombings

Recommendation 14

Despite its concerns about the adequacy of the terminology used in the Convention for the Suppression of Terrorist Bombings the Committee supports the Convention and recommends that binding treaty action be taken. (Paragraph 12.22)
Introduction

Purpose of the report

1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of a series of proposed treaty actions tabled on 12 March 2002.¹

1.2 Specifically, the report deals with the:

- Pacific agreement on closer economic relations (PACER);
- Agreement between the Government of Australia and the Government of the Kyrgyz Republic concerning the status of Australian forces in the Kyrgyz Republic;
- Protocol amending the convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income;

- Agreement between the Commonwealth of Australia and the Kingdom of the Netherlands on mutual administrative assistance for the proper application of customs law and for the prevention, investigation and combating of customs offences;

- Agreement between the Government of Australia and the Government of the Republic of France on employment of dependents of agents of official missions of one of the two states in the other state;

- Exchange of Notes amending the agreement on social security between the Government of Australia and the Government of New Zealand;

- Agreement between the Government of Australia and the Government of the United States of America on social security;

- Agreement between Australia and Uruguay on the promotion and protection of investments;

- Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the promotion and protection of investments;

- Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children;

- Convention on the recognition of qualifications concerning higher education in the European region; and

- International convention for the suppression of terrorist bombings.

### Availability of documents

1.3 The advice in this report refers to National Interest Analyses (NIAs) prepared for these proposed treaty actions. Copies of NIAs are available from the Committee’s website at [http://www.aph.gov.au/house/committee/jsct/index.htm](http://www.aph.gov.au/house/committee/jsct/index.htm) or may be obtained from the Committee Secretariat. These documents were prepared by the Government agency (or agencies) responsible for the administration of Australia’s responsibilities under each treaty.

1.4 Copies of treaty actions and NIAs can also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade (DFAT). The Australian Treaties Library is accessible through the Committee’s website or directly at: [http://www.austlii.edu.au/au/other/dfat](http://www.austlii.edu.au/au/other/dfat).
**Conduct of the Committee’s review**

1.5 The Committee’s review of the treaty actions canvassed in this report was advertised in the national press and on the Committee’s website. In addition, letters inviting comment were sent to all State Premiers and Chief Ministers and to individuals who have expressed an interest in being kept informed of proposed treaty actions like these. Twenty-six written submissions were received in response to invitations to comment; authors of submissions are listed at Appendix A.

1.6 The Committee also took evidence at public hearings held on Monday 13 and Monday 27 May, 2002. A list of witnesses giving evidence at the public hearings is at Appendix B. A transcript of evidence from the public hearing can be obtained from the Committee Secretariat or accessed through the Committee’s internet site at [www.aph.gov.au/house/committee/jsct/index.htm](http://www.aph.gov.au/house/committee/jsct/index.htm).

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2 The Committee’s review of the proposed treaty actions was advertised in *The Weekend Australian* on 27 March 2002. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee.
Proposed Pacific agreement on closer economic relations (PACER)

Background

2.1 The Pacific Islands Forum is comprised of 16 countries: fourteen developing or least-developed countries (the Forum Island countries), and two developed countries (Australia and New Zealand). Forum Island countries (FICs) include the Cook Islands, the Federated States of Micronesia, the Fiji Islands, Kiribati, the Republic of Marshall Island, Nauru, Niue, the Republic of Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu. It is expected that later this year FIC countries will enter into a free trade agreement (the Pacific Island Countries Trade Agreement, or PICTA), which will, in time, lead to the establishment of a free trade area in the Pacific.

2.2 The PACER is a negotiating mechanism designed to ensure that Australian trade interests are not disadvantaged if and when FICs negotiate free trade agreements (FTA) with other countries with Gross Domestic Products (GDPs) higher than that of New Zealand (which, of the two developed countries in the Forum, has the lower GDP). Such negotiations may begin with the European Union in September 2002.

1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Pacific Agreement on Closer Economic Relations (PACER). The full text of the Analysis can be found at the Committee’s website on www.aph.gov.au/house/committee/jsct.
There is no comparable provision in any other trade agreement between Australia and the Forum Island Countries.

2.3 It is proposed that Australia ratify the PACER prior to the next Pacific Islands Forum, which is expected to be held in August 2002. To date thirteen Forum members (including Australia) have signed the PACER, and four countries have ratified the Agreement.  

Proposed treaty actions

2.4 The Agreement stipulates a time schedule for the negotiation of free trade agreements between Forum members. FICs will be required at some future date to enter into negotiations for free trade arrangements with Australia and New Zealand. If one or more of the FICs begins negotiating a free trade arrangement with another developed country partner (such as the European Union, or the EU), this will trigger a requirement for consultations with Australia and New Zealand, leading to negotiation of a free trade agreement. Similar requirements apply if FICs negotiate free trade arrangements as a group with another country or countries, or if they negotiate free trade arrangements with other countries having higher per capita incomes than New Zealand.

2.5 On the other hand, if FICs negotiate with other developing countries, the requirement in relation to Australia and New Zealand is limited to consultation. The requirement does not apply in the case of agreements between FICs and least developed countries. If, however, FICs do not negotiate with developed countries (or ones with a GDP higher than that of the lowest developed Forum country), they would be obliged to commence free trade negotiations with Australia (and New Zealand) no later than 8 years after entry into force of the PICTA.

2.6 The Agreement would oblige Australia and New Zealand to offer FICs the opportunity to negotiate improved market access if Australia or New Zealand entered into free trade negotiations with other countries. In addition, Australia and New Zealand would be obliged to maintain existing market access arrangements until FIC countries concluded new or improved trade arrangements providing equal or better access to their markets. The PACER also provides for the creation of detailed programs for the development, establishment and implementation of trade facilitation measures designed primarily to benefit FICs.

2 These countries are: the Cook Islands, Fiji, New Zealand, and Samoa.
2.7 The PACER provides for annual reviews of the operation of the Agreement, and all aspects of trade and economic cooperation among the Parties. General reviews of the PACER would be held at three-yearly intervals, and Parties would meet at least once per year to review its implementation.

Evidence presented and issues arising

Effects of trade liberalisation

2.8 The Committee received a number of submissions from people arguing that the removal of all trade and investment barriers between Australia, New Zealand, and the Pacific Islands could be injurious to the smaller Pacific Island economies. Submissions identified a number of potential disadvantages for local businesses including, for example, having to compete with cheap imports.3

2.9 Representatives from the Department of Foreign Affairs and Trade told the Committee that Pacific Island states did, indeed, see there was a ‘down side’ to trade liberalisation for their countries. Many of these states rely heavily on the duty preferences they are given from Australia and other countries, and trade liberalisation would remove these advantages. As one DFAT witness explained:

They feel that the movement towards lower trade barriers worldwide deprives them of some of their advantages economically. Fiji, for instance, has exported a lot of garments into Australia, and we have relatively high tariffs on textiles, clothing and footwear. Duty free access for them gives them a benefit which China does not have. As tariffs go down, they lose that margin of benefit.4

2.10 DFAT witnesses acknowledged that trade liberalisation would entail transitional costs5 but argued that, ultimately, ratification of the treaty would be in the interests of both Australia and the lesser developed Forum Island Countries.6 They said the FICs recognised that:

3 Submissions 2-8, 10-13, and 16 specifically referred to the PACER. These submissions can be seen on the Committee’s website at www.aph.gov.au/house/committee/jsct.
They are not able to stop the movement towards freer trade worldwide, and they want to achieve as much as they possibly can through close relationships with their major partners like Australia and New Zealand. They agree also that it is better for their own economies to lower barriers, and that is why they have moved to negotiate the PICTA.\(^7\)

**Conclusions and recommendations**

2.11 The Committee understands that, without ratification of the PACER, Australia would be denied an enhanced opportunity to negotiate better access to Pacific markets for Australian businesses and industry, while any other country, including developed countries like member states of the European Union, could enjoy duty free access to FICs for their goods. The PACER is, as one DFAT witness described it, essentially a defensive mechanism designed to protect Australia’s trading access in the region.\(^8\) In short, it is in Australia’s national interest to enter into the treaty.

2.12 Concerns have been raised about the potential negative effects of trade liberalisation on the relatively small economies of the lesser developed Forum Island Countries. With regard to this, the Committee notes that Forum Island Countries have themselves come to terms with the reality of global trade liberalisation, and this is reflected in their decision to negotiate the regional free trade agreement, PICTA.

2.13 The Committee further observes that the PACER Agreement contains provisions designed to support FICs in their gradual integration into the international economy. It provides for the design of detailed programs for the development, establishment and implementation of trade facilitation measures which would take into account the special needs, resource and capacity constraints of the island states. It also provides for Australia’s existing obligations with regard to FICs to be maintained until these have concluded trade arrangements providing equal or better access to markets.

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2.14 Therefore the Committee makes the following recommendation:

**Recommendation 1**

2.15 The Committee supports the *Pacific agreement on closer economic relations (PACER)* and recommends that binding treaty action be taken.
A Status of Forces Agreement with the Kyrgyz Republic

Background

3.1 A Status of Forces Agreement (SOFA) is an internationally recognised means of providing for the presence of one country’s visiting forces in the territory of another country. A SOFA establishes conditions for the presence of visiting personnel and assets in the host country, addressing issues such as jurisdiction, claims, immigration requirements and customs duties.

3.2 The necessity for this Agreement arose out of the deployment of Australian forces to Kyrgyzstan in response to a request from the United States of America following the terrorist attacks of 11 September 2001. As the terrorist attacks on the United States of America could be applied to an alliance partner under article IV of the ANZUS Treaty, the Australian Government decided to provide assistance and support to the United States of America to combat international terrorism.

1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Agreement concerning the Status of Australian Forces in the Kyrgyz Republic. The full text of the Analysis can be found at the Committee’s website on www.aph.gov.au/house/committee/jsct.

2 ‘The way that ANZUS applies is that [Australia] recognised that the attacks on the US mainland, metropolitan territory on 11 September constituted an attack on Australia by the terms of the ANZUS Treaty’ (Nicola Mizen, Transcript of Evidence, 13 May 2002, p. 14).
3.3 Under the Agreement with the United States of America, Australia will deploy a Royal Australian Air Force detachment to the Kyrgyz Republic to support coalition forces currently undertaking operations in Afghanistan. The Australian Defence Force (ADF) deployment requires that it supply air-to-air refuelling services to the United States of America and to French aircraft operating out of Manas International Airport.

Proposed treaty action

3.4 The proposed Agreement arose because the Kyrgyz Republic advised Australia that a SOFA of treaty status was required as a precondition to the deployment of ADF personnel in its territory. This Agreement will replace a temporary non-legally binding arrangement that is currently in place covering the Australian forces operation in the Kyrgyz Republic.

3.5 Under this Agreement, Australian personnel are accorded a status equivalent to that of ‘administrative and technical staff’ under the Vienna Convention on Diplomatic Relations 1961. The Kyrgyz Republic provides the following privileges and immunities to Australian personnel under the Agreement:

- non-liability to any form of arrest or detention;
- appropriate steps to prevent any attack on Australian’s person, freedom or dignity;
- immunity from criminal jurisdiction;
- immunity from civil jurisdiction in certain circumstances;
- exemption from most taxes, in particular any taxes on salary;
- exemption from compulsory military service; and
- exemption from certain customs duties, taxes and related charges.

3.6 The rights of Australian personnel also covered under the Agreement include: entry and exit to and from the Republic; driving licences and laws; criminal jurisdiction; wearing of uniforms and carriage of arms; personal taxation; claims; telecommunications systems; operation of vehicles and aircraft; local purchases; and importation and exportation of personal property, equipment, supplies, materials, technology, training and services required to implement the Agreement.

3.7 The Agreement does not incur any costs on Australia although it provides a regime to handle claims made by either party and exemption for
Australia from certain fees and duties of the Kyrgyz Republic. The Agreement may be terminated unilaterally on 180 days notice by either party.

