The Parliament of the Commonwealth of Australia
Joint Standing Committee on Treaties

Report 131

Treaties tabled on 21 August, 11 and 18 September 2012

Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)

Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012

Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference (WRC-12) done at Geneva on 17 February 2012

Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011

Amendments to the Schedule of the International Convention on the Regulation of Whaling

MARPOL Resolution MEPC.216(63): Regional arrangements for port reception facilities under MARPOL Annexes I, II, IV and V

MARPOL Resolution MEPC.217(63): Regional arrangements for port reception facilities under MARPOL Annex VI and Certification of marine diesel engines fitted with Selective Catalytic Reduction systems under the NOx Technical Code 2008

November 2012
Canberra

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ISBN 978-0-642-79842-8 (Printed version)

ISBN 978-0-642-79843-5 (HTML version)

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Contents

Membership of the Committee vi
Resolution of Appointment viii
List of recommendations ix

1 Introduction
Purpose of the report 1
Conduct of the Committee's review 2

2 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)
Introduction 5
Background 5
Overview and national interest summary 6
Reasons for Australia to take the proposed treaty action 7
Obligations 8
Jurisdiction 10
Implementation 11
Costs 13
Conclusion 13

3 Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012
Introduction 15
Background 15

Overview 16
Reasons for Australia to take the proposed treaty action 17
Obligations 18
Implementation 22
Costs 22
Other issues 22
Human rights 22
Monitoring 23
Conclusion 24

4 Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference of 2012 (WRC-12)

Background 27
Radiofrequency regulation 28
The Radio Regulations revision of 2012 29
Australia's declarations and reservation 31
Reasons for Australia to take the proposed treaty action 32
Implementation 33
Costs 34
Conclusion 34

5 Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011

Background 37
Protection of classified information 38
Reasons for Australia to take the proposed treaty action 41
Implementation 41
Costs 42
Conclusion 42

6 Three Minor Treaty Actions

Introduction 45
Minor treaty actions 45

Amendments to the Schedule of the International Convention on the Regulation of Whaling... 45
MARPOL Resolution MEPC.216(63): Regional arrangements for port reception facilities under MARPOL Annexes I, II, IV and V 46
MARPOL Resolution MEPC.217(63): Regional arrangements for port reception facilities under MARPOL Annex VI and Certification of marine diesel engines fitted with Selective Catalytic Reduction systems under the NOx Technical Code 2008 46

Appendix A – Submissions 49

Appendix B – Witnesses 51

Membership of the Committee

Chair	Mr Kelvin Thomson MP	
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	The Hon Dr Sharman Stone MP	

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Resolution of Appointment

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 and related Explanatory Statements 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.

List of recommendations

2 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)

Recommendation 1

The Committee supports the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* and recommends that binding treaty action be taken.

3 Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012

Recommendation 2

The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.

Recommendation 3

The Committee supports the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012* and recommends that binding treaty action be taken.

4 Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference of 2012 (WRC-12)

Recommendation 4

The Committee supports the *Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference (WRC-12)* done at Geneva on 17 February 2012 and recommends that binding treaty action be taken.

5 Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011

Recommendation 5

The Committee supports the *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011* and recommends that binding treaty action be taken.

1

Introduction

Purpose of the report

1.1 This report contains the Joint Standing Committee on Treaties' review of treaty actions tabled on 21 August, 11 September and 18 September 2012.

1.2 These treaty actions are proposed for ratification and are examined in the order of tabling:

- **Tabled 21 August 2012**
  - ⇒ *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)*
- **Tabled 11 September 2012**
  - ⇒ *Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012*
  - ⇒ *Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference (WRC-12) done at Geneva on 17 February 2012*
- **Tabled 18 September 2012**
  - ⇒ *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011*
- **Minor Treaty Actions**
  - ⇒ *Amendments to the Schedule of the International Convention on the Regulation of Whaling*

- ⇒ *MARPOL Resolution MEPC.216(63): Regional arrangements for port reception facilities under MARPOL Annexes I, II, IV and V*
- ⇒ *MARPOL Resolution MEPC.217(63): Regional arrangements for port reception facilities under MARPOL Annex VI and Certification of marine diesel engines fitted with Selective Catalytic Reduction systems under the NOx Technical Code 2008*

1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.

1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.

1.5 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

1.6 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaties examined in this report do not require an RIS.

1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.

1.8 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at: <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/under_review.htm>

Conduct of the Committee's review

1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties

tabled on 21 August were requested by Friday, 21 September 2012; submissions for the treaties tabled on 11 September were requested by Friday, 12 October 2012 and submissions for the treaties tabled on 18 September were requested by Friday, 19 October 2012 with extensions available on request.

1.10 Invitations were made to all State Premiers, Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.

1.11 The Committee examined the witnesses on each treaty at a public hearing held in Canberra on Monday 29 October 2012.

1.12 Transcripts of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaty's tabling date, being:

- **21 August 2012**

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/21august2012/hearings.htm>

- **11 September 2012**

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/11september2012/hearings.htm>

- **18 September 2012**

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/18september/hearings.htm>

1.13 A list of witnesses who appeared at the public hearings is at Appendix A.

2

Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)

Introduction

2.1 On 21 August 2012, the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* (ReCAAP) was tabled in the Commonwealth Parliament.

Background

2.2 ReCAAP's origins can be traced back to regional concerns about incidents of piracy and armed robbery against ships, dating back to the 1990s, particularly through the Strait of Malacca – the waterway between the Malay Peninsula and Indonesia. Each year more than 80,000 ships pass through the Indian and Pacific oceans. At one stage, the Strait of Malacca and the straits of Singapore were the most heavily pirated areas in the world, peaking with 75 reported attacks in 2000. These incidents threatened maritime navigation, caused economic disruption, increased operating costs and, in some cases, resulted in the loss of life.[1]

2.3 In response, the Japanese government hosted the Asia Anti-Piracy Challenge Conference in 2000, where participants agreed to broaden

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1 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

regional cooperation to combat piracy. In 2002, 16 countries—the ASEAN countries plus six others—started to draft what would eventually become ReCAAP, which was finalised in November 2004. In that year, Singapore, Indonesia and Malaysia commenced coordinated counter-piracy patrols, which resulted in a significant drop in attacks, down to 38 in 2004 and then down to 10 attacks in 2005. With ReCAAP's finalisation in 2004, greater information exchange was facilitated to combat piracy and armed robbery at sea, which then helped inform patrolling programs.[2]

2.4 ReCAAP is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery in Asia. ReCAAP entered into force on 4 September 2006 and the ReCAAP Information Sharing Centre (ReCAAP ISC) was established on 29 November 2006. To date, 18 States have become Contracting Parties to ReCAAP.[3]

2.5 ReCAAP establishes a framework for cooperation amongst States, through information sharing, capacity building and cooperative arrangements in combating the threat of piracy and armed robbery against ships in Asia.[4] Information is collected and disseminated by the ReCAAP ISC. ReCAAP also facilitates capacity building initiatives to improve Contracting Parties' response capabilities.[5]

Overview and national interest summary

2.6 The following summary of the proposed treaty action and its claimed benefits is taken from the National Interest Analysis (NIA).

2.7 The security of shipping lanes throughout Asia and of Australia's maritime approaches is essential for our international trade. Ships carry 99.5 per cent of Australia's trade by volume and 74 per cent by value. In 2008-09, the value of the Australian economy was about A$1.2 trillion, with seaborne trade contributing A$368 billion.[6] Each year, about A$130

2 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

3 National Interest Analysis [2012] ATNIA 18 with attachment on consultation *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* [2004] ATNIF 15 (Hereafter referred to as 'NIA'), para 2.

4 Piracy being an incident occurring on the high seas, whereas incidents of armed robbery occur within a State's jurisdiction.

