IV. Jurisdiction

*Tim Reilly**

Jurisdiction—Abduction of Gillespie children

In June 1992 the two children of an Australian citizen, Mrs Jacqueline Gillespie were removed from Australia to Malaysia by their natural father, Raja Bahrin Shah, a Malaysian prince, in breach of an order of the Family Court of Australia.

On 10 May 1993 the Minister for Foreign Affairs, Senator Evans, said in the course of a ministerial statement on foreign affairs aspects of the Gillespie matter (Senate, *Debates*, vol 158 (1993), pp 349–54):

> A further question has been asked about our contacts with the Malaysian Government on questions of access; namely, what attempts has the Minister or his department made to obtain access for Mrs Gillespie to her children? I should say at the outset that there are two types of access which have been discussed in the context of this case: first, the question of parental access; secondly, consular access. As to parental access, I should make it clear that the Government has no role in the matter of access for Mrs Gillespie to her children. Parental custody and access are necessarily matters for the parents and in particular the courts of the two countries. Nevertheless, notwithstanding that limitation on our capacity to have any actual role, both I and my department have repeatedly registered with the Malaysian Government Mrs Gillespie's interest in securing access to her children. We have asked in particular that no governmental impediment be placed in the way of access by her. I have written to Foreign Minister Abdullah with this request, as well as raising it with him personally, and I have also raised it with the Malaysian High Commissioner in Canberra.
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> As to consular access, that is a government role, but the Government's role is limited to what we can do in the particular context; that is, in seeking access by consular officials to determine the children's welfare. We have no right of consular access because the children are not in the custody or control of the Malaysian Government. The decision rests with the children's natural father, Raja Kamarul Bahrin Shah, with whom the children currently reside, and therein has been the problem. I made all this very clear in the Senate estimates hearings last September...
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> Mrs Gillespie first sought a personal interview with me in her letter of 16 September 1992. She said then that she had had no personal contact with officials since her children had first been taken and that she had certain points relating to the children's welfare that she wanted to raise with me. I responded to that request in a detailed letter of 17 September and, in the light of many suggestions that have been made that I have never properly explained the

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Government's position to Mrs Gillespie, I seek leave to table and incorporate the text of that particular letter.

The tabled letter reads as follows:

Dear Mrs Gillespie,

Thank you for your letter to me of 16 September about the abduction of your children to Malaysia. I do sympathise with you enormously in your distress over this whole unhappy affair.

In your letter you request a personal interview with me to discuss possible government action, noting that you have had no direct personal contact with the Department of Foreign Affairs and Trade since 26 July 1992. You will be aware, I assume, that your lawyers have had frequent and substantive discussions with the Department since that date.

With the state of my program, including departure overseas again next week, I am afraid that it will be very difficult for me to find an opportunity to meet you. But I can make in this letter all the points I would face to face about the possibility of consular access to the children, of access by yourself to the children and of extradition of the father to Australia.

Consular access in cases such as yours is not, as a matter of international law and practice, something that is granted as of right. It is a matter of discretion for the government in question, and at the end of the day that discretion is subject to the willingness of the parent in possession of the children to grant access. Regrettably, we seem to have pretty well exhausted that process. It seems that while there has been no roadblock placed by the Malaysian Government, the father, Raja Bahrin, has not so far been prepared to agree to access to the children for Consular officers from our High Commission. You will be aware that I made personal representations to the Malaysian Foreign Minister, requesting him to use his good offices in gaining consular access, and that I have also personally raised the matter with the Malaysian High Commissioner here and—yesterday—with a visiting Malaysian Parliamentary delegation. The Malaysian Foreign Minister has written to me advising that our request has been conveyed to Raja Bahrin. The Australian High Commission in Kuala Lumpur has also been active in trying to obtain consular access, through representations to the relevant Malaysian authorities and directly to Raja Bahrin.

As for parental access by yourself to the children, we have, as you know, also made representations asking that the Malaysian Government place no impediment in the way of such access, and I have heard nothing in reply to suggest that any governmental impediment will be placed in your way. Again, we have no right under international law to demand parental access. Essentially such access is a matter of private law for the courts in the country in question to determine, and I understand that you are considering pursuing that particular legal course.

So far as the question of extradition of your former husband is concerned, I have been advised by the Attorney-General, on checking with him yesterday, that while he and his Department have given consideration to the difficult legal questions that would need to be addressed in any such proceeding, there is no formal extradition application presently before him, and unless and until such an application is pursued by the police authorities, the issue will remain hypothetical. May I also repeat in this context the point that I and other Ministers have repeatedly made: unhappily, no such proceeding would do

anything to bring your children back to Australia, nor would it appear to assist in any way the prospects of your securing access to your children in Malaysia.