3.8 Australia also has SOFAs with the United States of America, Papua New Guinea, Singapore, Malaysia and New Zealand.

Evidence presented and issues arising

Coverage of the Kyrgyz SOFA

3.9 The Committee was concerned that the Agreement should provide adequate protection for ADF personnel participating in operations in the Kyrgyz Republic. It was assured that, while the terms of the Agreement are not as comprehensive as some others that Australia has entered because of the limited nature of the deployment, they will ensure that Australian personnel have appropriate protection while overseas.³

3.10 The Committee notes that ADF forces remain subject to the Defence Force Discipline Code and that the Agreement will apply similar privileges and immunities to ADF personnel in the Kyrgyz Republic to those enjoyed by administrative and technical staff in diplomatic missions overseas.⁴

3.11 The Committee was told that this Agreement is not specifically limited to current operations in Afghanistan. The phrase ‘in connection with cooperative efforts in response to terrorism, humanitarian assistance and other agreed activities’ could be extended or used to enable Australia to be involved in any activity in Iraq, if this was felt to be appropriate. However, such a change would first require the sanction of the Kyrgyz authorities, and be considered appropriate by the Australian Government.⁵

Handling of compensation claims

3.12 Some concern was raised about what might happen if a third party in the Kyrgyz Republic suffered injury to their property as a result of actions by ADF personnel. In response to a question regarding the settlement of meritorious claims under the treaty, where fair and reasonable

³ John Wishart, Transcript of Evidence, 13 May 2002, p. 12. The deployment is only for 6 months when it will be reviewed (Capt. E Dietrich, Transcript of Evidence, 13 May 2002, p. 11).
compensation may be sought, the Committee was told that the Agreement had been negotiated in such a way as to deal with claims under Australian law as far as practicable. If the Kyrgyz Republic does not believe that the compensation being made is fair or reasonable then they would have a right to negotiate. If a claim went to an Australian court that is where the decision would be made, otherwise it would be determined in a fair and reasonable way between the two Governments under the treaty provisions.

**Other SOFA agreements**

3.13 All countries involved in the war on terrorism wishing to base personnel in Kyrgyz territory are required by the Kyrgyz Government to enter into a SOFA before they deploy forces. Other countries that have undertaken this process include France, the United States of America, Norway and Spain. Britain is yet to finalise a treaty arrangement.

**Conclusions and recommendation**

3.14 The Committee understands that the Kyrgyz Agreement is the only SOFA outside Australia’s immediate geographical region, and that raising the present arrangement to one of treaty status will offer far greater protection to Australian forces than does the present temporary non-treaty level arrangement. The Committee considers, therefore, that it is in Australia’s national interest to formalise this process with a treaty-level agreement.

3.15 For the protection the Agreement offers ADF personnel, and its similarity to other SOFA agreements Australia has with regional partners such as Malaysia, the Committee supports the treaty action.

**Recommendation 2**

3.16 The Committee supports the Agreement concerning the Status of Australian Forces in the Kyrgyz Republic and recommends that binding treaty action be taken.

Proposed treaty to amend an existing agreement with New Zealand on joint food standards

Background

4.1 The current Agreement, which entered into force on 5 July 1996, established a joint food standards system for Australia and New Zealand by extending the then Australia-only food standards system to include New Zealand. The Agreement created a system that enables the adoption of common Trans-Tasman food standards and facilitates the reduction of unnecessary barriers to trade between the two countries.

4.2 On 3 November 2000, the Commonwealth, States and Territories signed the Council of Australian Governments (COAG) inter-governmental Food Regulation Agreement (FRA), which specifies new food regulatory arrangements for Australia. The reforms to the Australian food regulatory system are designed to help realise governments’ objectives of improving the efficiency, timeliness, responsiveness and transparency of food standards-setting processes, protecting public health and safety, and

1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Exchange of Letters constituting an Agreement between the Government of Australia and the Government of New Zealand amending the Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards of 1995. The full text of the NIA can be found on the Committee’s website at www.aph.gov.au/house/committee/jsct.
addressing stakeholder concerns about the complexity of the current system.

4.3 The model for the new food regulatory system was developed in part as a response to the recommendations of a 1997 review of the food regulatory system. The 1997 review involved a significant amount of community consultation, as did a review of the operation and effectiveness of the Agreement undertaken between November 1998 and November 1999. Food regulatory reforms were again considered by the community when the Senate Community Affairs Legislation Committee considered the Australia New Zealand Food Authority (ANZFA) Amendment Bill 2001. Results of all these processes have fed into the COAG reforms to the food regulatory system.

4.4 New Zealand was consulted in the design of the new food regulatory system, but it is not a party to the Food Regulation Agreement. The FRA requires that the new system be formally agreed to by New Zealand, via amendments to the existing treaty, before the reforms can be fully implemented. If Australia were to adopt food standards developed under the new food regulatory arrangements without first amending the Agreement to incorporate these, it would be in breach of its obligation to adopt food standards developed under the Australia New Zealand Food Standards System as it is currently defined by the Agreement.

Proposed treaty actions

4.5 The entry into force of the Exchange of Letters will update the joint Australia New Zealand Food Standards System by giving effect to food regulatory reforms set out in the COAG Food Regulation Agreement (FRA) of 3 November 2000 and the ANZFA Amendment Act 2001. Those provisions of the ANZFA Amendment Act not yet in force will commence on the first day after the Exchange of Letters amending the Agreement enters into force.

4.6 The specific objectives of the proposed amendments are to:

- reflect the new food regulatory arrangements specified in the FRA and the ANZFA Amendment Act;

- enable Australia and New Zealand to adopt food standards developed by the new statutory authority Food Standards Australia New Zealand (FSANZ) in accordance with these new food regulatory arrangements;
incorporate recommended changes arising from the 1999 Review of the effectiveness of the Australian New Zealand Food Standards System; and

reflect the continuing development of Closer Economic Relations between Australia and New Zealand and the fact that the joint Australia New Zealand Food Standards System should be maintained.

4.7 A central theme in negotiating the treaty amendments between Australia and New Zealand was that there should be no diminution of New Zealand’s influence in the governance of the food regulation system. Specific amendments related to this include that:

- New Zealand will be entitled to directly nominate three members to the board of FSANZ;

- any future amendments to the treaty, the ANZFA or FSANZ Acts or the Food Regulation Agreement 2000 must also maintain New Zealand’s level of influence in the system;

- Australia must consult New Zealand and use its best endeavours to reach agreement with it on the development of any future amendments to relevant Australian legislation, with a similar obligation on New Zealand;

- New Zealand will be entitled to be represented on any committee established by the Food Regulation Ministerial Council or standing committee; and

- the Food Regulation Ministerial Council will be required to request FSANZ to review a food standard if the New Zealand Minister notifies the Council that New Zealand has concerns regarding such matters as health, safety, trade, environmental or cultural factors.

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Evidence presented and issues arising

Scope of amendments

4.8 The Department of Health and Ageing explained to the Committee that the proposed amendments to the current Joint Food Standards Agreement would not alter the fundamentals of the system that Australia has with New Zealand. The Agreement never has covered all spheres of food activity - primary production standards, for example, are outside its scope – and this would not change. According to the Department:

The amendments do not go to the scope of the Agreement; that is, to the types of food standards that are to be jointly developed and adopted in accordance with the Australia New Zealand Food Standards system established by the Agreement. They also do not affect the arrangement whereby Australia and New Zealand will each adopt the Joint Food Standards Code developed under the Australia New Zealand Food Standards system as the sole code of each country.³

4.9 According to the Department, the primary purpose of the amendments is to update the Agreement so that it correctly describes new structural arrangements for food regulation in Australia and New Zealand agreed to by the Council of Australian Governments in November 2000. Under the previous system the Australia New Zealand Food Authority (ANZFA) developed standards which were then decided by the Australia New Zealand Food Standards (Ministerial) Council (ANZFSC). Under the new system, FSANZ (ANZFA’s successor) will have the authority to approve standards and notify these to the Ministerial Council, which will have the power to reject, amend, or seek the review of any such standard.⁴

4.10 While food standards are clearly within the scope of the Agreement (and these proposed amendments), the food standards themselves are not included either in the Agreement or in the amendments. These are contained in a separate Food Standards Code, which is currently in a transition period between the original Australian Food Standards Code and the new joint Australia New Zealand Food Standards Code. This transition was envisaged in the original Agreement, and the proposed

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⁴ Department of Health and Ageing, Submission No. 23, p. 1.
amendments simply update the language used to describe how this will occur.\textsuperscript{5}

**Code-related**

4.11 The Committee appreciates that the purpose of these amendments is to maintain the viability and effectiveness of the joint food standards system with New Zealand; food standards themselves are not their main focus. Nevertheless, the Committee was interested in eliciting some information from the Department about the latest Food Standards Code.

4.12 The Department said that the most recent Code represented a ‘huge step forward’ for both countries and contained many important protections for consumers. The Agreement required, for the first time, that all foods have nutrition information panels indicating fat and sugar content. In addition, foods would now have enhanced allergen labelling so that people who are sensitive to particular components would be able to identify them on labels.\textsuperscript{6}

4.13 The Department explained that while the new joint Code provided for harmonised standards in most areas of activity, a few issues relating, for example, to country of origin labelling and dietary supplements, remained unresolved.\textsuperscript{7} According to the Queensland Government, inconsistencies in the regulatory regimes of Australia and New Zealand regarding dietary supplements are creating significant public health and trade difficulties for Australia.\textsuperscript{8} The Department has advised the Committee that work is underway to address this and other outstanding issues relating to the harmonisation of standards, and that it envisages the majority of this will be finalised prior to December 2002.\textsuperscript{9}

4.14 The Committee was curious to know whether the new joint food standards are having any negative effects on small, emerging food industries producing cheeses, for example, or cultivating wild game meats for export. The Department said they did not think they are, but added that:

> If those industries have concerns or issues that they want to raise about particular regulations, the ANZFA process...remains a very

\textsuperscript{5} Department of Health and Ageing, *Submission No. 23*, p. 1.
\textsuperscript{6} Carolyn Smith, *Transcript of Evidence*, 13 May, 2002, p. 27.
\textsuperscript{7} Carolyn Smith, *Transcript of Evidence*, 13 May, 2002, p. 28.
\textsuperscript{8} Queensland Government, *Submission No. 21*, p. 3.
\textsuperscript{9} Department of Health and Ageing, *Submission No. 23*, p. 3.
open process where stakeholders have ample opportunities to put their views forward and have these considered.\textsuperscript{10}

4.15 A subsequent submission from the Department elaborated that, with the exception of three raw milk cheeses specified in Standard 2.5.4 of the Code, it is not permissible to import or manufacture cheeses using unpasteurised milk. Anyone wanting to import or manufacture a type of raw milk cheese not meeting the requirements of the Code could make an application to ANZFA (or FSANZ) to permit their product to be included in Standard 2.5.4. The application would need to provide adequate safety information for their product and document appropriate Hazard Analysis Critical Control Point (HACCP) controls or a system that delivers an equivalent safety outcome.\textsuperscript{11}

4.16 With regard to the effects of standards regulation on the production of wild game meats, the Department advised that:

Currently, game meat production in Australia is regulated under the ‘Hygienic production of game meat for human consumption’ standard which was developed in 1997 by the Meat Standards Committee under the former Standing Committee on Agriculture and Resource Management (SCARM) and the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ).

However, once the amendments to the Joint Food Standards Agreement and associated legislation take effect, FSANZ will be responsible for Primary Production Standards which will include the development of a food safety standard for the Hygienic production of both meat and game meat. ANZFA is currently working with the Meat Standards Committee and consulting with the Food Regulation Standing Committee (FRSC) and its Development and Implementation Sub-Committee (DISC) on the logistics of taking up this new role.

FSANZ’s statutory processes for developing and amending applications and proposals will be followed during its review of the primary production standards. Industry and businesses will be consulted and their views considered as part of this process.\textsuperscript{12}

\textsuperscript{11} Department of Health and Ageing, \textit{Submission No. 23}, pp. 3-4.
\textsuperscript{12} Department of Health and Ageing, \textit{Submission No. 23}, pp.4-5.
Conclusions and recommendation

4.17 There are a number of reasons why the Committee considers that it is in Australia’s national interest for these amendments to proceed. These are:

- they will give effect to a number of food regulatory reforms that promise to deliver to Australia enhanced public health and safety as well as a more streamlined, efficient and nationally-focused food regulatory system;

- they will enable Australia and New Zealand to adopt joint food standards in accordance with these new food regulatory arrangements (and Australia will not be in breach of its current agreement with New Zealand on a joint food standards system); and

- common food standards help to reduce unnecessary trade barriers and to maintain a trans-Tasman market for food products which was worth A$578m to Australia in 1999-2000.

4.18 With regard to the potential adverse impacts on these amendments on small food industries, the Committee is satisfied that there are suitable and accessible processes in place through ANZFA (soon to become FSANZ) for the resolution of any such matters.

4.19 Accordingly, the Committee makes the following recommendation:

**Recommendation 3**

Protocol to the Double Taxation Agreement with the United States of America

Background

5.1 During the 1970s Australia negotiated a tax treaty with the United States of America. The Convention was signed in 1982, but largely reflects positions agreed by both countries in the early 1970s. The changes to the economic environment that have taken place in the intervening period have led to the Australian Government negotiating a new Protocol to that treaty. The Protocol reflects changes in the Australian tax system, such as the introduction of the capital gains tax and the fact that Australians are now investing much more freely abroad.