5 NIA, para 5.

6 NIA, para 8. This is cited from http://www.navy.gov.au/Publication:Semaphore_-_Issue_4,_May_2011.

billion worth of Australian trade is transported through the historically high-risk areas in the Strait of Malacca.[7]

2.8 Accession to ReCAAP would enable Australian maritime authorities to draw on the experience and expertise offered by this forum to promote a broader focus on piracy and robbery, particularly noting that Australia's maritime industry identifies piracy as a risk. Access to information-sharing arrangements under ReCAAP will also assist in lessening the risk of piracy incidents and, as a result, commercial costs for sea-borne trade in South-east Asia.[8]

2.9 The Office of the Inspector of Transport Security assesses that the risk of piracy within the Australian region is low. However, the threat towards Australian cargo transported via international shipping is as high as it is for any other international shipping country or ship operator. ReCAAP membership offers benefits to Australia's sea trade by facilitating regional cooperation to mitigate the risk of piracy and robbery, and accession to ReCAAP will underscore Australia's commitment to the eradication of piracy and the maintenance of secure and safe sea-borne trade.[9]

Reasons for Australia to take the proposed treaty action

2.10 Under International Maritime Organization (IMO) Security Forces Authority (SFA) arrangements, Australia is responsible for a Maritime Search and Rescue Region (MSRR) that covers just over 10 per cent of the Earth's surface and accounts for the carriage of 99 per cent of Australia's trade by sea. ReCAAP provides a vehicle to facilitate closer engagement between regional states and Australia to mitigate risks and to protect Australia's vital trade routes.[10]

2.11 As a Contracting Party to ReCAAP, Australia would benefit by increased visibility and awareness to monitor emerging regional threats; learn from the experience and expertise of other Contracting Parties; and gain access to a regional maritime security network comprising national authorities who are also responsible for managing the threat of piracy and armed robbery in our immediate region.[11]

2.12 Instances of piracy and robbery against ships in Asia declined by seven per cent in 2011. This was the largest year-on-year decrease since

7 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

8 NIA, para 6.

9 NIA, para 7.

10 NIA, para 9.

11 NIA, para 10.

ReCAAP commenced reporting in 2007. The ReCAAP Annual Report suggests that this decline can be attributed to the littoral States increasing their surveillance profile and bolstering policing efforts in their respective maritime domains.[12]

2.13 Activities conducted under ReCAAP enhance maritime domain awareness and facilitate improved maritime security through coordinated information-sharing arrangements and capacity-building initiatives. In addition, Australia's ascension to ReCAAP will further enhance Australia's reputation as a responsible maritime nation and underline our commitment to regional counter-piracy initiatives.[13]

2.14 Australia's Border Protection Command, tasked with being the lead agency for Australia's engagement, is very positive on ReCAAP: 'joining ReCAAP serves Australia well.'[14] The treaty has even served as a model for further international agreements.

> ReCAAP is proven to be an excellent model for how information sharing, collaborative capacity building and cooperative arrangements can reduce the threat of piracy and armed robbery at sea within the region. ReCAAP is also a best practice model that has been used by the International Maritime Organisation as a model for the Djibouti Code of Conduct, an arrangement that deals with the regional threat of Somali based piracy.[15]

Obligations

2.15 Contracting Parties shall implement ReCAAP in accordance with national laws and regulations, and subject to their available resources or capabilities. Nothing in ReCAAP shall affect Contracting Parties' rights or obligations under existing international agreements or international law.[16]

2.16 Contracting Parties are required to take effective measures to:

- prevent and suppress piracy and armed robbery against ships;
- arrest individuals who have committed armed robbery against ships;

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12 NIA, para 11.

13 NIA, paras 12 – 13.

14 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 6.

15 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 5.

16 NIA, para 14.

- seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and
- rescue victim ships and victims of piracy or armed robbery against ships within the Contracting Parties' maritime jurisdiction.[17]

2.17 Article 4 establishes the ReCAAP ISC, located in Singapore and consisting of a small Secretariat and a Governing Council composed of Contracting Parties' representatives. The Executive Director of the Secretariat is responsible for the ISC's day-to-day operations. Contracting Parties are required to send one representative to the annual Governing Council meetings in Singapore.[18]

2.18 The ISC's[19] functions include: managing the expeditious flow among the Contracting Parties of information relating to incidents of piracy and armed robbery against ships; collecting, collating and analysing information transmitted by the Contracting Parties concerning piracy and armed robbery against ships; providing alerts to the Contracting Parties of imminent threats of piracy or armed robbery against ships; and preparing statistics and reports from information received.[20]

2.19 Contracting Parties are obliged to designate a Focal Point to take responsibility for communication with the ReCAAP ISC. The Focal Point is responsible for maintaining lines of communication with other competent national authorities, such as rescue centres, and relevant non-government organisations.[21]

2.20 Contracting Parties shall make every effort to require their ships, ship owners or ship operators to promptly notify relevant national authorities of any incidents of piracy or armed robbery at sea, and are required to transfer any relevant information they receive about piracy or armed robbery at sea to the ReCAAP ISC. Contracting Parties must also promptly disseminate any ReCAAP ISC alerts about imminent threats of piracy or armed robbery to ships transiting any identified threat areas.[22]

2.21 A Contracting Party may request any other Contracting Party, through the ISC or directly, to cooperate in detecting, arresting or seizing persons, vessels or aircraft involved in piracy or armed robbery against ships, or to

17 NIA, para 15.
18 NIA, para 16.
19 ReCAAP ISC homepage: <http://www.recaap.org/> accessed 13 September 2012.
20 NIA, para 17.
21 NIA, para 18.
22 NIA, paras 19 – 20.

rescue victims of piracy or armed robbery against ships. Contracting Parties that have received such a request are required to respond and to notify the ISC of the measures taken.[23]

2.22 Contracting Parties shall endeavour to extradite individuals who have committed armed robbery against ships and render mutual legal assistance in respect of offences described in ReCAAP, at the request of another Contracting Party.[24]

2.23 Contracting Parties are encouraged to cooperate to the fullest extent possible with other Contracting Parties that request capacity-building assistance, subject to available resources and capabilities.[25]

Jurisdiction

2.24 The responsibilities and jurisdiction of individual nations under ReCAAP was of interest to the Committee. Border Protection Command (BPC) described the cooperative nature of counter-piracy agreements:

> …there are national sensitivities about security related cooperation between countries. One of the important elements of counter-piracy is that it is shared; it does avoid some of those sensitivities and therefore it does provide us with a framework for dialogue and cooperation that can work quite effectively and that builds a stronger foundation for other security matters.[26]

2.25 In terms of Australia's particular responsibilities, BPC explained that:

> At the moment our responsibilities are bound to the security forces authority area of Australia. I give the example of an Australian warship that may be patrolling on the high seas—conducting visits overseas or deploying to an operational area. It does have an obligation already to be able to assist in an act of piracy; under the conventional law of the sea there is an obligation that exists on nations in a similar manner to providing safety of life at sea, to be able to interdict to stop an act of piracy if able to do so.[27]

2.26 But given this obligation of an Australian vessel to respond while on the high seas, a question then arose about legal jurisdictions and whether

23 NIA, para 21.

24 NIA, para 22.

25 NIA, para 23.

26 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 7.

27 Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command, Australian Customs and Border Protection Service, *Committee Hansard*, 29 October 2012, p. 7.