Overall, the position is simply that there are a number of legal and other constraints on what governments can do in these sad circumstances, which unfortunately arise all too frequently (there have been over 80 recorded abductions from Australia in the past two years). I believe that the Government has acted in your case to the fullest extent open to it within these constraints.

The abduction of your children has certainly drawn attention to the inadequacy of existing arrangements between Australia and most of our regional neighbours to ensure that orders of the Family Court of Australia are recognised in those countries (and vice versa). Wider adherence to the Hague Convention on Civil Aspects of International Child Abduction would reduce the problem. I have agreed with the Minister for Justice, Senator Tate (who has portfolio responsibility for the Convention) to take action to encourage relevant countries to become parties to the Convention.

I can only say again that I am deeply sorry that the situation developed as it did, and that we are as a Government simply unable to do more. I hope very much that you do succeed in your effort to gain access to your children, and that you find them well and happy when you do.

Yours sincerely

GARETH EVANS

An official request for the extradition of Raja Bahrin Shah from Malaysia to Australia was made on 16 September 1993. The request was rejected by the Government of Malaysia in a third person note of 3 November 1993, without giving reasons. On 3 November 1993 the Attorney-General, Mr Lavarch issued a new release which read in part:

I understand from media reports that the Malaysian government has decided to refuse the request by the Australian government for the extradition of Raja Bahrin Shah...

I fully sympathise with Jacqueline Gillespie's plight in her continuing separation from her children.

However even if the request had been successful, it would not of itself have reunited her with her children.

In the absence of Hague Convention arrangements with Malaysia for the return of the children removed from Australia in breach of Family Court orders, unfortunately there appears to be no legal avenues open to the Australian government to resolve this matter.

Jurisdiction—Extradition—"No evidence" requirement

On 10 May 1993 the Attorney-General, Mr Lavarch, answered a question without notice from Mr Campbell (ALP, Kalgoorlie) concerning extradition treaties. The question and answer were as follows (House of Representatives, *Debates*, vol 188 (1993), p 400):

(Q) I address my question to the Attorney-General. I draw his attention to the extradition treaty that Australia has signed with many countries. He will be aware that under this treaty there is no requirement for the requesting nation to provide a *prima facie* case and, indeed, where an uncontestable offence is

debatable, the courts do not have the facilities to hear it. In the case of the Orionia several years ago which led to a massive injustice, and where an Australian citizen is involved, it could lead to a diminution of our sovereignty. Will the Attorney-General undertake to review the legislation with a view to amending the deficiency I have outlined?

(A) I believe the honourable member is referring to the "no evidence" provision of Australian extradition laws, and that is normally the basis with which Australia has negotiated particular treaties with countries. It is a matter which honourable members can have some concern about. I know the honourable member has expressed concern in the particular case he mentions. I know it is also a matter of concern in the case of Stanton. The acting Attorney-General, now Minister for Justice, Mr Kerr, made a decision on it a few weeks ago. Comments were made by Mr Justice Spender in Queensland in relation to the sort of case which was being put forward there, notwithstanding that the question which was being asked did not require that a *prima facie* case be submitted.

I have had preliminary discussions with the honourable member for Banks, who, I understand, is likely to become the Chair of the House of Representatives Legal and Constitutional Affairs Committee, as to whether this particular provision regarding extradition law may be looked at and whether we should look again at the question of no evidence. In relation to the specific case which the honourable member mentions, I have to confess that I have not been briefed on the details, but I undertake to get back to him.

Jurisdiction—Child sex tourism offences—Australian legislation

On 4 November 1993 the Minister for Justice, Duncan Kerr, issued a media release concerning the Australian Government's proposed amendments to the Crimes Act 1914 to confront the problem of Australians exploiting children for sex while overseas, which read in part:

The proposed amendments to the Crimes Act are:

- prescribed sexual offences against a child under the age of 16 years outside Australia, and
- aggravated sexual offences against a child under 12 years outside Australia,

Proof of a valid marriage between the accused and the child will provide a defence to both offences.

The amendments will include an offence of inciting, organising or profiting from child sex tourism. This offence will attract the confiscation and forfeiture provisions of the Proceeds of Crime Act 1987, so that any tainted property (property used in the commission of the offence or proceeds of the offence) of a natural person or a commercial enterprise convicted of the offence will be forfeited to the Commonwealth...