5.2 As a result of the Ralph Report’s Review of Business Taxation recommendations, the Australian Government has given priority to renegotiating Australia’s ageing tax treaties with major trading partners.2

5.3 This Agreement sets in place mechanisms to avoid double taxation and prevent fiscal evasion and is also designed to develop and strengthen bilateral relationships between parties in commercial areas. As well, it

1 Unless otherwise specified the material in this section was drawn from the National Interest Analysis (NIA) or the Regulation Impact Statement (RIS) for the Protocol amending the convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; (NIA/RIS on the DTA with United States. The full text of the Analysis may be found on the Committee’s website at: www.aph.gov.au/house/committee/jscct.

2 The Treasurer, the Hon. Peter Costello MP, announced on 14 August 1998 the terms of reference for the Review of Business Taxation. The Government indicated in A New Tax System that consultation would occur with business on the proposed reforms of business entities and business investments and appointed Mr John Ralph, AO, as Chairman of the Review.
serves a more general purpose of encouraging trade and investment and movement of technology and personnel between the two countries.

The proposed treaty action

5.4 The NIA notes that the proposed Protocol will involve, at least in the first instance, a reduction in revenue but that the benefits arising from the Agreement will be widely spread around the economy, with the most direct benefits accruing to business.

5.5 The key changes to the existing treaty involve a reduction in rates of Dividend Withholding Tax (DWT) in particular, as well as in rates of Interest Withholding Tax (IWT) and Royalties Withholding Tax (RWT).

5.6 Under the Protocol, the 15 percent rate of DWT currently applying to non-portfolio dividends paid to Australian companies will be removed in the USA, thereby enabling major Australian public companies to bring profits made by their subsidiaries back to Australia without further tax being payable. Dividends derived by companies from other shareholdings of 10 percent or more will be subject to 5 percent DWT (also down from 15 percent). Australia will exempt dividends paid by USA companies out of profits derived from sources in Australia. This exemption will place United States of America companies on an equal footing with companies from other tax treaty countries.

5.7 The NIA notes that major Australian companies have for many years raised concerns about the lack of competitiveness of Australia’s tax treaty with the United States of America and suggested that the reduction in withholding tax rates made by the Protocol, particularly on non-portfolio dividends, would be welcome.

5.8 The Regulation Impact Statement (RIS) notes that companies from other countries generally face a lower United States of America DWT rate of around 5 percent. The 15 percent rate of United States DWT faced by multinationals operating out of Australia is a significant penalty. This Protocol will have the effect of bringing Australia into line with other countries trading into the USA.

5.9 The Protocol provides some exemptions from the standard IWT rate of 10 percent applying to interest paid to financial institutions and to government bodies of the other country. It also sets down rules consistent with USA tax treaty practice which allow:
interest calculated by reference to the profits of the payer to be taxed at a higher 15 percent rate (ie, at the same rate that generally applies to dividends); and

- tax to be charged on intra-entity interest payments taken to arise between a branch and its head office.

5.10 Royalties withholding tax will be reduced from 10 per cent to 5 percent. The RIS suggests that Australian residents required to meet the cost of Australian RWT on royalty payments made to USA residents will benefit from the reduced RWT rate, while Australian residents who derive royalty income from the USA may also benefit from the reduced United States RWT rate.

5.11 Apart from these changes, several other important modifications are incorporated in the Protocol:

- the prevention of double taxation of capital gains derived by USA residents on the disposal of Australian entities while retaining Australian source country taxing rights;

- the removal of double taxation of capital gains in the case of departing residents through a reduction of compliance difficulties;

- a revised list of taxes to be covered by the Convention;

- a clause to ensure USA trust beneficiaries can be taxed on business profits derived through a permanent establishment in Australia;

- a revised article on shipping and air transport; and

- a revised article on other income.

5.12 The Protocol also updates the Limitation on Benefits Article of the Convention to prevent residents of third countries from inappropriately accessing treaty benefits.

5.13 Implementation of the Protocol would involve some changes to Australian legislation. The text will be incorporated as a schedule to the International Tax Agreements Act 1953.

5.14 The NIA indicates that there will be a loss of approximately A$190 million in revenue as a result of this Protocol. There may also be flow on losses as a result of the inclusion of most favoured nation clauses - these possible costs cannot be specified. The new Limitation of Benefits Article may also cause some additional administrative costs.

5.15 The proposed action on the Protocol should be viewed in light of the fact that Australia had investment in USA amounting to A$156.7 billion in
1999-2000, with some A$90 billion of direct equity investments that would benefit from the withholding tax changes. The USA is the largest investor in Australia with approximately A$215 billion invested. The United States of America is Australia’s second largest trading partner and in 1999-2000 exports to USA totalled A$9.68 billion, while Australia’s imports amounted to A$23.34 billion.

Evidence presented and issues arising

Justifying the benefits of double tax agreements

5.16 Evidence presented by the Australian Tax Office (ATO) suggested that Double Tax Agreements (DTAs) strengthen bilateral commercial relationships. The ATO went on to suggest that DTAs provide certainty with regard to levels of taxation on investments and that the Protocol will significantly assist trade and investment flows between the two countries.3

5.17 At the same time the ATO acknowledged that:

There is a significant cost to this protocol, which is estimated to be around $190 million per annum;

and went on to state that:

the main beneficiaries of the agreement [will be] Australian businesses [that] will be able to access some of these new competitive arrangements. Also, there will be an economic benefit to Australia by allowing freer investment into Australia by United States businesses and to allow Australia to invest more freely overseas. Those kinds of benefits are very difficult to quantify, but we believe that, overall, the cost to revenue is outweighed by the cost to the economy.4

5.18 It was argued that there may be revenue gains to Australia, although these too could not be quantified:

There are knock-on benefits to revenue, as I mentioned before, in terms of distributions to shareholders under the imputation system. They will not get their franked dividend exemptions, so we will be able to tax them on those distributions. There is a capital gains tax element, where we will get some knock-on

3 Ariane Pickering, Transcript of Evidence, 13 May 2002, p. 35.
4 Ariane Pickering, Transcript of Evidence, 13 May 2002, p. 35.
benefits. Even less tax being paid on the amount will result in
extra economic activity in Australia perhaps, and that could also
return more revenue.  

5.19 The ATO indicated that the two key objectives of the Protocol are:

- to remove the risk of an adverse court decision on the capital gains tax,
  to protect our taxing rights; and

- to provide Australian businesses with an opportunity to undertake
  activities in the United States of America on a level playing field with
  companies from other countries.

5.20 As it has done with a number of earlier DTAs, the Committee questioned
whether the ATO could quantify the benefits of this Agreement. In
particular, the Committee took note of the marked level of revenue loss
and questioned whether, without effective modelling tools to demonstrate
the projected benefits, the Committee could make an effective judgement
on whether this Agreement was in Australia’s national interest.

5.21 The Committee accepts that other countries have a similar problem in
quantifying the benefits of these tax treaties. Nevertheless, the Committee
is concerned that it had been asked to make a judgement on the basis of a
$190 million loss to Australia under the proposed Protocol while having
insufficient proof of what the potential benefit would be.

5.22 The Committee notes that major Australian companies have raised
concerns about the lack of competitiveness of Australia’s tax arrangements
with the United States of America, especially the high level of DWT in the
USA permitted under the Convention. This issue was highlighted in
Council of Australia and the Corporate Tax Association in their
submission on a Platform for Consultation commented that:

Tax paid profits can be remitted from Australia to the United
States without any further imposts, while United States tax paid
profits suffer a 15% dividend withholding tax on repatriation. This
is just one example, although a very important one, of Australia’s

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5 David Bryant, Transcript of Evidence, 13 May 2002, p. 40.
6 David Bryant, Transcript of Evidence, 13 May 2002, p. 40.
7 David Bryant, Transcript of Evidence, 13 May 2002, p. 36.
8 Kim Wilkie MP, Transcript of Evidence, 13 May 2002, p. 36.
9 NIA on the DTA with United States, p. 4.
inefficient international tax treaties with respect to dividend withholding taxes.\footnote{Business Council of Australia and Corporate Tax Association Submission on a Platform for Consultation, Submission No. 163, Attachment to submission, p. 1.}

5.23 Among Australian organisations which raised their concerns about DWT at the time were CSR and the American Chamber of Commerce in Australia (AMCHAM). CSR noted that:

In the interest of Australian companies and the Australian economy in general we implore the Government to instruct the ATO to ensure that a reduction in the U.S. dividend withholding tax is a major priority in the negotiations [for the proposed DTA with the United States].\footnote{Letter from CSR General Manager Corporate Affairs and Investor Relations to The Hon Peter Costello MP, 26 March 2001, p. 1.}

5.24 AMCHAM was critical of the current Agreement with the United States of America and suggested that:

Corporates in Australia have suffered under the current agreement, as reported profits are reduced by the 15% U.S. dividend withholding tax at levels higher than most other countries (often 5%). This reduces their ability to compete with other multinationals investing in the U.S. from more favourable treaty jurisdictions.\footnote{Letter from Charles Blunt National Director AMCHAM to Australian Tax Office, 19 March 2001, p. 1.}

5.25 The ATO indicated that there are currently about 70 Australian businesses with investments in the USA that would benefit from the withholding tax changes\footnote{David Bryant, Transcript of Evidence, 13 May 2002, p. 38.} and about 200 publicly listed USA companies with investments in Australia.

5.26 The Committee also considered what would happen if no action was taken on the Protocol and Australia remained party only to the earlier Convention. The Committee was informed that if Australia did not accede to the Protocol:

- .. a good deal of revenue could be at risk if a court registered an adverse decision against the imposition of the capital gains tax.\footnote{Asked what revenue might be lost if an adverse judgement was delivered, Mr Pickering said that ‘it is something we cannot put a figure on but we have seen live cases that have involved substantial amounts and some in excess of $190 million’ (David Bryant (ATO), Transcript of Evidence, 13 May 2002, p. 38).}
with by the Convention and it could continue to impose its domestic capital gains tax regime, but it is likely to be challenged in court without the provisions in the Protocol. The ATO emphasised that

[For Australia] it is important that we clarify our taxing right and protect our taxing right.\textsuperscript{15}

- the provisions in the current agreement have been cited as causing problems for Australian businesses, particularly because of the dividend withholding tax issue;

- the exemption of financial institutions from the interest withholding tax proposed under the Protocol will not come into place and there will be no reduction in the cost of acquiring debt for Australian companies and no reduction in the royalty withholding tax that will mean Australian companies will not have access to cheaper technology.\textsuperscript{16}

### Conclusion and recommendations

5.27 The Committee is concerned about Australia taking binding treaty action which will lead to a fairly clear loss of revenue of some A$190 million to Australia, without any quantitative evidence of the benefits to justify that decision.

5.28 If no treaty was currently in place that protected the rights of Australian companies, as is the case, albeit with some limitations, it would be clearly beneficial to put in place a legally enforceable structure to assist business in both countries to facilitate trade.

5.29 It is clear that there are potential benefits offered by the Protocol. A reduction in the various USA taxes must create a more favourable opportunity for Australian business and shareholders than currently exists. The Committee accepts that those Australian firms who have indicated their discontent about the existing level of withholding taxes imposed by the United States of America have strong grounds of complaint while USA firms operating in Australia are paying much less tax.

5.30 The Committee notes the support of the Queensland Government, which commented that the reduction of the royalty withholding tax, would

\textsuperscript{15} David Bryant, \textit{Transcript of Evidence}, 13 May 2002, p. 36.

decrease the cost of technology and intellectual property acquired from the United States of America.17

5.31 The Committee has agreed to the Government taking binding treaty action in the case of a number of similar agreements on the basis that building up a network of such agreements is beneficial to Australian companies trading overseas.18 However, the absence of a quantitative assessment of the benefits to weigh against the expected loss of A$190 million in revenue points to the need for the ATO to make a much greater effort to find effective modelling methodologies.

**Recommendation 4**

5.32 At this stage, the Committee declines to support binding treaty action on the Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, pending the receipt of further and better particulars concerning its net benefit to Australia.

**Recommendation 5**

5.33 The Committee recommends that the Australian Tax Office, in consultation with the Australian Treasury and other interested parties, take immediate action to develop an effective methodology to quantify the economic benefits of double tax agreements.

The Committee further recommends that the ATO report back to the Committee on the methodology developed before the Committee is required to recommend action on further double tax agreements.

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Proposed Agreement on customs law with the Netherlands

Background

6.1 The proposed Agreement provides the legal and administrative framework necessary for the customs services of Australia and the Netherlands to work together to combat terrorism and transnational crime.