Australian citizens serving on Australian vessels could be tried in foreign courts should there be injuries or fatalities as a result of an Australian interdiction. BPC explained that ultimately Australian personnel on Australian ships cannot be arrested by foreign authorities without the consent of the Australian Government:

> Accession to ReCAAP does not affect the potential or actual liability of ADF members or Australian Government personnel undertaking anti-piracy operations.
>
> The national jurisdiction that will apply to a given incident, and whether there may be competing claims to jurisdiction, will depend on the circumstances of the incident, including the location of the vessel(s) at the time of the incident, who was on which vessel when the incident occurred (ie victim(s) and alleged offender(s)), the nationality of the victim(s) and alleged offender(s), the nationality of the vessel (i.e. the flag State of the vessel) and whether States with a possible claim to jurisdiction seek to exercise that jurisdiction.
>
> Where there are competing claims to jurisdiction, these issues may be resolved through diplomatic avenues. If a foreign state sought to exercise jurisdiction over someone in Australia or in Australian custody, issues of extradition and mutual assistance in criminal matters would be considered by the Attorney-General.
>
> The principle of sovereign immunity applies to Australian Government and military vessels. Therefore foreign law enforcement authorities cannot undertake law enforcement action on board such vessels. As such, Australian personnel on board those vessels cannot be arrested by foreign authorities without the consent of Australia.
>
> Where relevant Australian domestic criminal law has extra-territorial application, Australia may give consideration to domestic prosecution of the alleged offender.[28]

Implementation

2.27 Obligations under Article 3(1)(a),(b) and (c) are already met under Australian law in Part IV of the *Crimes Act 1914*. The obligation to rescue ships and victims of piracy or armed robbery is met through Australia's existing Security Forces Authority (SFA) arrangements. A coordinated response to an incident of piracy or armed robbery within Australia's

28 Border Protection Command, *Submission 1*, pp. 1 – 2.

Security Forces Authority Area (SFAA, concurrent with Australia's MSRR) would be coordinated by Border Protection Command (BPC).[29]

2.28 Australia's SFA representative Commander Border Protection Command is already attending the Governing Council meetings in Singapore. BPC would be designated as Australia's ReCAAP Focal Point. BPC already leads and coordinates whole-of-government maritime security operations to protect Australia's interests regarding civil maritime security matters. BPC works closely with the Australian Maritime Safety Authority (AMSA)[30] in response to AMSA's requests for assistance involving safety at sea incidents within the MSRR.[31]

2.29 Australian ships, their owners and operators already observe a series of notification and incident reporting measures. Australia's current framework is sufficient to meet ReCAAP's essential information-sharing objectives.[32]

2.30 Information transfers between Australia's Focal Point to the ReCAAP ISC, as well as prompt incident alert dissemination to ships transiting identified threat areas, would be facilitated through minimal adjustments to existing AMSA and BPC procedures. Under ReCAAP, Australia would not be obliged to share information that is subject to a national security classification.[33]

2.31 Furthermore, upon accession to ReCAAP, Australian Government agencies will: conduct a comprehensive education campaign notifying relevant maritime industry participants about reporting requirements under ReCAAP; consider amendments to existing notifications to reinforce reporting regime requirements; and conduct a review of mechanisms to facilitate information sharing.[34]

2.32 The Attorney-General's Department has advised that minor amendments to Australia's extradition and mutual assistance regulations will be needed

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29 NIA, paras 24 – 25. Part IV criminalises acts of piracy and armed robbery against ships and provides specified authorities with the power to seize pirate controlled vessels and arrest alleged pirates. (The definition of piracy in the *Crimes Act 1914 (Cth)* covers both the ReCAAP definitions of piracy and armed robbery against ships, as the *Crimes Act 1914 (Cth)* definition applies both on the high seas and within Australia's territorial sea.) For further information on the Border Protection Command, see <http://www.bpc.gov.au/>, accessed 20 September 2012.

30 For further information on the Australian Maritime Safety Authority, see <http://www.amsa.gov.au/>, accessed 20 September 2012.

31 NIA, paras 26 – 28.

32 NIA, paras 29 – 30. See NIA for specific details.

33 NIA, para 31.

34 NIA, para 32.

so that Australia is able to respond to requests for extradition and mutual legal assistance.[35]

Costs

2.33 ReCAAP's entry into force for Australia would not impose a significant cost burden on the Australian Government. Many ReCAAP obligations are already met through existing activities. Furthermore, Article 2(1) provides that Contracting Parties shall implement this Agreement 'subject to their available resources and capabilities.' Australia's Focal Point would be incorporated into existing BPC structures.[36]

2.34 The ISC will be funded through, host country financing and support, voluntary contributions by Contracting Parties, international organisations and other entities; and any other voluntary contributions as agreed upon by the Governing Council.[37]

2.35 There are no assessed contributions. However, voluntary monetary contributions or hosting of capacity building activities are strongly encouraged. Based on contributions made by other comparable Contracting Parties, voluntary payments are estimated to cost Australia around A$150,000 per annum. Funds have been provided in BPC's budget for the financial year 2012/13 for this purpose. There is no known compliance cost associated with this venture for industry.[38]

Conclusion

2.36 The Committee notes that despite the high profile of piracy in recent times, particularly in the Gulf of Aden and off Somalia, attacks in those regions are decreasing. Similarly, in South-East Asia, the incidence of piracy is also reducing.[39] This is not only through measures like sea patrols being conducted in choke points such as the Strait of Malacca and the Straits of Singapore, but also through agreements such as ReCAAP.

2.37 The Committee also notes that Australian personnel serving in the Royal Australian Navy or in Border Protection Command have a set of legal protections which mean that ultimately Australian personnel on

35 NIA, para 33.

36 NIA, paras 34 – 35.

37 NIA, para 17.

38 NIA, paras 36 – 37.

39 Mrs Paula Watt, Director, Counter Terrorism Policy Section, Counter Terrorism Branch, International Security Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 29 October 2012, p. 6.

Australian ships cannot be arrested by foreign authorities without the consent of the Australian Government.

2.38 Given the agreement's success in fostering cooperation, and the high dependence that Australia has on maritime trade, the Committee supports the Treaty and recommends that binding treaty action be taken.

Recommendation 1

The Committee supports the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004)* and recommends that binding treaty action be taken.

3

Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012

Introduction

3.1 On 11 September 2012, the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012* ('the Treaty') was tabled in the Commonwealth Parliament.

Background

3.2 Vietnam and Australia work closely in a range of areas and both countries' education, business and travel relationships continue to grow. Two-way trade between Australia and Vietnam now amounts to over A$6 billion. Australia is a leading destination for Vietnamese students, with more than 23,000 student enrolments in Australian education institutions. After the United States of America, Australia is the second most common destination for Vietnamese migrants. People born in Vietnam represent the sixth largest migrant community in Australia. Given Australia's developing ties with Vietnam, it is timely to strengthen our bilateral international cooperation arrangements.[1]

3.3 The proposed Treaty is indicative of Australia's commitment to developing and improving Australia's international legal cooperation relationships in order to combat transnational crime. Vietnam is an important regional partner in the fight against transnational crime. Having an effective extradition relationship with Vietnam is key to

1 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 9.

ensuring that criminals who cross our respective borders are not impervious to prosecution.[2]

Overview

3.4 The Treaty provides effective extradition arrangements between Australia and Vietnam. The Attorney-General's Department explained that Australia does not have bilateral arrangements with Vietnam to facilitate extradition. The Department explained:

> Currently, there is no bilateral framework in place, which means that we can only consider requests from Vietnam under multilateral conventions to which we are both parties, such as the UN [United Nations] Convention Against Corruption or the UN Convention Against Transnational Organized Crime. Those multilateral treaties to which we are both parties do contain extradition obligations, but there is no existing bilateral framework which would apply to all offenses.[3]
>
> …there have not been any extraditions under the multilateral conventions… no person has been brought before the courts pursuant to an extradition request from Vietnam.[4]

3.5 The Treaty will enable Australia to cooperate with Vietnam to request or grant extradition for any offences punishable under the laws of both countries by imprisonment for a maximum period of at least one year or by a more severe penalty.[5]

3.6 The Treaty is consistent with other Australian bilateral extradition treaties and is able to be implemented under Australia's existing domestic legislative framework for extradition. The Treaty adds to Australia's existing network of 38 other modern bilateral extradition treaties and to our extradition obligations under a number of multilateral agreements.

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2 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 9.

3 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 10.

4 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 10.

5 National Interest Analysis [2012] ATNIA 20 with attachment on consultation *Treaty between Australia and the Socialist Republic of Vietnam on Extradition (Canberra, 10 April 2012)* [2012] ATNIF 4, (Hereafter referred to as 'NIA'), para 4.

The safeguards and protections in the proposed Treaty are consistent with those in the *Extradition Act 1988*.[6]

Reasons for Australia to take the proposed treaty action

3.7 The following summary of the proposed treaty action and its claimed benefits is taken from the National Interest Analysis (NIA).