"These recommendations and amendments represent Australia's response to community concern about the behaviour of some Australians abroad since Australia ratified the UN Convention on the Rights of the Child on 17 December 1990. At the time we believed that domestic legislation was adequate to fulfil Australia's obligations but since then Australian tourists have been identified as significant sexual abusers of children overseas, particularly in Asia.

"Children's rights are fundamental and a major focus of the international agenda. The recent World Conference on Human Rights in Vienna highlighted the need to develop effective and independent international machinery to ensure that abuses of children's rights are identified and that tangible measures are taken to remedy those abuses.

"The amendments and associated measures will send a powerful message to those who engage in these abhorrent practices that it is no longer safe to do so", the Minister said.

Jurisdiction—International transfer of prisoners

Senator Colston (ALP, Queensland) asked a series of questions in the Senate concerning Australians in foreign prisons. On 13 May 1993 he asked the Minister representing the Minister for Justice, Senator Bolkus, the following question without notice (Senate, *Debates*, vol 158 (1993), pp 559–60):

(Q) My question, which is directed to the Minister representing the Minister for Justice, relates to Australians who are serving sentences in foreign prisons. Can the Minister advise whether there are any arrangements with other countries to allow prisoners to return to Australia and serve their sentences here? If not, is the Government investigating this possibility? If so, can any progress be expected in the near future?

(A) At present, there are no arrangements with any other country to allow for the scheme that Senator Colston has asked about, whereby prisoners who are serving sentences in foreign prisons can return to Australia to serve their sentences here. However, we are pursuing this concept in the forum of the Standing Committee of Attorneys-General. In July 1992 the committee agreed in principle that we should work towards a regime of the nature that Senator Colston has referred to. However, before we can participate in such a scheme, a range of legislative and administrative steps need to be taken at both State and Federal level. To this end, the Committee of Attorneys-General has set up a working group in order to devise the necessary legislative and administrative framework.

That group held its first meeting in December 1992. In order to facilitate discussions, the Commonwealth prepared a discussion paper proposing that, as a first step, Australia should seek to be a party to one of the existing international schemes—the Council of Europe convention on the international transfer of sentenced persons. It may then be necessary to look at how we can enter into other bilateral arrangements with other countries.

The Commonwealth's position is premised on the need for the full participation of all States and Territories. It is also noted in this process that there is no such agreement between all the jurisdictions. In terms of the next step, it is now up to the States and Territories to state their positions on the scheme so that the issue can be addressed at the next attorneys meeting in June 1993.

On 18 August 1993, Senator Colston asked a further question without notice on this subject to Senator Bolkus as the Minister representing the Attorney-General. Question and answer were as follows (Senate, *Debates*, vol 159 (1993), pp 196–97):

(Q) I direct my question to the Minister representing the Attorney-General. Can the Minister advise what progress, if any, was made at the latest meeting of the

Standing Committee of Attorneys-General in relation to a transfer to Australia of Australian citizens who are held in overseas prisons? Can the Minister also advise whether there are any prospects of a transfer treaty being negotiated with Thailand, which holds a greater number of Australian prisoners than any other foreign country?

(A) The last meeting of the Standing Committee of Attorneys-General was held in June this year and unfortunately not all jurisdictions were able to give a final indication as to whether they wanted to participate in an international prisoner transfer scheme. As a result, Australia's participation in such a scheme is still to be settled. The states and territories are important because returning prisoners do need to be held in prisons in the state or territory with which they are connected. Despite the fact that agreement has not been reached, the Commonwealth's position still is to favour, in principle, a transfer of prisoners by way of such a scheme. We remain committed to that, and the idea remains on the agenda to be discussed by Attorneys-General in November this year.

If the proposal does go ahead, however, in terms of where we would start with the rest of the world, the first step would be to seek to become a party to the Council of Europe convention on the transfer of sentenced persons. As well as that, there is a Commonwealth scheme that we would seek to participate in. This does not cover Senator Colston's concern with the transfer of prisoners from Thailand. We would treat Thailand as we would any other country; we would try to enter into bilateral agreements with it. Thailand is particularly important, as Senator Colston has said, because Thailand is the country where the largest number of Australians are currently serving terms of imprisonment. As at 6 June some 27 Australians were in prison in Thailand.

We could not get agreement on this matter at the last meeting of state and federal Attorneys-General. It is up for discussion in November. I ask the Senate to note that even were we to get agreement in the next few months, it would still be two or three years before one would be able to put into place the international bilateral and multilateral treaties that would give effect to any such scheme.