6.2 Once in force, the Agreement would provide the basis for, and facilitate, administrative assistance between the customs services of Australia and the Netherlands. Assistance, including the exchange of information and intelligence, would improve the administrative ability of both customs services to identify areas of high risk and to enforce customs legislation more effectively. The identification of areas of high risk would assist in the:

- proper collection of customs duties and other taxes collected at importation and exportation;

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1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Agreement between the Commonwealth of Australia and the Kingdom of the Netherlands on Mutual Administrative Assistance for the proper application of customs law and for the prevention, investigation and combating of Customs offences done at the Hague on 24 October 2001. The full text of the Analysis can be found at the Committee’s website at: www.aph.gov.au/house/committee/jsct.
interception of prohibited imports, illegal drugs, endangered species and hazardous goods; and

the movement of legitimate trade.

6.3 Amendments to Section 16 of the *Customs Administration Act 1985* regulate the disclosure and recording of protected information by Customs. The definition of ‘protected’ is very broad and includes all information that directly or indirectly comes to the knowledge of, or into the possession of a customs officer (or a contractor) while that person is ‘performing’ his or her duties. Under Section 16, Customs can only disclose information to an overseas agency when Customs has an agreement with the agency. Disclosures can only be made for the purpose of the agreement.

6.4 The Agreement is based on the World Customs Organization Model Bilateral Agreement on Mutual Administrative Assistance in Customs Matters. Australian Customs has a number of mutual administrative assistance arrangements of less than treaty status with customs agencies of other countries, including Canada, the Republic of Korea, the United Kingdom, the USA, Hong Kong, Indonesia, New Zealand, and Japan. In this instance, the Australian Government agreed to an instrument of treaty status as the domestic legislation of the Netherlands requires that mutual administrative assistance agreements be at treaty level.

**Proposed treaty actions**

6.5 The Agreement outlines assistance measures between Australia and the Netherlands on the proper application of customs law and the prevention, investigation and combat of customs offences. Its implementation would require each customs administration to provide information to the other on new customs law enforcement techniques and new trends, means and methods of committing customs offences. Parties to the Agreement would be required, on request, to provide information as to whether goods had been lawfully exported from, or imported into, their country. The Agreement would also require parties to provide, on request, surveillance of suspected customs offenders, goods, transport and premises. It would further oblige parties to provide information on any transaction suspected of being a customs offence.

6.6 Parties to the proposed treaty would be obliged, on request, to provide testimony in relation to customs offence proceedings. Also, they would have to allow officials from the other country to consult and copy records relating to customs offences, and to be present during an inquiry into a customs offence.
The Agreement sets out exemptions to its obligations, based on the protection of public order, an essential interest or commercial secret, where compliance with an obligation would not be reciprocated by the other country, and where compliance would interfere with an ongoing investigation, prosecution or proceeding.

All assistance under the terms of the Agreement would be provided in accordance with national legislation and within the competence and available resources of customs administrations. Parties would not be required to comply with requests if resources were not available or if the request was outside the scope of customs legislation. Application would be limited to customs law and there would be no implications for other government agencies.

The Agreement outlines other areas of assistance, including the recovery of claims, how requests would be communicated and executed, the confidentiality of information, and costs associated with the implementation of the Agreement.

**Evidence presented and issues arising**

**Information provision**

The Committee sought clarification from witnesses from the Australian Customs Service (ACS) about the Agreement’s provisions relating to the exchange of information. Committee members asked whether under the terms of the Agreement it might be possible, for example, for Australian officials to be obliged to tap Australian citizens’ telephones to obtain evidence relating to a Dutch illegal smuggling racket, or to provide information which could be used against an Australian company involved in an antidumping case.  

With regard to the possibility of a request for arranging a phone tap, ACS representatives indicated they would not facilitate such a request, arguing that phone tapping was ‘not something that Customs did’, the treaty was not aimed at limiting Australians’ right to privacy, and in a case like this Customs would have the ‘absolute’ right to refuse to cooperate.  

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2 Dumping is the practice whereby a company will sell goods at less than the cost of production in a particular country or region, often with the objective of eliminating local manufacture in that country or region, and capturing that particular market.

6.12 The Committee sought clarification about whether such a refusal would contravene Article 12 of the Agreement, which appears to impose an obligation on parties to initiate inquiries to obtain desired information (in accordance with national legal and administrative provisions). ACS representatives indicated that the operation of Article 12 would be limited by Article 2.2 of the Agreement, which states that:

All assistance under this Agreement shall be performed in accordance with the legislation of the requested State and within the competence and available resources of the requested administration.

6.13 Customs law would, therefore, limit the ability of Customs officers to comply with such a request. ACS witnesses pointed out that Article 16 of the Agreement, which spells out a number of exemptions for information which can be provided, further limits the scope of Article 12.

6.14 With regard to the possibility that this proposed treaty could be used to request information that could be used against Australian companies allegedly involved in antidumping cases, ACS representatives said that it was very unlikely that Dutch Customs would ever make such a request of Australia.

6.15 The ACS elaborated that anti-dumping is an area of shared responsibility between Dutch Government agencies and European authorities, and the proposed Agreement allows Australia to refuse a request by the Netherlands for any anti-dumping matters not specifically conducted under the customs law of the Netherlands. Apart from this, confidentiality provisions in the Agreement would require the Dutch Government to seek ACS approval before any information could be passed on to the EC. The ACS would, in short, be in a position to refuse to provide the requested assistance.

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4 Article 12 of the Treaty reads: If the requested administration does not have the information requested, it shall initiate inquiries to obtain that information in accordance with its national legal and administrative provisions. These inquiries may include the taking of statements from persons from whom information is sought in connection with a customs offence and from witnesses and experts.


6 Clause 1 of this Article provides exemptions on the grounds of likeliness to jeopardize public order or any other essential interest of the State, or if the request would violate an industrial, commercial or professional secret.


9 Australian Customs Service, Submission No. 24, p. 3.
Conclusions and recommendations

6.16 The exchange of information and intelligence is increasingly important in these times of increased terrorism and transnational crime. This increase imposes considerable demands on customs services globally. The only way to respond to these demands is to work more closely together, particularly regarding information and intelligence exchange and the identification of areas of high risk.

6.17 While the customs services of Australia and the Netherlands have for some time been sharing information in support of each others’ work, this treaty would enable this exchange of information to happen in a more structured way that makes clear the obligations of each party.

6.18 Australia has much to gain from the exchange of information with the Netherlands that is proposed to be formalised in this treaty. Rotterdam has a wealth of knowledge with regard to container interceptions, for example, and the ACS is quite keen to learn more about this technology to help them be more successful in their interdiction efforts.  

6.19 Accordingly, the Committee makes the following recommendation:

Recommendation 6

6.20 The Committee supports the Agreement between the Commonwealth of Australia and the Kingdom of the Netherlands on mutual administrative assistance for the proper application of customs law and for the prevention, investigation and combating of customs offences and recommends that binding treaty action be taken.

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Proposed Agreement with France on employment of dependents of mission officials

Background

7.1 The lack of opportunity for spouses and dependents of diplomatic, consular and similar officials to engage in remunerated employment is a significant disincentive for officers to apply for postings to particular countries. In order to encourage other countries to provide employment opportunities to Australian dependents, the Australian Government offers reciprocal opportunities to dependents of foreign officials.

7.2 The purpose of the proposed treaty action is to enable dependents of Australian and French officials to undertake paid employment while serving in the other’s State. Under the Agreement, dependents of Australian diplomatic and consular personnel stationed in France (and Noumea), and of French diplomatic and consular personnel stationed in Australia, could engage in paid work for the duration of the official’s service in the receiving country.

7.3 Bilateral employment instruments are usually in the form of arrangements or memoranda of understanding (MOUs), both of which are instruments

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1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Agreement between the Government of Australia and the Government of the Republic of France on employment of dependents of agents of official missions of one of the two states in the other state. The full text of the Analysis can be found at the Committee’s website at: www.aph.gov.au/house/committee/jsct.
of less than treaty status. However, the Government of France has in this case indicated its strong preference for a treaty to be concluded. To date, Australia has four Agreements and nineteen Arrangements concerning the employment of dependents of diplomatic and consular personnel. Negotiations are underway for similar agreements or arrangements with another thirteen countries.

**Proposed treaty actions**

7.4 The Agreement obliges Australia to allow dependents of Agents assigned to an overseas mission of the Republic of France in Australia to engage in remunerated employment activities. The obligations contained in the Agreement are reciprocal, with France providing the same benefits to dependents of Australian officials. Dependents employed by virtue of this proposed Agreement will be exempted from any obligation under the laws and regulations of the receiving State with respect to the registration of foreigners and residence permits.

7.5 Dependents (defined as including children as well as spouse\(^2\)) would not be restricted in the nature or type of employment they could undertake, but where special qualifications are required to engage in particular professional activities, dependents would need to fulfill the requirements governing such professions or activities in the respective countries.

7.6 Under the terms of the Agreement, Australian dependents authorised to undertake paid employment in France would waive immunity (normally enjoyed under the Vienna Convention on Diplomatic Relations 1961) from civil and criminal prosecutions relating to matters arising out of their overseas employment. The waiver of immunity from civil prosecution is obligatory, but the waiver of immunity from criminal prosecution is contingent on whether Australia would consider this to be in its interests. Australian dependents authorised to undertake paid employment in France would also lose the customs privileges normally accorded them by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.\(^3\)

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\(^2\) A conservative definition of spouse (excluding de facto and gay partners) had to be adopted to enable France to comply with its local law and terminology, but any progressive legal developments in this regard could be accommodated by this treaty (Ben Milton, _Transcript of Evidence_, 13 May, 2002, p. 63).

Evidence presented and issues arising

7.7 The Committee sought clarification from the Attorney-General’s Department and the Department of Foreign Affairs and Trade on a number of minor matters relating to the provisions of this proposed treaty, but no major issues were raised in evidence that require elaboration in this report.

7.8 The Committee asked Departmental witnesses about the employment in Australia of dependents with professional qualifications (for example, in law or medicine) obtained overseas who might want to practice their profession while they are in Australia. According to the Department of Foreign Affairs and Trade (DFAT):

The treaty essentially allows for such people to work; the next question is whether they meet the local requirements for that work. In the case of a doctor or a lawyer, they would have to comply with all the requirements that Australian doctors and lawyers comply with – or the requirements, for example, that normal foreign workers would comply with when they come to Australia.4

7.9 DFAT acknowledged that, given the time required to qualify for professional practice in Australia, it was unlikely that the treaty would be of much benefit to dependents wanting to employ their professional skills in Australia. Treaty arrangements:

...might not provide for the employment of choice of the dependent, but at least they allow for some employment. That is as good as we can do, given the circumstances.5

Conclusions and recommendations

7.10 This treaty will make it easier for the dependents of French diplomats in Australia, and Australian diplomats in France (and Noumea), to find paid employment in their respective receiving countries. Its intention is to enable the highest quality of representation overseas for both States by addressing a factor (lack of employment opportunities for dependents) which has been identified as a significant disincentive for people who might otherwise be interested in applying for such postings.

7.11 It is in Australia’s interest to limit such disincentives and to enable the Government to have the best possible representation overseas. These reciprocal arrangements will also benefit Australia by encouraging high quality foreign representation in Australia.

7.12 Accordingly, the Committee makes the following recommendation:

Recommendation 7

7.13 The Committee supports the Agreement between the Government of Australia and the Government of the Republic of France on employment of dependents of agents of official missions of one of the two states in the other state and recommends that binding treaty action be taken.
Social security agreements with the USA and New Zealand

Proposed social security agreement with the USA

Background¹

8.1 Australia’s network of bilateral social security agreements improves access to income support for people whose adult lives are split between Australia and the other country that is a party to the Agreement. Most people benefiting from these agreements are age pensioners. Such agreements also improve income support coverage for people with disabilities, widowed persons and some carers.

8.2 The proposed Agreement with the United States of America (USA) incorporates the same general principles as a number of other agreements that Australia has on social security – including those with Austria, Canada, Cyprus, Denmark, Ireland, Italy, Malta, the Netherlands, Portugal, and Spain. A key element of these Agreements is the sharing of responsibility between the parties in providing adequate social security coverage for former residents of their countries.

¹ Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Agreement between the Government of Australia and the Government of the United States of America on Social Security. The full text of the Analysis can be found on the Committee’s website at: www.aph.gov.au/house/committee/jsct.
The Australian Government currently pays pensions under the *Social Security Act 1991* to around 3,800 USA-born pensioners, the vast majority of whom are resident in Australia. Under domestic portability provisions in the Act, Australia pays pensions to approximately 450 people (not necessarily USA-born) living in the USA.