3.8 It is in Australia's interests that criminals cannot evade justice simply by crossing borders. The Treaty will oblige Vietnam to consider Australian requests for extradition and to grant extradition where the requirements set out in the Treaty are met. Whilst Australia can request extradition of any country in the absence of a treaty, there are no assurances that the other country will consider such a request.[7]

3.9 Implementation will enable Australia to receive extradition requests from Vietnam and oblige Australia to consider them. The *Extradition Act 1988* only allows Australia to receive extradition requests from countries declared to be an 'extradition country' in regulations, although Australia can currently consider extradition requests for offences covered by multilateral instruments to which both countries are parties.[8]

3.10 The Treaty contains a number of important safeguards and human rights protections, including mandatory grounds for refusal of extradition where a person would be subject to the death penalty or torture.[9] The Attorney-General's Department noted:

> …there are certain serious offences which do still carry the death penalty under the Vietnamese penal code, including murder, treason and terrorism offences. Statistics on the use of the death penalty in Vietnam are classified and have not been released by the Vietnamese government. … [However] Amnesty International has reported that at least five executions were carried out in 2011.[10]

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6 NIA, para 5. For the text of that Act, see '*Extradition Act 1988*'. <http://www.austlii.edu.au/au/legis/cth/consol_act/ea1988149/>, accessed 21 September 2012.

7 NIA, paras 3 and 7.

8 NIA, para 8. Prior to bringing the proposed Treaty into force, regulations will be made under the *Extradition Act 1988* declaring Vietnam to be an extradition country, and stating that the *Extradition Act 1988* applies in relation to Vietnam subject to the proposed Treaty.

9 NIA, para 9.

10 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 10.

3.11 An undertaking not to impose the death penalty is done by the issuance of a formal, written document that is communicated through official channels.[11]

3.12 The Treaty adopts the 'no evidence' standard for extradition requests. The 'no evidence' standard is included in the UN Model Extradition Treaty. Australia has over 30 bilateral extradition treaties which adopt this standard. The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of the conduct alleged against the person in respect of each offence for which extradition is sought, instead of evidence sufficient to prove each alleged offence under the laws of the requested country.[12]

Obligations

3.13 The Treaty will oblige Australia and Vietnam to consider one another's requests for the extradition of persons who are wanted for prosecution, or for the imposition or enforcement of a sentence for an extraditable offence.[13]

3.14 The Treaty provides that an extraditable offence is an offence which, at the time of the request, is punishable under the laws of both Parties by imprisonment for a maximum period of at least one year or by a more severe penalty. Where extradition is sought to enforce a sentence of imprisonment for such an offence, extradition shall be granted only if at least six months of the sentence remains to be served.[14]

3.15 The obligation to extradite is qualified by a number of internationally accepted mandatory and discretionary grounds for refusal which reflect grounds contained in the *Extradition Act 1988*. The Requested Party is obliged to refuse an extradition request in any of the following circumstances:

- where there are substantial grounds for believing that the extradition request 'has been made for the purpose of prosecuting or punishing a person on account of that person's race, ethnic origin, gender, language, religion, nationality, political opinion or other status, or that that person's position may be prejudiced for any of those reasons';

11 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 11.

12 NIA, para 10.

13 NIA, para 11.

14 NIA, para 12.

⇒ Sexual orientation has also been added to the *Extradition Act 1988* as a ground for refusal and it applies to this Treaty. The Treaty itself includes a ground of refusal in relation to 'other status' and this can include sexual orientation.[15]

- where the person whose extradition is requested would be exposed to 'double jeopardy': that is, where that person has already been acquitted, pardoned, or punished under the laws of the Requested Party or another country in respect of the offence for which extradition is sought;
- where a lapse of time has meant that the person whose extradition is requested has become immune from prosecution or punishment under the laws of the Requesting Party;
- if the offence for which extradition is requested, or any other offence for which the person may be detained or prosecuted under the proposed Treaty, carries the death penalty, and the Requesting Party has not provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out; or
- where there are substantial grounds for believing that the person would be subject to torture in the Requesting Party's territory.[16]

3.16 The Minister cannot surrender a person to another country for an offence punishable by death unless the requesting country first gives an undertaking that the person will not, one way or another, be put to death.[17]

3.17 Extradition may be refused where:

- the Requested Party regards the offence for which extradition is sought as a political offence or an offence under military law but not under the ordinary criminal law of the Requested Party;
- the offence for which extradition is requested is considered by the Requested Party as having been committed within its own jurisdiction;
- a prosecution in respect of the offence for which extradition is requested is already pending for the relevant individual in the Requested Party;
- the authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is requested;

15 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 12.

16 NIA, para 13.

17 NIA, para 14.

- the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced by an extraordinary or *ad hoc* court or tribunal in the Requesting Party; or
- the Requested Party considers that the extradition of the person would be 'unjust or oppressive, or, in exceptional cases, because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations'.[18]

3.18 The Treaty provides that either Party may refuse extradition of its own nationals. If such an extradition is not granted, the Requesting Party may ask the Requested Party to prosecute that person in lieu of extradition. If such a request is made and the laws of the Requested Party allow it, the Requested Party must submit the case to its authorities to determine whether a prosecution may be undertaken.[19]

3.19 The Treaty will not affect the Parties' obligations arising from any other multilateral instrument. This would include situations where a Party is obliged to refuse extradition under specific international treaty obligations outside of the Treaty.[20]

3.20 Particular information and documentation must be provided in support of an extradition request.[21] The Treaty provides extradition may still be granted, even if all of the relevant requirements have not been met, provided that the person consents to be extradited.[22]

3.21 In urgent cases a Party may request the provisional arrest of the person sought to be extradited before the extradition request is presented. The request for provisional arrest must be accompanied by the information listed in listed in Article 10(2) (including a statement of the existence of an arrest warrant or conviction against the person sought).[23]

3.22 Article 12 deals with the situation where an extradition request is received for the same person from two different countries. It sets out six factors that must be considered by the Requested Party in deciding to which country the person is to be extradited, including the relative seriousness of the offences for which extradition is sought if the requests relate to different offences.[24]

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18 NIA, para 15.

19 NIA, para 16.

20 NIA, para 17.

21 NIA, para 18. Para 18 provides a further detailed list of the requisite information and documentation.

22 NIA, para 19.

23 NIA, para 20.

24 NIA, para 21.

3.23 Article 13 sets out the procedure for surrendering the person to the Requesting Party once a decision to extradite has been made. For instance, it requires that the Requesting Party remove the person from the territory of the Requested Party within such reasonable period as the Requested Party may specify.[25]

3.24 Article 14 makes provision for the surrender, upon request, of all property found in the Requested Party's territory that has been acquired as a result of the offence for which extradition is requested, or may be required as evidence. Surrender of such property is subject to the law of the Requested Party and the rights of third parties.[26]

3.25 Article 15 allows extradition to be postponed to allow the Requested Party to prosecute or enforce a sentence against the person for an offence other than an offence constituted by conduct for which extradition is sought.[27]

3.26 Article 16 sets out the rule of speciality, which prohibits the Requesting Party from prosecuting or punishing an extradited person for any offence other than an offence for which extradition was granted, or any other extraditable offence provable on the same facts and punishable by the same or lesser penalty, unless the Requested Party consents.[28]

3.27 Where a person has been extradited under the proposed Treaty, the Requesting Party must not then extradite the person to a third country for any offence committed prior to the person's extradition.[29]

3.28 A person can be extradited to a Party from a third country through the territory of the other Party. In these circumstances, the Party seeking the person's extradition must request permission for transit from the other Party.[30]

3.29 The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for extradition, and shall otherwise represent the interests of the Requesting Party.[31]

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25 NIA, para 22.

26 NIA, para 23.

27 NIA, para 24.

28 NIA, para 25. Speciality only applies to offences committed before the person was surrendered, and does not apply if the person fails to leave the Requesting Party's territory within 45 days of being free to do so or voluntarily returns to the Requesting Party's territory after leaving it.

29 NIA, para 26. This applies unless the Requested Party consents, or the person fails to leave the Requesting Party's territory within 45 days of being free to do so or voluntarily returns to the Requesting Party's territory after leaving it.