**Proposed treaty actions**

The proposed Agreement provides for enhanced access to certain Australian and USA social security benefits and greater portability of these benefits between the countries. For Australia, the Agreement will cover access to age pensions, disability support pensions for people who are severely disabled, carer payments in respect of the partners of persons who receive disability or age pensions, and pensions payable to widowed persons. For the USA, the Agreement will cover old-age benefits, disability benefits and survivor benefits.

The Agreement provides that both countries will share the financial responsibility for providing these benefits. This means that individuals may be eligible for benefits from both countries if they meet certain eligibility criteria and have lived and/or worked in both countries during their working lives. The Agreement also has provisions to ensure that pension payments to beneficiaries are appropriately indexed.\(^2\)

Double coverage provisions have also been included to ensure that Australian and USA employers do not have to make two superannuation contributions for an employee seconded to work in the other country. Under current arrangements, employers are required to make contributions under both Australian and USA legislation. New provisions ensure that employers (and employees where compulsory employee contributions are required) have to contribute only to the relevant superannuation scheme in their home country.

**Evidence presented and issues arising**

**Benefits of Agreement**

The Department of Family and Community Services (FACS) explained to the Committee that the proposed Agreement with the United States of America (USA) would:

- allow people to lodge pension claims from either country;

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help people to meet minimum qualifying requirements for benefits and overcome time and other limitations on portability of payments if they live in either country;

- apply a specific income testing regime for Australia; and
- provide avenues for mutual assistance to facilitate the determination of correct entitlements.³

8.8 Elaborating on how the Agreement would facilitate expatriates’ access to pension benefits, FACS said:

All countries, including Australia, have criteria for eligibility to their particular social security schemes. In some countries, such as the US, that is based on periods of coverage by that scheme. In Australia it is based on residence. In some countries it is based on years of contribution. The issue here is that we require 10 years of residence in Australia; similarly, the US legislation requires around 10 years of coverage in that system. It may be that a person would not have sufficient time in either country to qualify. The virtue of an agreement is that it enables both countries, firstly, to recognise the period of coverage and therefore eligibility and, secondly, having done that, to pay their proportional share of the person’s pension, generally based on working life residence and the number of years actually spent.⁴

8.9 While the scope of the Agreement is limited,⁵ the Department of Family and Community Services estimated that approximately 4000 people living in Australia and the USA will benefit by being able to claim payments to which they currently do not have access. The majority of beneficiaries in Australia and the USA are people who are expected to be in a position to receive USA age or disability support pensions.⁶ FACS told the Committee that Australia would be a net beneficiary of the Agreement, as Australian outlays have been estimated to be around A$3 million per year, while the USA is expected to pay an additional A$7 million in pensions into Australia.⁷ FACS said that, while implementation of the Agreement would involve some initial costs⁸ and quantifying the net effect of these

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⁵ The Agreement relates only to access to the age pension, the disability support pension for the severely disabled, the pension for widowed persons, and carer payments.
⁶ Peter Hutchinson, Transcript of Evidence, 13 May, 2002, p. 69.
⁷ Peter Hutchinson, Transcript of Evidence, 13 May, 2002, p. 72.
⁸ A$3.7m in training, administration, and systems changes Centrelink will put in place for the Agreement to operate.
agreements is always complicated, the Department expected a net positive inflow to Australia over time.9

Conclusions and recommendations

8.10 This Agreement will enable residents of Australia and the USA to move between respective countries, knowing that their right to benefits is recognised in each country, and that each country will contribute fairly to support them if they have spent part of their working lives in those countries. It will enable people to maximise their income and increase their level of choice about where they live and where they retire.

8.11 The Agreement has been subjected to widespread consultation with governments as well as with a range of relevant community groups. FACS made some adjustments to its proposals as a result of this process, and has assured the Committee that there are no outstanding concerns about the new Agreement in the eyes of those it is designed to benefit.10

8.12 The Committee does not see any reason why it should oppose this arrangement, especially when there is an expectation of net positive inflow of funds to Australia.

Recommendation 8

8.13 The Committee supports the Agreement between the Government of Australia and the Government of the United States of America on social security and recommends that binding treaty action be taken.

Proposed amendments to the Social Security Agreement with New Zealand

Background11

8.14 In August 2001, the Joint Standing Committee on Treaties recommended that binding treaty action be taken with regard to the Agreement with New

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9 Roger Barson, Transcript of Evidence, 13 May, 2002, p. 73.
11 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the Exchange of Notes amending the agreement on social security between the Government of Australia and the Government of New Zealand. The full text of the Analysis can be found on the Committee’s website at: www.aph.gov.au/house/committee/jsct.
Zealand on Social Security. The Agreement replaced an earlier one which was set in place in the 1940s.

8.15 The Agreement, which has not yet entered into force, will provide access to Australian and New Zealand social retirement and disability pensions and change the method of calculating how much each country will contribute to the payments covered. The main benefits of the Agreement were identified in JSCOT’s Report 41 as including:

- application to persons who reside or have resided in Australia and traveled regularly between Australia and using trans-Tasman travel arrangements;¹²
- sharing of financial responsibility for the provision of relevant social security benefits based on the proportion of working life residence spent by a person in each country (Australia or New Zealand);
- continuation of benefits under the existing agreement; and
- allowing people to move freely between the two countries and enhancing the single Australia-New Zealand labour market under the Closer Economic Relations Agreement between Australia and New Zealand.¹³

8.16 Following the signing of the Agreement and subsequent discussions on the administrative arrangements, it became evident that it was necessary to amend the text of the treaty. The amendments do not alter the policy underpinning the Agreement, nor the costs and savings that the Agreement in its original form was expected to achieve. Implementation of the Agreement will result in savings of around A$93.9 million in Government outlays, and result in costs of A$14.5 million due to changes in administrative processes.¹⁴

Proposed treaty action

8.17 The proposed amendments relate primarily to changes in New Zealand social security legislation which now requires bilateral social security treaties to contain specific reference to the manner in which information is to be exchanged and overpayments to be raised under the treaty. These

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¹² The Trans-Tasman Travel Arrangement is an arrangement between Australia and New Zealand that allows holders of Australian and New Zealand passports to move relatively freely between the two countries and to live and work in either without going through a migration process. New Zealanders are able to choose whether to enter Australia under the Trans-Tasman Arrangement as special category visa holders or as holders of a permanent visa under the Migration Program, as if migrating from any other country.


requirements are dealt with by amending the Agreement to include at its end a two-part Schedule detailing (1) the terms and conditions for recovery of social security debts, and (2) the terms and conditions for exchange of information for social security purposes.

8.18 In addition, during negotiations for the administrative arrangements for the implementation of the treaty, New Zealand negotiators realised they had left out critical paragraphs that overcome domestic legislation that restricts payments outside New Zealand. This oversight would have meant that, despite other clauses, New Zealand domestic law would have made payments into Australia impossible. The oversight has been addressed by amending Article 6 of the Agreement to include two paragraphs dealing with the grant and continued payment of New Zealand pensions in Australia.

8.19 Given that two critical amendments were required, New Zealand negotiators took the opportunity to make a couple of other changes to the Agreement. Provisions for the payment of Australian Carer pensions have been made more explicit by amendments to Articles 11 and 12 of the Agreement, and clauses relating to the use of agreed exchange rates have been deleted because their use had been made redundant.

Evidence presented and issues arising

Impact of amendments

8.20 The Department of Family and Community Services (FACS) told the Committee that the proposed amendments to the Agreement did not affect the benefits and obligations of governments to social security beneficiaries. Therefore, while the Department had consulted widely with regard to the development of the original Agreement, it was thought unnecessary to do so with regard to the amendments.15

8.21 The Department explained that the amendments were more concerned with the ability of the Australian and New Zealand governments to implement the intent of the original Agreement. A FACS witness elaborated that:

When New Zealand changed some of its legislation and that meant we had to make some changes to how certain things would be done, we took the opportunity to clarify some points which, again, while they were probably okay in terms of text, in hindsight we felt they could have been better worded and be easier to implement from both governments’ sides – but, as my colleague

15 Marion Carrick, Transcript of Evidence, 13 May, 2002, p. 79.
said, they did not change the effect on the client, on the customer. What they did was correct some points which, if they had gone ahead as written, would have been far more difficult to implement than we originally thought.

Conclusions and recommendations

8.22 The Committee understands that the proposed amendments will enable the Agreement on Social Security with New Zealand, which was recommended for binding treaty action by this Committee last year, to be implemented more effectively. It is satisfied that these will not alter the benefits and obligations imposed by the terms of the earlier Agreement.

8.23 The Committee believes it is in the national interest to support agreements like this, which enable people to move between countries, confident in the knowledge that their legitimate social security entitlements will be respected in each country.

Recommendation 9

8.24 The Committee supports the Exchange of Notes amending the agreement on social security between the Government of Australia and the Government of New Zealand and recommends that binding treaty action be taken.
Promotion and Protection of Investments Agreements with Uruguay and Egypt

Background

9.1 Since its inception the Committee has scrutinised a number of Investment Promotion and Protection Agreements (IPPAs) as well as a range of trade and tax related treaties. In this Chapter the Committee will review two new IPPA agreements:

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1 Unless otherwise specified the material in this section was drawn from the National Interest Analysis (NIA) for the Agreement between Australia and Uruguay on the Promotion and Protection of Investments (NIA for Uruguay) and the National Interest Analysis for the Agreement between Australia and Egypt on the Promotion and Protection of Investments (NIA for Egypt). The full text of these National Interest Analyses can be found at the Committee’s website on www.aph.gov.au/house/committee/jsct.

■ a proposed Agreement with Egypt on the Promotion and Protection of Investments; and

■ a proposed Agreement with Uruguay on the Promotion and Protection of Investments.

9.2 These agreements guarantee certain treatment for investments. They are intended to encourage and facilitate bilateral investment by citizens, permanent residents and companies of either party, in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence.

Proposed treaty actions

9.3 Both these agreements are based on the Australian Model Investment Promotion and Protection Agreement and establish a clear set of obligations relating to the promotion and protection of investments in accordance with each Party’s laws, regulations and investment policies.

9.4 Both Agreements benefit Australian investors by providing them with a range of guarantees relating to non-commercial risk. The types of areas covered by the Agreements include:

■ a requirement to encourage, promote and, where lawful and in accordance with applicable investment policies, admit investments by investors and companies of the other Party;

■ provision for investors and their employees to enter and remain in the territory of the other Party to engage in investment activities;

■ a prohibition on the expropriation or nationalisation of investments unless it is in the public interest under due process of law;

■ free transfer of funds in accordance with the law of the Party;

■ indemnities and guarantees provided by a Party; and

■ a requirement that investors are provided with full access to competent judicial or administrative bodies regarding disputes with other investors and provisions for the recognition and enforcement of any resulting judgements or awards.

9.5 Because each agreement complies with Australian law and practice the agreements will be implemented within the framework of existing laws and policies relating to foreign investment.
9.6 There are no foreseeable costs incurred by entering into these Agreements although participation in the dispute resolution procedures, if activated, may incur expense to Australia.

The Agreement with Egypt

9.7 Currently investment flows between Australia and Egypt are small; however, the trade relationship is quite strong with exports to Egypt in 1999/2000 amounting to $502 million. The NIA notes the deregulation of Egypt’s economy and privatisation of government enterprises is creating significant commercial opportunities. Australia’s commercial relationship is expanding beyond its traditional focus on commodities into promising areas of agribusiness.

9.8 Australian expertise in areas of civil engineering, water management, land reclamation, arid land agriculture and desert housing opens opportunities for Australian companies which have a high degree of expertise and experience in these areas. The NIA also notes that:

Egypt has expressed interest in drawing on Australia’s experience in deregulating the telecommunications sector. A number of Egyptian businesses are exploring projects using Australian technologies.³

The Agreement with Uruguay

9.9 Currently there is limited investment in Uruguay and there are no official estimates of investment flows between Australia and Uruguay. Rio Tinto and Pioneer have interests in Uruguay and proposals are on the table for others like Bishop Austrans, Burns Philp and Hoyts. The NIA notes a number of large Australian companies have considered investing in Uruguay but have so far not proceeded.

Evidence presented and issues arising

Selecting potential treaty partners

9.10 In noting that there were 17 similar IPPAs in force the Committee questioned the selection of countries with which Australia negotiates these

³ NIA for Egypt, p. 2.
protection and investment treaties. DFAT indicated that there were two major reasons why Australia negotiated these treaties.4

1) The general pattern experienced by most developed or OECD member countries is that a developing country will approach them seeking to conclude an investment agreement and generally also a double taxation agreement. In the case of Uruguay and Egypt agreements were negotiated in response to a request by these countries to have a treaty of this type in place.5

2) The alternative approach is where Australia determines it has an interest in negotiating an agreement on the basis of a number of factors including:

- Australian investor interest in that country;
- Australian potential for investments with that country;
- the protection of Australian investors in that country;
- Australia’s interest in that country being able to successfully conclude an application to join the OECD; and
- as a secondary concern, an assessment of whether there will be a direct financial interest to Australia in terms of investment coming from the other country into Australia.

9.11 The Committee noted that Australia has a large number of bilateral investment agreements, and questioned whether these have the potential to erode national sovereignty by allowing foreign countries to question or undermine decisions of the Australian Government. The Department of Foreign Affairs and Trade responded that these agreements:

   .... do not limit Australia’s sovereignty. Such agreements form part of the Australian Government’s overall framework to attract foreign investment to Australia ... [and further] an investor can only successfully take action under an investment and protection agreement if the government in question fails to comply with its obligations under the agreement. This may occur if the government imposes unfair, inequitable, arbitrary or discriminatory measures.6

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4 Australia has IPPAs in place with Argentina, Chile, the People’s Republic of China, the Czech Republic, Hong Kong, Hungary, India, Indonesia, Lao People’s Democratic Republic, Lithuania, Pakistan, Papua New Guinea, Peru, the Philippines, Poland, Romania and Vietnam (Department of Foreign Affairs and Trade, Submission No. 22.1, pp.2-3).

5 Peter Scott, Transcript of Evidence, 13 May 2002, p. 84.

6 Department of Foreign Affairs and Trade, Submission No. 22.1, p. 7.
Investor-state dispute resolution

9.12 The major issue arising from the evidence is the investor-state dispute resolution procedures. Opponents of this type of agreement believe that the Articles relating to dispute resolution (Articles 12, 13 and 14) provide an avenue by which powerful corporations could challenge the right of democratic governments to regulate essential services thereby acting as a disincentive to the enactment of such regulation. As a number of submissions argued:

Investor-state complaint mechanisms allow corporations to challenge government legislation and to sue governments for damages. We object to these provisions as an undermining of democratic governance and an expansion of legal powers for corporations which can already exercise huge economic influence on governments.7

9.13 In response to this suggestion, the Department of Foreign Affairs and Trade (DFAT) commented that investment agreements like these do not limit the ability of governments to pass laws or to regulate essential services. Rather:

.... an investor can only take action if the government in question has failed to comply with obligations made under the investment agreement. Of course, having made those obligations it is obliged to ensure that its domestic law is compliant with them before concluding the treaty. This may also only occur if the government has imposed some kind of discriminatory measure that adversely affects the investor concerned. Laws and regulations that do not represent a breach of the investment agreement or do not represent discriminatory treatment against the investor are not open to question under the investor-state dispute mechanism.8

9.14 DFAT went on to explain that the possible misunderstanding relating to dispute settlement processes arose from a decision by the Canadian government to prohibit the transport of certain hazardous wastes from Canada to the United States. The case was brought before the North American Free Trade Association (NAFTA) dispute resolution body, which has quite different dispute resolution mechanisms than those used by these treaties:

7 Brian Jenkins, Submission No. 2, p. 1. For similar comments see also submissions from Tony Troughton-Smith (S3), James Arvanitakis (S4), Dr David McKnight (S6), Rosie Wagstaff (S7), Marj O’Callaghan (S8), Riki Stevens (S10), Anita Devos (S11), Ron Clifton (S12), Robin F Borton (S13) and Francis Milne (S16).

8 Peter Scott, Transcript of Evidence, 13 May 2002, p. 80.
The tribunal found that this decision breached Canada’s international obligations under the NAFTA treaty protecting investors. It was not due to Canada’s inability to protect the environment, but because of the discriminatory nature of the regulation in question and the fact that it did not have the environmental benefit that the regulation claimed. Consequently, the finding was not anti-regulatory or anti-environment, but simply anti-discriminatory.9

9.15 In this case the investor had in fact been discriminated against and the measure being imposed by the government did not operate to protect the environment, but rather to discriminate against the nationals of a particular country.10

9.16 Under the two agreements being discussed and where both countries are parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States a dispute can be referred to the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention.

9.17 The dispute resolution mechanisms used in this treaty involve alternate ways of solving a dispute:

- a private company can take a State to the ICSID; or

- an Australian company could have access to the courts of the other party.11

9.18 The submission from the Australian Fair Trade and Investment Network cited a case currently before the ICSID between the Argentine Government and the Compania de Aguas. The submission noted that the case involves the privatisation of water services in Argentina where a company alleged that regulations required by government offended its investor rights. The submission argued that:

This kind of complaints mechanism clearly enables companies to challenge the rights of governments to regulate essential services… such decisions about regulation in the public interest should be made by democratic means at the local and national level, and should not be subject to the challenge by transnational corporations through trade agreements.12

9 Peter Scott, Transcript of Evidence, 13 May 2002, p. 81.
10 Peter Scott, Transcript of Evidence, 13 May 2002, p. 90.
11 Peter Scott, Transcript of Evidence, 13 May 2002, p. 87.
12 Australian Fair Trade and Investment Network, Submission No. 5, pp. 1-2.
9.19 DFAT responded to this concern by indicating that:

A decision in this case has been handed down in the state of Argentina’s favour. The main basis of the decision was that the claimant had failed to first take action in the domestic Argentinean courts. Proceedings to annul the award have been commenced and a decision is still pending upon this, but it demonstrates that the international arbitration procedures do not arbitrarily or unjustifiably intrude into states’ regulatory decisions or the contractual relations between an investor and the state.¹³

9.20 With particular reference to the Agreement with Egypt, DFAT suggested that:

In relation to what protection this agreement can provide .... we can ensure that the Egyptian government provides access to the Egyptian courts to the Australian investor and, if the outcome is manifestly unfair or unjust, there is a provision for the Australian government to seek consultations with Egypt in relation to such outcomes.¹⁴

9.21 Perhaps the most telling comment by DFAT in relation to the dispute resolution mechanism was:

Australia has been including investor-state dispute settlement provisions in our investment agreements, which are published and available to the public, for some 14 or 15 years. It is important to recognise that, in all of that time, no large corporate investor has ever taken Australia to ICSID in relation to a governmental measure.¹⁵

9.22 In a further submission the Department of Foreign Affairs and Trade indicated that it was not aware of any challenge to Australian legislation pursuant to an investment protection and promotion agreement.¹⁶

Expropriation or nationalisation of investments

9.23 Under Article 7 of these Agreements the expropriation or nationalisation of investments is prohibited unless it is for a public purpose under due process of law, it is non-discriminatory, and proper compensation has

¹³Peter Scott, Transcript of Evidence, 13 May 2002, p. 81.
¹⁴Peter Scott, Transcript of Evidence, 13 May 2002, p. 87.
¹⁵Peter Scott, Transcript of Evidence, 13 May 2002, p. 90.
¹⁶Department of Foreign Affairs and Trade, Submission No. 22.1, p. 7
been made in freely convertible currency. However, submissions from the Australian Council of Trade Unions (ACTU) and the National Tertiary Education Union (NTEU) expressed concern that:

should a future Australian Government act to prohibit a product or a production input or process, or to heavily tax the same as a deterrent to their use, that is central to the activities and viability of a Uruguayan or Egyptian company operating in Australia, it may be open to such a company to claim compensation for expropriation .... even if the Government action was in the national interest, under due process of law, and non-discriminatory between Australia and the foreign-owned company.  

9.24 With regard to the likelihood of a compensation case based on Article 7 DFAT said that the risks highlighted by these submissions were more apparent than real. Elaborating, a DFAT witness said that:

Some of the concerns surrounding investment agreements arise from a misunderstanding as to the kinds of governmental actions that can be successfully challenged. Given the protections inherent in Australia’s legal system and Australia’s generous treatment of investors in general, it is unlikely that such an action against Australia would be sustained let alone attempted.  

9.25 The ACTU also voiced concerns about the possibility of companies from the other parties to these agreements suggesting that they would have options for arbitration of disputes that go beyond the options available under Australian law to Australian investors. DFAT responded that:

It is unlikely that a foreign investor in Australia would obtain a better result under the investment agreement than it would under domestic law in Australia. Thus the foreign investor’s ability to go to international arbitration does not constitute an advantage over Australian investors or investors from countries with no investment agreement with Australia.  

9.26 Under Article 10 of these agreements additional protection is offered against expropriation. DFAT has advised the Committee that the Export Finance and Insurance Commission (EFIC) covers investors against losses due to one or more of the following risks: (a) politically motivated violence; (b) expropriation; and (c) exchange blockage/currency

18 Peter Scott, Transcript of Evidence, 13 May, 2002, p. 82.
20 ACTU, Submission No. 14, p. 2.
inconvertibility. The Department of Foreign Affairs and Trade noted that EFIC provides overseas investment insurance and political risk insurance to cover Australian investments, however no previous or current policies cover Egyptian or Uruguayan risks.\footnote{21 Department of Foreign Affairs and Trade, Submission No. 22.1, p. 8.}

**Conclusions and recommendations**

9.27 The Committee is confident that these two Agreements will assist in the further development of trade and investment between the three countries.

9.28 The Committee acknowledges the concerns expressed in a number of submissions in relation to the ability of transnational companies to challenge national governments on the commercial impacts of their legislation. However, the Committee is persuaded that adequate protection is provided for Australian investors and for the Australian Government in the dispute resolution procedures under these Agreements. In the 15 years of operation of these agreements, Australia has not been involved in any disputes brought before the international dispute resolution body.

9.29 The Committee is also confident from evidence provided by DFAT that these Agreements will ensure equality of treatment for Australian citizens and corporations involved in commerce between the bilateral partners.

9.30 Therefore, the Committee makes the following recommendations:

**Recommendation 10**

9.31 The Committee supports the *Agreement between Australia and Uruguay on the Promotion and Protection of Investments* and recommends that binding treaty action be taken.

**Recommendation 11**

9.32 The Committee supports the *Agreement between Australia and Egypt on the Promotion and Protection of Investments* and recommends that binding treaty action be taken.
The Child Protection Convention

Background

10.1 The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (The Child Protection Convention) facilitates international cooperation between State Parties in the interests of protecting children. Its provisions are designed to eliminate potential conflicts of jurisdiction between different countries and to provide for international recognition of measures for the protection of children.

10.2 Existing family law litigation across international boundaries is subject to uncertainty as to jurisdiction and unpredictability in relation to the enforcement of orders abroad. The Convention attempts to overcome these uncertainties by providing clear jurisdictional rules and encouraging cooperation between authorities in different countries to protect the best interests of children affected by disputes over parental responsibility.

10.3 The rules established under the Convention set the questions:

- whether a court has jurisdiction to hear an international parental responsibility dispute;

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1 Unless otherwise specified the material in this section was drawn from the National Interest Analysis (NIA for the Child Protection Convention). The full text of the Analysis can be found at the Committee’s website on www.aph.gov.au/house/committee/jsct.

- which country’s law is to be applied in determining international parental responsibility disputes;
- what conditions must be satisfied to ensure international recognition and enforcement of parenting orders; and
- what obligations courts in Australia and overseas have to co-operate in the protection of children.

Proposed treaty action

10.4 The proposed ratification of the Convention would help to resolve a number of problems under the current arrangements:
- removal of jurisdictional uncertainty;
- finality in litigation;
- recognition of parental responsibility under the law;
- provisions covering cross border access cases; and
- international cases involving protection of children from abuse and neglect.

10.5 The formal cooperation procedures set out in the Convention will apply to a range of cases including:
- overseas authorities making requests to transfer child protection measures for children immigrating to Australia;
- cases in which children subject to foreign protection measures are brought to Australia without notice to Australian child protection authorities;
- cases in which care proceedings are taking place in Australia, but the child is removed to another country prior to the conclusion of the proceedings;
- overseas authorities asking Australian authorities to check on the welfare of a child visiting Australia on an access visit and providing a report; and
- parents in Australia seeking the transfer to Australian authorities of children in the care of overseas child protection authorities.

10.6 There are also a number of areas relating to children not covered in this Convention. The provisions of the Convention do not apply to the
establishment or contesting of a parent-child relationship; decisions on adoption; the names of a child; emancipation; maintenance obligations; trusts or succession; social security; public matters relating to education or health; measures taken as a result of penal offences committed by children; and decisions on the right of asylum and immigration.