30 NIA, para 27.

31 NIA, para 28.

Implementation

3.30 The Treaty is expected to be implemented by way of regulations made under the *Extradition Act 1988*. Section 11 of the Act allows regulations to be made subject to a bilateral extradition treaty between that country and Australia. This is how extradition treaties are given effect in Australia's domestic law.[32]

Costs

3.31 The Requesting Party must bear the expenses incurred in conveying the person from the Requested Party's territory. The Requested Party agrees to pay all other expenses incurred in its territory in connection with extradition proceedings arising out of an extradition request. Expenses incurred in relation to extradition requests received or made by Australia will be met from existing budgets.[33]

Other issues

Human rights

3.32 When seeking to establish extradition agreements, a country's human rights record is examined through an extensive consultation process, including with Australian diplomatic posts.[34]

3.33 Although Vietnam is signatory to the main human rights convention – the International Covenant on Civil and Political Rights – and the Vietnamese Government has also indicated a commitment to acceding to the Convention against Torture, Vietnam's human rights record is questionable. The Department of Foreign Affairs and Trade observed:

> We have noted over the longer term that there has been an improvement overall in its human rights observance. However, we would also assess that Vietnam has lost ground in some human rights areas—specifically, in the area of the protection of civil and political rights in the last couple of years. It continues to make some incremental progress in terms of economic and social rights—the two broad strands of human rights. The things that we are most seized by in terms of human rights in Vietnam is the

32 NIA, para 29.

33 NIA, paras 30-31.

34 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 12.

> imprisonment of individuals for the peaceful expression of their political and religious beliefs.[35]

3.34 The treaty does provide numerous grounds of refusal in relation to human rights protection. If the Australian Government is concerned about human rights safeguards, then those concerns can be taken into account and, in appropriate cases, extradition refused.[36]

Monitoring

3.35 In the past, the Committee has made recommendations that the Australian Government monitor those individuals extradited to those countries with whom Australia has signed extradition treaties, with regard to the United Arab Emirates and India in JSCOT Reports 91[37] and 110[38] respectively. This included Australian and non-Australian nationals. In response, the Committee heard that:

> The government did respond in the context of both the India and the United Arab Emirates reports in relation to the committee's recommendations. Extra measures have been put in place in relation to those. In the context of the committee's report on the proposed treaty with India, the government accepted the recommendation that all Australians who are subject to extradition should receive a face-to-face meeting with an Australian consular official—unless that person, of course, objects—and their welfare would continue to be monitored by our consular arrangements.
>
> In relation to non-nationals, as was outlined in the government's response to the committee's reports, there is no legal framework under the Vienna convention on consular relations, which we can use to monitor non-nationals. However, in response to the committee's concerns, the government has asked us to undertake additional measures so that, where a foreign national is extradited from Australia, the government would formally advise that

35 Mr Arthur Milton Spyrou, Director, Vietnam, Burma, Laos Section, Department of Foreign Affairs and Trade, *Committee Hansard*, 29 October 2012, p. 12.

36 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 12.

37 *Treaty on Extradition between Australia and the State of the United Arab Emirates*, Chapter 2, JSCOT Report 91.

38 *Extradition Treaty between Australia and the Republic of India*, Chapter 6, JSCOT Report 110.

> person's country of citizenship, subject to the person's consent, and that country of citizenship would monitor that person's welfare.[39]

3.36 Notwithstanding the Australian Government's welcome reforms in response to the Committee' concerns, the Committee re-iterates its recommendation that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the status of extradited persons.

Recommendation 2

The Committee recommends that new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.

Conclusion

3.37 Australia and Vietnam have a growing relationship. The Committee notes that Australia is the second most common destination for Vietnamese migrants and that people born in Vietnam represent the sixth largest migrant community in Australia. Given Australia's developing ties with Vietnam, the Committee agrees that it is timely to strengthen our bilateral international cooperation arrangements.

3.38 The Committee agrees that it is in Australia's interests that criminals cannot evade justice simply by crossing borders and this Treaty provides for an effective extradition relationship with Vietnam. It is key to ensuring that criminals who cross our respective borders are not impervious to prosecution.

3.39 The Committee also notes the provisions for refusal, including protections against the use of the death penalty, and punishing a person on account of that person's race, ethnic origin, gender, language, religion, nationality, political opinion or sexual orientation.

3.40 Given this balance, the Committee supports the Treaty and recommends that binding treaty action be taken.

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39 Ms Alex Taylor, Assistant Secretary, International Crime - Policy and Engagement Branch, International Crime Cooperation Division, Attorney-General's Department, *Committee Hansard*, 29 October 2012, p. 11.

Recommendation 3

The Committee supports the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition done at Canberra on 10 April 2012* and recommends that binding treaty action be taken.

4

Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference of 2012 (WRC-12)

Background

4.1 On 11 September 2012, the *Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference (WRC-12)* done at Geneva on 17 February 2012 (the 'Radio Regulations revision of 2012') was tabled in Parliament.

4.2 The Radio Regulations are part of the international regulatory framework of the International Telecommunications Union (the ITU).[1]

4.3 The ITU is a United Nations specialised agency with 192 members. The ITU maintains and extends international cooperation between member states for the improvement and rational use of telecommunications of all kinds.[2]

4.4 The ITU provides an international framework for the operations of the communications industries and an international forum for Australia to

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1 National Interest Analysis [2012] ATNIA 21 with attachment on consultation *Partial Revision of the 2008 Radio Regulations as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference (WRC-12), (Geneva, 17 February 2012),* [2012] ATNIF 15, (Hereafter referred to as 'NIA'), para 2.

2 Joint Standing Committee on Treaties, *Report 119*, p 3.

pursue Australian and regional perspectives on radio communications, broadcasting and telecommunications.[3]

4.5 Within the ITU, Australia promotes the development of international standards that support the development of efficient, inter-operable telecommunications networks through the standardisation of communications systems and the harmonisation of regulatory arrangements.[4]

4.6 The work of the ITU is technically complicated and not widely understood. However, its work does materially improve telecommunication services for the general public.[5]

4.7 The ITU funds its activities through contributions from member states. Unlike other United Nations agencies, member states decide their own level of contribution.[6]

Radiofrequency regulation

4.8 Radiofrequencies constitute part of the spectrum of electromagnetic energy, the best known part of which is the spectrum of visible light. Radiofrequencies are considered to be those electromagnetic frequencies with the longest wavelength and the least energy.[7] The radiofrequency spectrum is the span of electromagnetic frequencies used in communications systems to convey information.[8]

4.9 The radiofrequency spectrum is considered by the ITU to be a limited natural resource because the transmission of information through radiocommunications requires that the particular frequency used to transmit the information be free of other transmissions that may interfere with the transmission.[9]

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3 Joint Standing Committee on Treaties, *Report 119*, p 3.

4 NIA, para 7.

5 International Telecommunications Union (ITU), *All About the Technology*, <http://www.itu.int/osg/spu/ni/3G/technology/index.html#Cellular Standards for the Third Generation>, viewed on 1 November 2012.

6 Joint Standing Committee on Treaties, *Report 119*, p 4.

7 The Conversation, *What is the electromagnetic spectrum*? <http://theconversation.edu.au/explainer-what-is-the-electromagnetic-spectrum-8046>,viewed on 5 November 2012.

8 Australian Communications and Media Authority, *Radiofrequency spectrum planning*, <http://www.acma.gov.au/WEB/STANDARD/pc=PC_2616>, viewed on 5 November 2012.

9 Australian Communications and Media Authority, *Radiofrequency spectrum planning*, <http://www.acma.gov.au/WEB/STANDARD/pc=PC_2616>, viewed on 5 November 2012.