10.7 The Convention obliges Australia, in cases with international aspects, to follow new rules to decide which country has jurisdiction to consider parental responsibility issues under State/Territory child protection laws. The Family Law Amendment (Child Protection Convention) Bill 2002 will establish a legal framework to implement the Convention.

10.8 When implemented in Australian law a number of new obligations will be created including:

- recognition and enforcement of protection measures for parties within Australia made in other State parties;
- establishment of one or more central authorities which will co-operate with similar authorities in other Convention countries to implement the Convention, facilitate communications between countries, locate children, and provide reports on the situation of children;
- seeking the consent of authorities in another Convention country before placing a child in a foster family in that country;
- cooperation in securing contact by an overseas parent to his or her child in Australia; and
- notifying authorities of another country of any serious danger to a child in that other country.

10.9 The administrative aspects of the Convention will be implemented in Australia by the Commonwealth Attorney-General’s Department, acting as the Commonwealth Central Authority and State and Territory child protection departments, acting as State Central Authorities.

10.10 Commonwealth, State and Territory Governments have considered at length the implementation of the Convention. The NIA notes that an intergovernmental working group has developed legislation to implement the Convention in Commonwealth, State and Territory law. This has been circulated for comment to relevant Commonwealth and State agencies, courts, legal aid bodies, community legal centres, the Law Council of Australia and family law practitioner associations. The working group’s final report stated there was no opposition to Australia’s ratification of the Convention and concluded that there were no substantial arguments against ratification.
10.11 The Family Law Amendment (Child Protection Convention) Bill 2002, is currently before the Parliament and key parties have been given the opportunity to comment on the implementation of the legislation which must be in place for ratification of the Convention. States and Territories are currently considering a model Bill prepared by the Queensland Government, which will implement the Convention in State and Territory law.

Evidence presented and issues arising

Needs and benefits of a treaty

10.12 The need to ratify this treaty has arisen because of a range of problems encountered by Australian authorities and Australian parents in the international family law and child protection areas including:

- conflicting decisions between the Australian Family Court and overseas courts in child custody cases;
- obtaining recognition overseas for Australian custody orders; and
- lack of success in negotiating bilateral arrangements with other countries.

One of the ways ensuring worldwide recognition of Australian custody orders is for Australia to ratify this child protection convention.3

10.13 Evidence given to the Committee indicated that there is a close link with the Hague Convention on Child Abduction. While some cases can be handled under the Child Abduction Convention, it is quite limited in its application. This limitation may lead to a situation where Australian residents have to litigate in a foreign court to try to obtain an order from the foreign court giving them custody of a child.4

10.14 The Child Protection Convention will assist this process markedly. In expanding on this issue the Attorney-General’s Department commented that:

[a] parent in Australia who wants the child returned to Australia would go to the Family Court and get a parental responsibility order. The Attorney-General’s Department would liaise with

authorities in the other convention country to have it registered and enforced there.\textsuperscript{5}

10.15 In Australia in the 2001 calendar year there were 58 applications for the return of children who were brought to Australia, and 83 applications for the return of children taken out of Australia. However, in regard to cases that an Australian citizen litigates overseas, there are no statistics available, except where Australia has a bilateral Agreement in place. Under this Convention with the new structures in place record keeping will be enhanced.\textsuperscript{6}

\section*{Implementing the Commonwealth, State and Territory legislation}

10.16 The NIA notes that the Queensland Government is currently developing a model Bill that will implement the Convention in State and Territory law but it does not comment on the progress of this model Bill or the impact of the proposed Commonwealth legislation on the model.

10.17 A submission from the Queensland Government expressed concern at the introduction of the Commonwealth legislation prior to the completion of the model State/Territory legislation and without consultation with State and Territory Governments.\textsuperscript{7} The Queensland Government stated:

\begin{quote}
Taking binding treaty action prior to the necessary implementing legislation for States and territories being in place is likely to cause considerable legal and administrative difficulties. It would constrain the effective implementation of the Convention in Australia.\textsuperscript{8}
\end{quote}

10.18 The Attorney-General’s Department submitted that the Commonwealth Bill is designed to ‘implement aspects of the Convention relevant to Commonwealth Law’, while the draft Queensland bill implements ‘aspects of the Convention relevant to State law’.\textsuperscript{9} At the time of drafting this report the Committee is not aware whether the Queensland Government had been alerted by the Attorney-General’s Department to this distinction in legislative design.

10.19 The Western Australian agencies are also working with Commonwealth agencies to implement domestic obligations under this Agreement.\textsuperscript{10}

\textsuperscript{8} Queensland Government, \textit{Submission No. 21}, p. 2.
\textsuperscript{9} Attorney-General’s Department, \textit{Submission No. 20}, pps. 1-2.
\textsuperscript{10} Letter, Department of Premier and Cabinet (WA), p. 1.
Conclusions and recommendation

10.20 It is in Australia’s interest to enter into international agreements which assist families, and in particular offer protection and assistance to children.

10.21 The Committee understands that new Commonwealth, State and Territory structures are being set up to expedite requests and that a proposed legislative program for the Commonwealth, States and Territories is progressing. The Committee notes the concerns raised by the Queensland Government regarding the timing of Commonwealth legislation and the possibility of conflict between the Commonwealth and State jurisdictions.

10.22 The Committee encourages close consultation between the Attorney-General’s Department and Australian States and Territories in relation to the model State/Territory legislation currently under preparation to ensure all Australian legislation is harmonised in this important area to ensure effective implementation of the Convention.

Recommendation 12

10.23 The Committee supports the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and recommends that Australia ratify the Convention.
Convention on the recognition of higher education qualifications

Background

11.1 The Convention on the Recognition of Qualifications Concerning Higher Education in the European Region (the Convention) provides an improved international framework for the assessment and recognition of higher education qualifications.

11.2 Once in force, the Convention would enhance arrangements for exchanges of students and provide generally more flexible mechanisms for the recognition of overseas qualifications. These arrangements would assist students from countries that are parties to the Convention to study in Australia. Europe is an increasingly important source of students for Australian higher education institutions, and the Convention would provide support for the marketing and internationalisation of Australian education.

11.3 The arrangements to be implemented would facilitate the recognition of Australian academic qualifications, particularly in Europe and non-European signatory states such as the USA and Canada, once they

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1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis (NIA) prepared for the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, done at Lisbon on 11 April 1997. The full text of this Analysis may be found on the Committee’s web site at www.aph.gov.au/house/committee/jsct/.
become parties to the Convention. The Convention would therefore aid the international mobility of Australian students.

11.4 Improved recognition arrangements also have the potential to facilitate the recognition of overseas trained professionals’ qualifications in Australia through better access to information networks for the National Office of Overseas Skills Recognition (NOOSR). The Convention may also be of benefit to those seeking the recognition of Australian qualifications for purposes of professional practice in countries which are party to the Convention.

Proposed treaty actions

11.5 The central obligations of the Convention concern greater transparency and fairer processes for the recognition of higher education qualifications. The Convention recognises that, for some parties, competence to make such decisions lies with other entities. This is the case for Australia, where higher education institutions are the only bodies that have power to make binding decisions in relation to the recognition of overseas qualifications for the purpose of admission into higher education programs. The Convention’s obligations would therefore be carried out principally through administrative action of Australia’s higher education institutions.

11.6 Among its main obligations, the Convention would require that higher education institutions:

- ensure that procedures and criteria used in the assessment and recognition of qualifications are transparent, coherent and reliable; and
- comply with any reasonable request for information for the purpose of assessing qualifications at said institutions.

11.7 Among its main obligations, the Commonwealth would be required to:

- ensure that adequate and clear information on the nation’s education system is provided to other parties;
- encourage higher education institutions to recognise the qualifications conferred by another party, unless a substantial difference can be shown between the qualification conferred and the corresponding qualification in Australia;
- ensure that the holder of a higher education qualification issued by one of the other parties can obtain an assessment of that qualification upon request by the holder;
establish and maintain a national information centre to facilitate access to (1) authoritative information on the Australian higher education system and qualifications, (2) information on the systems and qualifications of other parties, (3) and to give advice and information on recognition matters and the assessment of qualifications;

promote the use of the UNESCO/Council of Europe Diploma Supplement by higher education institutions; and

nominate an Australian officer as a member of the European Network of Information Centres (ENIC) and to cooperate, through the ENIC, with the national information centres of other parties.

11.8 As the relevant Commonwealth agency, NOOSR acts as the Australian national information centre and currently carries out most of the roles outlined in the Convention, with the exception of the promotion of the Diploma Supplement.

11.9 To a lesser extent, the Convention also applies to the recognition of higher education qualifications for employment or migration purposes. These recognition decisions are made by the employers themselves and professional assessing bodies. NOOSR would liaise with the relevant authorities to raise awareness of the Convention amongst the professions.

11.10 The Convention is intended to replace a number of existing conventions regarding the recognition of higher education qualifications, including the UNESCO Recognition Convention which Australia joined in 1986. Once the Convention is ratified, Australia would continue to apply the UNESCO Convention in its relations with other States that are a party to the UNESCO Convention but not to this proposed Convention.

11.11 The Convention’s obligations will bind only the Commonwealth and not the States or Territories, nor Australia’s higher education institutions. No legislative action is required by the Commonwealth or the States and Territories to give effect to the Convention’s provisions. Costs to the Commonwealth of meeting its obligations under the Convention can also be met within existing resources.

Evidence presented and issues arising

Implementation of Obligations

11.12 The Committee was concerned that while the Convention is binding on the Commonwealth, its implementation requires action by higher education institutions which cannot be directed or required to act by the
Commonwealth. Similarly, the Committee sought clarification regarding the extent to which professional bodies and employers would be obliged to implement the Convention’s obligations.

11.13 The Department of Education, Science and Training (DEST) explained that, while universities are autonomous, they are highly supportive of the Convention and currently utilise NOOSR guidelines to assess overseas qualifications and to make admission decisions. DEST also observed that while there is no obligation for universities to adopt the Diploma Supplement, there is considerable interest from the universities in developing such a system. NOOSR also produce guidelines for the recognition of professional qualifications for use by registration boards and professional associations. These bodies are not bound by these guidelines, and NOOSR would seek to promote the Convention’s obligations to the professions. 2

11.14 The Department of Foreign Affairs and Trade also noted that a compelling economic incentive exists for universities to comply with the Convention. If Australian universities wish to attract fee paying students from Europe, they will have to ensure that the qualifications obtained by these students in Australia are able to be recognised when they return home; otherwise students will not come. 3

11.15 The Committee sought clarification as to the obligations in the Convention relating to the recognition of overseas trained professionals’ qualifications in Australia, compared with the recognition that may be given to Australian qualifications for purposes of professional practice in other parties. DEST responded that the obligations on all state parties are the same in this regard. However, it was noted that the Convention only concerns the recognition of professionals’ academic qualifications and that professional bodies in other countries could have additional, non-academic, requirements that would need to be satisfied before Australian professionals were allowed to practice. 4

Conclusions and recommendations

11.16 The marketing and internationalisation of Australian higher education, particularly in the European region which Australia now looks to as an important future source for overseas students, is of national importance. Australia’s efforts in this regard would be aided by the improved

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arrangements proposed under the Convention, which would have the effect of assisting students from parties to the Convention to study in Australia. The Committee notes that the Queensland Government, which expressed strong support for ratification, maintains that the Convention would provide wider recognition of qualifications derived from the State’s institutions and broaden the market for the State’s educational services. The Queensland Government also said that the Convention would expose the State’s higher education sector to greater global competition, and that this would stimulate providers to achieve world best practice.\(^5\)

11.17 The Committee notes that the Convention only binds the Commonwealth and that universities and professional associations are not bound to adhere to the Convention’s obligations and cannot be directed to implement its requirements by the relevant Commonwealth agency. However, the framework to be implemented under the Convention largely reflects existing principles and practices and will further raise the profile of Australia’s expertise in this area, while also signalling its commitment to uphold principles of fair practice and non-discrimination in assessment and recognition procedures. The Committee notes that the Australian Vice-Chancellors’ Committee, which supports the ratification of this Convention, has submitted it believes that current practices of Australian universities are fully consistent with the obligations of the Convention.\(^6\)

11.18 Ratification of the Convention signals to the world that Australia’s education systems aspire to meet the highest global standards, and permits greater international mobility for Australian students and Australian-trained professionals.

**Recommendation 13**

11.19 The Committee supports the *Convention on the recognition of qualifications concerning higher education in the European region* and recommends that binding treaty action be taken.