4.10 This limited resource needs to be shared amongst a growing number of services such as fixed, mobile, broadcasting, amateur, space research, emergency telecommunications, meteorology, global positioning systems, environmental monitoring, and communication services.[10]

4.11 The Radio Regulations manage access to the radiofrequency spectrum through international agreement on access to the radiofrequency spectrum and satellite orbits.[11]

4.12 The ITU organises World Radiocommunication Conferences every four years which are empowered to amend the Radio Regulations. The Conference that is the subject of this Chapter resulted in a partial amendment of the Radio Regulations.[12]

The Radio Regulations revision of 2012

4.13 The Radio Regulations are binding on the member states of the ITU.[13]

4.14 The Radio Regulations revision of 2012 will come into effect on 1 January 2013 for all member states who have notified the ITU of their consent by that date. For those states that have not notified the ITU of their consent, the Radio Regulations revision of 2012 will be deemed to apply from 1 January 2013 until such time as a document of consent is received by the ITU from that member state.[14]

4.15 In effect, then, while a member state may notify the ITU of reservations and declarations in relation to the amendments, there is no way for a member state to avoid being bound by the Radio Regulations revision of 2012 once those revisions were agreed in February 2012.[15]

4.16 The amendments to the Radio Regulations agreed to in February 2012 include:

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10 ITU, *Welcome to ITU Radiocommunications* < http://www.itu.int/ITU-R/index.asp?category=information&rlink=itur-welcome&lang=en>, viewed on 1 November 2012.

11 ITU, *Welcome to ITU Radiocommunications* < http://www.itu.int/ITU-R/index.asp?category=information&rlink=itur-welcome&lang=en>, viewed on 1 November 2012.

12 Mr Andrew Maurer, Assistant Secretary, Spectrum, Treaties and Internet Governance Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 29 October 2012, p. 1.

13 NIA, para 2.

14 NIA, para 3.

15 NIA, para 6; and ITU, *2008 Radio Regulations, Article 59.*

- the revision of frequencies and channelling arrangements for maritime mobile services, allowing new digital maritime communications technologies to be used;[16]
- the allocation of spectrum to support the safe operation of unmanned aircraft systems;[17]
- new spectrum allocations to radiolocation services, including: oceanographic radar for measurement of coastal sea surface conditions to support environmental, oceanographic, meteorological, climatological, maritime and disaster mitigation operations; and new defence radar systems that require increased bandwidth for improved resolution and range accuracy;[18]
- the enhancement of Earth observation systems that provide critical data relating to weather and climate forecasts, disaster prediction, and natural resources through a new spectrum allocation for passive lightning detection, and an extension of the spectrum allocated to existing non-geostationary meteorological satellite to allow increased data transmission in the next generation of satellites;[19]
- new spectrum allocations to space research to support Earth-to-space communications for lunar exploration missions;[20]
- an allocation of spectrum globally for radio determination satellites (that is, global positioning system satellites) to accommodate the new Galileo satellite navigation system and improve existing global positioning systems;[21]
- a new allocation of spectrum to amateur users to allow for emergency communications and to provide an opportunity for research and development of new communication modes;[22] and
- an improvement to the international coordination of satellite networks through:
  - ⇒ improving the international notification process for new satellite deployments, and to provide additional security of tenure for notified satellite networks;

16 NIA, para 15.
17 NIA, para 17.
18 NIA, para 19.
19 NIA, para 20
20 NIA, para 21.
21 NIA, para 22. "Galileo is Europe's own global navigation satellite system, providing a highly accurate, guaranteed global positioning service under civilian control. It is inter-operable with GPS and Glonass, the two other global satellite navigation systems." <http://www.esa.int/esaNA/galileo.html>, accessed 19 September 2012.
22 NIA, para 23.

- ⇒ consolidating spectrum required for the coordination of satellites in two major satellite frequency bands;
- ⇒ improving the interference and coordination dispute resolution process; and
- ⇒ permitting the use of an alternative reference radiation pattern for Earth station antennas, which may result in the more efficient use of geostationary orbits.[23]

Australia's declarations and reservation

4.17 The ITU Constitution permits member states to make reservations at the time revisions to the Radio Regulations are agreed, and to maintain such reservations when notifying the ITU of its consent to be bound.[24]

4.18 Reservations exclude or modify the legal effect of certain provisions of the treaty in their application to a member state.[25]

4.19 It is also accepted international practice for member states to be able to make declarations at the time of signing or ratifying a treaty. A declaration differs from a reservation in that it does not purport to exclude or modify the legal effect of the treaty, but merely sets forth the State's interpretation of the treaty.[26]

4.20 Given that revisions to the Radio Regulations are binding regardless of whether a member state consents or not, the use of declarations and reservations is relatively common. A number of member states made reservations and declarations to the Radio Regulations revision of 2012.[27]

4.21 Australia made two such statements. The first permits Australia to take actions in its national interest if another state violates the regulations to Australia's detriment. In addition, the reservation keeps open the option for Australia to lodge further declarations or reservations at the time it ratifies the Radio Regulations revision of 2012. The reservation states:

> In signing the Final Acts of the World Radio-communication Conference (Geneva, 2012), the delegation of Australia reserves for its Government the right to take any measures it might deem necessary to safeguard its interests if another Member State of the International Telecommunication Union in any way fails to respect the conditions specified in the Final Acts or if the reservations made by any Member State should be prejudicial to the operation

23 NIA, para 24.
24 NIA, para 11.
25 NIA, para 11.
26 NIA, para 11.
27 NIA, para 11.

> of radio-communication services in Australia or its full sovereign rights.
>
> The delegation of Australia further declares that it reserves for its Government the right to make declarations or reservations when depositing its instrument of ratification for amendments to the Radio Regulations adopted at this World Radio-communication Conference (Geneva, 2012).[28]

4.22 The second reservation, to which there are a number of signatories,[29] counters claims by some equatorial countries, such as Columbia, to the ownership of geostationary satellite orbit slots. This statement has been made at all WRC meetings since 1995.[30] The second reservation states:

> The delegations of the above-mentioned States, referring to the declaration made by the Republic of Colombia (No. 34), inasmuch as these and any similar statements refer to the Bogotá Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, or to any related claims, consider that the claims in question cannot be recognized by this conference.
>
> The above-mentioned delegations also wish to state that the reference in Article 44 of the Constitution to the "geographical situation of particular countries" does not imply recognition of a claim to any preferential rights to the geostationary-satellite orbit.[31]

Reasons for Australia to take the proposed treaty action

4.23 As noted earlier, amendments to the Radio Regulations bind member states of the ITU regardless of whether a member state consents to be so bound or not, so, arguments relating to the advantages of ratification for

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28 NIA, para 12.

29 The Federal Republic of Germany, Australia, Austria, Belgium, Canada, the Republic of Croatia, Denmark, the Republic of Estonia, the United States of America, Finland, France, Georgia, Greece, Hungary, Ireland, Iceland, Italy, Japan, The Former Yugoslav Republic of Macedonia, the Principality of Liechtenstein, Luxembourg, Malta, the Republic of Moldova, Norway, New Zealand, the Kingdom of the Netherlands, the Republic of Poland, Portugal, the Slovak Republic, the Czech Republic, Romania, the United Kingdom of Great Britain and Northern Ireland, the Republic of Slovenia, Sweden, the Confederation of Switzerland and Turkey.

30 Mr Neil Meaney, Manager, International Regulatory Section, Australian Communications and Media Authority, *Committee Hansard*, 29 October 2012, p. 3.

31 NIA, para 12.

Australia are limited to the impact a failure to notify Australia's acceptance of the amendments will have on Australia's reputation in the ITU context.

4.24 According to the Department of Broadband, Communications and the Digital Economy:

> The proposed treaty action would align Australia with the rest of the world in its regulation of the radiofrequency spectrum and would allow for continued international compatibility. Australia would retain its sovereign right to control transmissions within and into its territory and to protect Australian users from interference from foreign systems. Consenting to be bound by the revisions would make possible the introduction of new communication technologies, improved end user efficiencies, enhanced public safety and greater access to wireless networking and broadband data services. It would also continue Australia's good standing in the ITU and enable Australia to maintain its position that the geographical situation of particular countries does not enable them to claim any preferential rights to the geostationary-satellite orbit.[32]

4.25 The Department points out that Australia's failure to notify its acceptance of the Radio Regulations revision of 2012:

> …may have a negative effect on Australia's standing within the ITU and on Australia's negotiating position at future reviews of the Radio Regulations.[33]

4.26 In contrast, notifying acceptance would:

> …maintain Australia's good standing in the ITU and place Australia's administration of the radio frequency spectrum in line with the rest of the world.[34]

4.27 The Department further argues that Australia has been a long term supporter of the ITU and its regulatory framework. Australia has been a member of the ITU and its predecessor organisations since federation.[35]

32 NIA, para 4.
33 NIA, para 6.
34 NIA, para 6.
35 NIA, para 7.

Implementation

4.28 Australia's obligations under the Radio Regulations are implemented through the Australian Radiofrequency Spectrum Plan, which is prepared by the Australian Communications and Media Authority in accordance with Sections 30 and 34 of the *Radiocommunications Act 1992*. The existing Plan will be updated by the Authority to take account of the Radio Regulations revision of 2012.[36]

Costs

4.29 According to the Department of Broadband, Communication and the Digital Economy, there are no identifiable direct costs to Commonwealth, State or Territory Governments arising from the proposed treaty action.[37]

Conclusion

4.30 The binding nature of the Radio Regulations revision of 2012 means that a recommendation whether or not to take binding treaty action in relation to this treaty can have no impact on whether the amendments are implemented or not.