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\(^6\) NIA, p. 5.
Convention for the suppression of terrorist bombings

Background

12.1 The purpose of the Convention for the Suppression of Terrorist Bombings (the Convention) is to enhance cooperation between states in the prevention and investigation of terrorist acts and the prosecution and punishment of their perpetrators. It was adopted by the United Nations General Assembly in New York on 15 December 1997 and entered into force on 23 May 2001. As of the beginning of June 2002, 61 countries have deposited instruments ratifying, accepting, approving or acceding to the Convention.

12.2 The Convention forms part of a framework of international treaties intended to combat the worldwide escalation of terrorist acts. International concern at the types of offences targeted by the Convention was heightened as a result of the attacks against the World Trade Centre in New York and the Pentagon in Washington DC on 11 September 2001. Since this event, 35 of the 61 parties to the Convention have deposited their instruments of ratification.

1 Unless otherwise indicated, the material in this and the following section has been drawn from the National Interest Analysis prepared for the International Convention for the Suppression of Terrorist Bombings. The full text of this Analysis may be found on the Committee’s web site at www.aph.gov.au/house/committee/jsct/.
12.3 Australia already has extensive domestic legislation to combat the types of acts covered by the Convention. The Convention proposes to increase the effectiveness of these measures by providing a mechanism for cooperation with other countries in cases where terrorist acts have an international dimension. The Convention includes obligations to provide mutual assistance in the investigation and prosecution of alleged offenders and to cooperate in the prevention of terrorist bombings. These obligations extend to extradition and imprisonment of offenders. As the Department of Foreign Affairs and Trade (DFAT) explained to the Committee, the Convention

... attempts to establish a broad jurisdictional regime which has the necessary nexus to Australia ... and ensures that there is a common offence of terrorist bombing that is understood by all parties to this convention, to facilitate international cooperation in criminal proceedings.²

**Proposed treaty actions**

12.4 Article 2 of the Convention makes it an offence if a person

...unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

This offence includes any person who participates as an accomplice, organises or directs others to commit an offence, or in any other way contributes to the commission of an offence as set out under the Convention.

12.5 The Convention requires that Australia:

- be able to exercise jurisdiction over alleged offenders when they are nationals or commit offences in Australian territory, or on Australian registered vessels or aircraft;

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be able to exercise jurisdiction where alleged offenders are present in its
territory and it chooses not to extradite them to another country
claiming jurisdiction;

provide assistance to other parties to the Convention and for the
transfer of detainees to assist with investigation or prosecution of
offences; and

investigate and, if appropriate, take steps to ensure the alleged
offender’s presence for the purpose of prosecution or extradition.

12.6 The Convention does not extend to offences that have no international
dimension (Article 3) or the activity of military forces inasmuch as they are
governed by other rules of international law (Article 19).

12.7 To comply with the Convention the Commonwealth Government has
proposed the **Criminal Code Amendment (Suppression of Terrorist Bombings)
Bill 2002** (Amendment Bill). Item 1 of Schedule 1 adds a new division
(Division 72) to Chapter 4 of the **Criminal Code Act 1995**. Item 2 of the
Schedule amends the definition of ‘political offence’ in Section 5 of the
**Extradition Act 1988** so that offences created by Article 2 of the Convention
are not included as ‘political offences’.\(^3\) Convention offences that are
politically motivated do not provide grounds for the denial of extradition.
The Amendment Bill has been considered by the Senate Legal and
Constitutional Legislation Committee, which recommended that it
proceed.\(^4\)

12.8 The Convention gives Australia the option of establishing its jurisdiction
over offences committed against its nationals or facilities abroad. The
option also extends Australia’s jurisdiction over an alleged offender who
is a stateless person resident in Australia or a person who attempts to
exercise duress over Australia. Australia has signalled its intention to
accept this option to ensure its ability to take action against offences in the
event that no other State is in a position, or willing, to do so.

\(^3\) Jennifer Norberry, ‘**Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002**’, **Bills Digest No. 120**, Department of the Parliamentary Library, 2001-02, Canberra.

\(^4\) Senate Legal and Constitutional Legislation Committee, **Consideration of Legislation Referred to the Committee**, May 2002.
Evidence presented and issues arising

Definition of terms

12.9 The Committee explored with DFAT witnesses whether the terminology employed in the 1997 Convention would work effectively in the post-September 11 environment. DFAT was asked whether an aeroplane would constitute an explosive or lethal device and, thus, whether it would fall within the scope of terrorist devices as defined in the Convention.

12.10 DFAT acknowledged the difficulty of arriving at a universally accepted definition of terrorism. In order to gain the benefits of increased international cooperation promised by the Convention, negotiating parties had focussed on specific offences rather than definitional issues. This means that the Convention refers to acts of terrorism and their consequences or potential consequences, and does not attempt to define who is a terrorist. However, it also said there was a high level of international consensus that the Convention was adequate for dealing with terrorist acts such as that committed on 11 September 2001:

…it is the view of the Australian government and also most other government delegations present at the terrorism negotiations in New York that this convention would indeed have covered the attacks of September 11.

Maintenance of human rights and civil liberties

12.11 Non-government organisations such as Amnesty International and the Uniting Church in Australia supported Australia’s accession to the Convention. However, they expressed concern about the possibility that Australia could be obligated to extradite alleged offenders to countries where a regime is either repressive or has no acceptable criminal justice system.

12.12 DFAT assured the Committee that the Convention respects the human rights of alleged offenders. In cases where Australia has substantial grounds for believing that a request for extradition has been made for the purpose of persecution, it may itself choose to investigate and, if necessary, prosecute alleged offenders. In these cases Australia has an obligation to investigate and, if appropriate, prosecute alleged offenders.

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7 National Interest Analysis, Attachment B, ‘Consultation with Non-government organisations’ and Rev David Pargeter, Uniting Church in Australia, *Submission No. 19*. 
and to report these proceedings to the Secretary-General of the United Nations. (Articles 12 and 16)

12.13 The Committee recognised that concerns have been raised about the potential for the package of anti-terrorist Bills currently before Parliament (particularly the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]) to threaten civil liberties. The two areas in which this threat arises are the proscription of organisations with alleged terrorist connections and the reversal of the presumption of innocence normally enjoyed by alleged offenders.

12.14 The Committee was reassured that the Amendment Bill associated with the Suppression of Terrorist Bombings Convention does not include a proscribed organisations clause and maintains that the burden of proof is carried by the prosecution in designated criminal offences.  

**Implications for federalism**

12.15 Section 51 (xxix) of the Constitution allows the Commonwealth Government to make laws with regard to external affairs. This external affairs clause has allowed the Commonwealth to exercise authority in areas that had previously fallen under the jurisdiction of the States and Territories. The entry of the Commonwealth into international treaties that may require the exercise of its power at the expense of State and Territory responsibilities is of legitimate concern. In regards to the Convention

‘The Law Institute of Victoria submitted that implement[ation] would see a transfer of power (albeit a very small transfer of power) from the States to the Commonwealth.’

12.16 The Attorney-General’s Department pointed out that

...there is a quite deliberate intent to allow state law to operate and, in essence, to take on an administrative level precedence where charges are being selected....one of the things the Attorney-General is to take account of is whether the person may have also committed a state or territory offence.

12.17 The Commonwealth consulted widely with State and Territory governments. The Committee notes that all State and Territory governments supported the Commonwealth’s accession to the Convention.

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9 National Interest Analysis, Attachment B.
11 National Interest Analysis, Attachment A.
Conclusions and recommendations

12.18 The Committee expressed concern at the adequacy of the terminology used in the Convention but notes there is a high degree of consensus in the international community on what constitutes a terrorist act in the wake of the events of 11 September 2001.

12.19 The Committee is satisfied that neither the Convention nor the proposed Amendment Bill puts at risk human rights or civil liberties in Australia. The Committee is cognisant that the Senate Legal and Constitutional Legislation Committee has reviewed the entire package of proposed anti-terrorist legislation and recommended amendments. However, it notes that the Senate Committee recommended that the Amendment Bill associated with the Convention for the Suppression of Terrorist Bombings should proceed.

12.20 Far from endangering the human rights and civil liberties of Australian nationals this Convention augments their security against attack at home and abroad. In return, it places on Australia an obligation to aid investigations and prosecutions of Convention offences by other states and, where appropriate, to investigate, prosecute and punish alleged offenders within its jurisdiction.

12.21 Accordingly, the Committee makes the following recommendation:

**Recommendation 14**

12.22 Despite its concerns about the adequacy of the terminology used in the Convention for the Suppression of Terrorist Bombings the Committee supports the Convention and recommends that binding treaty action be taken.

Julie Bishop MP

Committee Chair

June 2002
Appendix A – Submissions

Individuals and agencies who made written submissions on treaties tabled on 12 March 2002

1  Ms Joanna Alwast
2  STOPMAI (WA)
3  Mr Tony Troughton-Smith
4  Mr James Arvanitakis
5  Australian Fair Trade and Investment Network
6  Dr David McKnight
7  Ms Rosie Wagstaff
8  Ms Marj O'Callaghan
9  Mr Ted Murphy
10 Riki Stevens
11 Ms Anita Devos
12 Mr Ron Clifton
13 Mr Robin Borton
14 ACTU
15 Ms Tina Lesses
16 Ms Frances Milne
17 E Webber
18 Mr Charles Holub
19 The Uniting Church in Australia
20 Attorney-General's Department
20.1 Attorney-General's Department
21 Queensland Government
22 Department of Foreign Affairs and Trade
22.1 Department of Foreign Affairs and Trade
23 Department of Health and Aged Care
24 Confidential
Appendix B – Witnesses at hearings

Monday, 13 May 2002 - Canberra

Attorney-General’s Department

Mr John Atwood, Acting Assistant Secretary, Public International Law Branch
Ms Amanda Bush, Acting Principal Legal Officer, International Family Law Section
Mr Mark Jennings, Senior Advisor, Office of International Law
Mr John Mc Ginness, Principal Legal Officer, Legal Procedure Unit

AusAid

Mr Tony O’Dowd, Program Manager, Governance, Policy & Management Reform Section, South Pacific

Australian Customs Service

Mr Murray Edwards, Director, International
Ms Sylvia Kyle, Assistant Director, International Section
Ms Tonie Smith, Director, Intelligence Coordination
Australian Tax Office
Mrs Ariane Pickering, Assistant Commissioner, International, Large Business & International

Australian Taxation Office
Mr David Bryant, Executive Officer, Treaties Unit, Large Business & International
Mr Nigel Murray, Director, Superannuation

Department of Defence
Wing Commander Dean Carr, SO1 Air Operations, Strategic Command Division
Captain Edwin Dietrich, Royal Australian Navy, Strategic Command Division
Ms Nicola Mizen, Director of Europe, Middle East, South Asia, Rest of the World, Strategic & International Policy Division
Mr John Wishart, Acting Director of Agreements, The Defence Legal Service

Department of Education, Science and Training
Dr Heather Gregory, Assistant Director, Educational Standards Branch, International Group
Ms Margaret Pearce, Branch Manager, Educational Standards Branch, International Group

Department of Family and Community Services
Mr Roger Barson, Assistant Secretary, International Branch
Ms Marion Carrick, Director, New Zealand
Mr Peter Hutchinson, Director, International Agreements
APPENDIX B – WITNESSES AT HEARINGS

Department of Foreign Affairs and Trade

Mr Claus Dirnberger, Executive Officer, Pacific Islands Branch, South Pacific, Middle East & Africa Division

Mr Hugh Fletcher, Assistant Secretary, Pacific Regional Section, South Pacific, Middle East & Africa Division

Ms Amanda Gorely, Director, International Law and Transnational Crime Section

Mr Ben Milton, Acting Director, Administrative & Domestic Law Section, Legal Branch, International Organisations & Legal Division

Mr Peter Scott, Executive Officer, International Law and Transnational Crime Section

Mr Mark Scully, Executive Officer, Legal Branch, International Organisations and Legal Division

Mr Paul Smith, Director, Protocol Branch

Ms Shennia Spillane, Executive Officer, International Law and Transnational Crime Section, Legal Branch

Mr Dominic Trindade, Legal Adviser, Legal Branch

Mr Russell Wild, Executive Officer, International Law and Transnational Crime Section

Department of Health and Ageing

Ms Michele Flint, Acting Director of Food Policy

Ms Carolyn Smith, Acting Assistant Secretary, Preventive Services & Food Policy Branch

Treasury

Mr John Nagle, Manager, International Tax Research Unit
Monday, 27 May 2002 - Canberra

Attorney-General’s Department

Dr Karl Alderson, Principal Legal Officer, Criminal Law Branch, Attorney-General’s Department

Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch, Attorney-General’s Department

Department of Foreign Affairs and Trade

Mr Peter Scott, Executive Officer, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

Ms Annette Willing, Principal Legal Officer, Security Law and Justice Branch, Attorney-General’s Department