4.31 However, there are good reasons for the Committee to make a supportive recommendation.

4.32 The Department of Broadband, Communication and the Digital Economy has argued persuasively that a failure to ratify the Radio Regulations revision of 2012 will have a harmful impact on Australia's position within the ITU.

4.33 In the Committee's assessment, the revisions are sound and represent a stable regulatory environment for Australians to capitalise on technological improvements in communications.

4.34 In addition, the Committee notes the consultations with relevant parties undertaken by the Department prior to the Government's decision to support the Radio Regulations revision of 2012 indicated broad support for the amendments.[38]

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36 Mr Andrew Maurer, Assistant Secretary, Spectrum, Treaties and Internet Governance Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 29 October 2012, p. 2.

37 NIA, para 26.

38 Mr Andrew Maurer, Assistant Secretary, Spectrum, Treaties and Internet Governance Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 29 October 2012, p. 1.

4.35 Consequently, the Committee recommends that Australia notify the ITU of its support for the agreement.

Recommendation 4

The Committee supports the *Partial Revision of the 2008 Radio Regulations, as incorporated in the International Telecommunication Union Final Acts of the World Radiocommunication Conference (WRC-12)* done at Geneva on 17 February 2012 and recommends that binding treaty action be taken.

5

Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011

Background

5.1 On 18 September 2012, the *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest* done at Madrid on 17 November 2011 (the 'Agreement') was tabled in the Commonwealth Parliament.

5.2 The proposed Agreement sets out security procedures and practices for the exchange and protection of classified information between Australia and Spain, and for visits to either party that require access to such information or restricted areas or facilities where classified information is held.[1]

5.3 Australia already has a number of similar legally binding agreements related to the protection of Classified Information.[2]

5.4 The proposed Agreement will replace a less-than-treaty status Arrangement between the National Security Authority of the Kingdom of

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1 National Interest Analysis [2012] ATNIA 15 with attachment on consultation *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011* [2011] ATNIF 29 (Hereafter referred to as 'NIA'), para 6.

2 Australia has also concluded agreements with Germany, Republic of Korea, NATO, Denmark, New Zealand, Singapore, South Africa, United States of America, Sweden, France, Canada and the European Union. See Joint Standing Committee on Treaties, *Report 115*, p. 15.

Spain and the Defence Security Authority of the Department of Defence of Australia for the Mutual Protection of Classified Information of Defence Interest. This Arrangement was signed on 19 January 2006 as an interim measure until the proposed Agreement enters into force.[3]

5.5 Less-than-treaty status arrangements are widely used. They differ from treaties in that their content is usually confidential and they are not legally binding.[4]

5.6 The Agreement was negotiated at the request of Spain because of a Spanish legal requirement that all agreements of this sort entered into by Spain be treaty level status agreements.[5]

5.7 Australia and Spain have a number of defence interests in common. The Department of Defence identified the following projects in particular as examples where classified information would need to be exchanged:

- the $8 billion Air Warfare Destroyer project;
- the $3 billion amphibious ships project; and
- the nearly $1.5 billion air-to-air refueller project, now part of Airbus military.[6]

5.8 The Agreement is specifically limited to defence information, and will not cover information exchange relating to criminal or terrorist matters.[7]

Protection of classified information

5.9 Classified information is defined in Article 1(2) of the proposed Agreement as:

> …all information and material of Defence interest which requires protection in the interests of national security and which is subject to a national security classification of the Originating Party. The information may be in oral, visual, electronic or documentary

3 NIA, para 4.

4 Mr Francis Colley, Chief Security Officer, Defence Security Authority, Department of Defence, *Committee Hansard*, 29 October 2012, p. 14.

5 Mr Francis Colley, Chief Security Officer, Defence Security Authority, Department of Defence, *Committee Hansard*, 29 October 2012, p. 14.

6 NIA, para 5; and the Hon. Stephen Smith, MP, Minister for Defence, *Speech: Asia and International Security: An Australian Perspective*, 15 February 2010, <http://www.foreignminister.gov.au/speeches/2010/100215_madrid.html>, accessed 21 September 2012.

7 NIA, para 9.

form, or in the form of material including equipment or technology.[8]

5.10 Like previous agreements of this sort, the Agreement requires each party to treat the other party's classified information in accordance with an equivalent agreed standard.[9]

5.11 Spain and Australia have examined each other's security policies and standards, and are each satisfied these obligations can be met by the other.[10]

5.12 To ensure this occurs, the following steps must be adhered to when classified information is being exchanged:

- the originating country must ensure that the information has been given a security classification in accordance with the originating country's classification scheme;[11]
- the receiving country must then assign a security classification that is not lower than the classification given by the originating country;[12]
- the receiving country shall accord the transferred information a standard of physical and legal protection no less stringent than that which it accords its own classified information of a corresponding classification;[13]
- the transferred information is not to be used for any purpose other than that for which it was provided, nor is it to be disclosed to any third party without prior written consent of the originating country;[14]
- the receiving country is obliged to take all appropriate legal steps to prevent disclosure of the information, for example, as a result of a freedom of information request;[15]

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8 NIA, para 5.

9 NIA, para 8.

10 NIA, para 8.

11 *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011* [2011] ATNIF 29 (Hereafter referred to as the Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information), Article 4.

12 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 4.

13 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

14 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

15 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

5.13 The Agreement contains a number of compliance mechanisms to ensure that the exchanged information is being protected appropriately.

5.14 For example, on request, each party must provide the other with information concerning security standards, practices and procedures for safeguarding the exchanged information. Each party must inform the other party in writing of any changes that affect the manner in which exchanged information is protected.[16]

5.15 Exchanged information will be transferred in accordance with the national laws, security regulations and procedures of the transmitting country and through government-to-government channels, unless otherwise mutually agreed.[17]

5.16 The Agreement requires each party to ensure that all establishments, facilities and organisations within its territory protect the exchanged information in accordance with the Agreement, including carrying out security inspections where necessary.[18]

5.17 Access to the exchanged information will be restricted to citizens of either party who have been granted a personnel security clearance to an appropriate level, and who have a need-to-know. The Agreement will also permit parliamentary representatives to continue to access classified information provided current information access practices are applied.[19]

5.18 If a breach of security is believed to have occurred, the parties are required to report the breach to the other party as soon as possible. Breaches will be investigated immediately by the receiving country, and the originating country will be informed of the findings and any corrective action taken.[20]

5.19 Once it is no longer required for its original designated purpose, the exchanged information must be destroyed or returned to the originating country.[21]

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16 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 5.

17 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 9.

18 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 6.

19 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 8.

20 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 12.

21 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 7.

5.20 Disputes over the Agreement are to be resolved through consultation and negotiation. There is no right to access a third party dispute settlement process.[22]

Reasons for Australia to take the proposed treaty action

5.21 As has been already noted, this treaty has been negotiated at Spain's request on the basis that Spanish law requires that agreements of this sort be of treaty level status.[23] Consequently, ratification of the treaty is important to Australia's ongoing good defence relations with Spain. In addition, Australia and Spain share common billion dollar defence projects, the success of which may be impeded by a failure to reach an agreement on the exchange of classified information.

5.22 Also:

> The proposed Agreement ensures that Classified Information which the Government of Australia passes to the Kingdom of Spain will be afforded the required standard of protection. Likewise the proposed Agreement will give the Kingdom of Spain confidence that the Government of Australia will protect its Classified Information.[24]

Implementation

5.23 No changes to domestic laws or policy are required to implement the proposed Agreement. The proposed Agreement can be implemented in accordance with the Australian Government Protective Security Policy Framework, which sets out procedures for the protection of classified information.[25]

5.24 The new Protective Security Policy Framework (PSPF) includes a revision of the Government's security classification system. The revised system reduces the number of classifications from six to four: 'Protected', 'Confidential', 'Secret' and 'Top Secret'.[26]

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22 *Agreement between Australia and Spain for the Mutual Protection of Classified Defence Information*, Article 13.

23 Mr Francis Colley, Chief Security Officer, Defence Security Authority, Department of Defence, *Committee Hansard*, 29 October 2012, p. 14.

24 NIA, para 7.

25 NIA, para 10 -12.

26 NIA, para 11.

5.25 The terms of the proposed Agreement were negotiated prior to the announcement of the new PSPF. The proposed Agreement (at Article 4) aligns with the Department of Defence's current classification system and this is necessary until the Department makes the transition to the new classification system in August 2013.[27]

5.26 The National Security Authority of the Kingdom of Spain was kept informed of the changes during the negotiation of the proposed Agreement. When given the option of how best to accommodate the anticipated reform, Spain specifically requested that the proposed Agreement proceed with the existing classifications and that any necessary changes be made via the treaty amendment process at a later date.[28]

5.27 The proposed Agreement will not result in any change to the existing roles of the Commonwealth Government or the State and Territory Governments.[29]

Costs

5.28 Each Party shall bear its own costs incurred in the implementation of the proposed Agreement. There are no anticipated costs to the Australian Government in complying with the proposed Agreement.[30]

Conclusion

5.29 The Committee believes that the existence of billion dollar defence contracts between Australia and Spain is sufficient cause to support the Agreement. The Committee has examined agreements of this sort in the past and is of the view that they provide a sound basis for the exchange of classified information.

27 NIA, para 11.
28 NIA, para 12.
29 NIA, para 12.
30 NIA, para 13.

Recommendation 5

The Committee supports the *Agreement between the Government of Australia and the Kingdom of Spain for the Mutual Protection of Classified Information of Defence Interest done at Madrid on 17 November 2011* and recommends that binding treaty action be taken.

6

Three Minor Treaty Actions

Introduction

6.1 Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest.

6.2 Minor treaty actions are presented to the Joint Standing Committee on Treaties with a one-page explanatory statement and are listed on the Committee's website. The Committee has the discretion to formally inquire into these treaty actions or indicate its acceptance of them without a formal inquiry and report.

Minor treaty actions

6.3 There are three minor treaty actions reviewed in this chapter. The Committee determined not to hold a formal inquiry into these treaty actions and agreed that binding treaty action may be taken for all three.

Amendments to the Schedule of the International Convention on the Regulation of Whaling.

6.4 The proposed minor treaty action extends the operation of the zero catch limit on commercial whaling established under the *Schedule to the International Convention for the Regulation of Whaling* for another year. It also extends Aboriginal Subsistence Whaling quotas allocated to aboriginal communities in the Russian Federation, the United States of America (USA) and St. Vincent and the Grenadines under the Schedule for a further six year-period (until 2018).

6.5 Australia does not propose to lodge an objection to these amendments and no active binding treaty action is required to be taken by Australia. The

amendments will not alter Australia's obligations under the Convention and in fact extend the life of the moratorium, which Australia strongly supports.

MARPOL Resolution MEPC.216(63): Regional arrangements for port reception facilities under MARPOL Annexes I, II, IV and V

6.6 The treaty matter proposed will amend international regulations for the prevention of pollution from ships (MARPOL Annex I, II, IV and V) relating to the provision of reception facilities for waste generated on board ships.

6.7 These Annexes place obligations on port States to provide adequate reception facilities in all ports and terminals for waste generated on board ships. The obligation to provide adequate reception facilities has been recognised by the International Maritime Organization as a barrier to some States' ratification of MARPOL, particularly small island developing states.

6.8 In March 2010, the MEPC considered a proposal to allow small island developing states to meet their obligations to provide waste reception facilities through regional arrangements, by entering into a Regional Reception Facilities Plan (RRFP). MEPC adopted the amendments in March 2012. The amendments to the Annexes will not impose any new obligations on Australia or require it to enter into a RRFP.

6.9 It is recommended that Australia support the amendments to assist our neighbours, many of which are small island developing states. It is expected that the amendments will assist these states in compliance with waste reception facilities provisions contained in MARPOL.

MARPOL Resolution MEPC.217(63): Regional arrangements for port reception facilities under MARPOL Annex VI and Certification of marine diesel engines fitted with Selective Catalytic Reduction systems under the NOx Technical Code 2008

6.10 The treaty matter proposed will amend international regulations for the prevention of air pollution from ships (MARPOL Annex VI relating to the provision of reception facilities for waste generated on board ships and the NOx Technical Code 2008 relating to certification of marine diesel engines fitted with Selective Catalytic Reduction systems).

6.11 The "NO_x Technical Code 2008" (NTC) is the *Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines*, adopted by the International Maritime Organization in 2008.

6.12 The amendments will result in a procedure for certain engines where their size, construction and delivery schedule precludes test-bed testing, whereby such engines may instead be subject to an onboard test.

6.13 The amendments to the NTC would not impose any additional costs on Australian shipping. This is because the amendments provide for alternate test methods for NOx emissions from ship engines but do not alter the standards that ships are required to meet for certification.

6.14 It is recommended that Australia support the amendments to assist our neighbours, many of which are small island developing states. It is expected that the amendments will assist these states in compliance with NTC provisions contained in MARPOL.

Kelvin Thomson MP

Chair

A

Appendix A – Submissions

Treaty tabled on 21 August 2012

1 Australian Customs and Border Protection Service

Treaties tabled on 11 September 2012

1 CONFIDENTIAL

2 Attorney-General's Department

B

Appendix B – Witnesses

Monday, 29 October 2012 - Canberra

Attorney-General's Department

Ms Louise Cairns, Principal Legal Officer, Transnational Crime and Treaties Section, International Crime – Policy and Engagement Branch, International Crime Cooperation Division

Ms Alexandra Taylor, Assistant Secretary, International Crime – Policy and Engagement Branch, International Crime Cooperation Division

Australian Communications and Media Authority

Mrs Maureen Cahill, General Manager, Communications and Infrastructure Division

Dr Andrew Kerans, Executive Manager, Spectrum Infrastructure Branch, Communications Infrastructure Division

Mr Neil Meaney, Manager, International Regulatory Section, Spectrum Infrastructure Branch, Communications Infrastructure Division

Australian Customs and Border Protection Service

Mr Andrew Hudson, Manager, International Engagement, Directorate of Strategy Engagement and Counter Terrorism, Border Protection Command

Rear Admiral David Johnston, Commander Border Protection Command (COMBPC), Border Protection Command

Department of Broadband, Communications and the Digital Economy

Dr Jason Ashurst, Director, Radiocommunications Policy, Spectrum, Treaties and Internet Governance Branch, Digital Services Division

Mr Andrew Maurer, Assistant Secretary, Digital Economy Services Division, Spectrum and Wireless

Department of Defence

Mr Chris Birrer, Assistant Secretary, Major Powers and Global Interests, International Policy Division

Mr Patrick Burke, Acting Assistant Secretary, Security Policy & Plans, Defence Security Authority

Mr Francis Colley, Chief Security Officer, Defence Security Authority

Mr Kerry Hempenstall, Senior Legal Officer, Directorate of International Government Agreements and Arrangements, Defence Legal

Department of Foreign Affairs and Trade

Mr Rob Krauss, Executive Officer, Regional Issues and Defence Strategy Section, Strategic Issues and Intelligence Branch, International Security Division

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Mr Arthur Spyrou, Director, Vietnam, Burma, Laos Section

Mrs Paula Watt, Director, Counter Terrorism Policy Section, Counter Terrorism Branch, International Security Division