On 9 December 1993, Senator Bolkus answered further questions without notice from Senator Colston to the Minister representing the Minister for Justice, as follows (Senate, *Debates*, vol 161 (1993), p 4270):

(Q) My question is directed to the Minister representing the Attorney-General. I preface my question by indicating that some honourable senators are aware of my longstanding interest in the transfer of Australians who are imprisoned overseas. I ask the Minister: can he advise what progress, if any, was made at the latest meeting of the Standing Committee of Attorneys-General in relation to Australian participation in the international transfer of prisoners?

(A) Let me, at the outset, acknowledge the long interest that Senator Colston has had in this particular issue. He is right; there was a recent meeting of the Standing Committee of Attorneys-General. That meeting was held last month. At that meeting the Attorneys-General all agreed to lend their support for this scheme which Senator Colston has shown an interest in over a number of years.

We now have all jurisdictions in support for an international transfer of prisoners scheme. But all is not perfect, of course. The Northern Territory has reserved the right to opt out of the scheme. But to the extent that agreement is necessary, we have achieved that, and the scheme can now be developed. There are good humanitarian reasons for such a scheme and good prison administration

grounds for such arrangements. These schemes do operate overseas, and they operate well. A number of countries have already been pressing Australia to participate.

The scheme will allow Australians serving sentences overseas to serve their sentences in Australia. It will also allow foreign citizens imprisoned in Australia to be repatriated to their home prison system when there are demonstrated community ties. The next step in developing the scheme will be a report by the group of officials working on the details of the legislative and administrative framework delivered at the next SCAG meeting in February.

At this stage it is envisaged that, in order to be transferred to Australia, amongst other things the prisoner would be required to be an Australian national who has a minimum of six months of his or her sentence remaining to be served. In addition, both countries, the prisoner and the Australian state receiving the prisoner, would all have to agree to such transfer.

In order for this scheme to operate successfully we do have to link with international mechanisms. It is proposed that, once the necessary legislation is in place, Australia as a first step will become a party to the Council of Europe Convention on the Transfer of Sentenced Persons, which currently has 23 parties to it. We will also be able to participate in the Commonwealth countries scheme—a scheme which now has four participants.

Multilateral arrangements are one way to go but there will also be a need to focus on bilateral arrangements. On the basis of patterns of imprisonment as between Australia and other countries, we will also look at the need to enter into bilateral arrangements with particular countries. The foremost amongst these would be Thailand, a country where the largest number of Australians—27 as at 6 June 1993—are serving terms of imprisonment. I understand that Thailand has already indicated a willingness to discuss a transfer scheme as soon as possible.

Jurisdiction—Reciprocal provisions with New Zealand for obtaining evidence and authenticating laws and documents—Australian legislation

On 25 November 1993 Mr Duncan, Parliamentary Secretary to the Attorney-General, made the following speech to Parliament concerning the Evidence and Procedure (New Zealand) Bill 1993 (House of Representatives, *Debates*, vol 191 (1993), pp 3766-67):

This bill implements arrangements that have been agreed with New Zealand to facilitate obtaining evidence from New Zealand for use in Australian proceedings and from Australia for use in New Zealand proceedings, and to facilitate proof of each country's laws and official acts and documents.

At present, unless a witness is willing to attend voluntarily, evidence is obtained between Australia and New Zealand by means of a letter of request to the other country's judicial authorities or arrangements for evidence to be taken on commission. These methods are more cumbersome and expensive, and much less satisfactory, than obtaining the evidence of the witness directly in the course of the hearing.

The arrangements implemented in the bill provide for evidence to be given in the course of a hearing by requiring attendance of the witness at the court, or by evidence being given by video link or telephone. Broadly similar

arrangements to those contained in the bill were implemented in 1990 in relation to a very narrow range of competition law cases. These 1990 arrangements are replaced by the new and broader schemes in this bill. These arrangements reflect the close relationship between New Zealand and Australia especially in, but not limited to, the economic area. There is a need for Australia-New Zealand legal cooperation to keep pace with developments in other areas. This bill provides for:

- Australian subpoenas to be served in New Zealand;
- enforcement of New Zealand subpoenas served in Australia;
- Australian courts to take evidence by video link or telephone from New Zealand;
- sanctions and administrative arrangements in support of New Zealand courts taking evidence from Australia by video link or telephone; and
- judicial notice to be taken of New Zealand laws and facilitated proof of New Zealand public and official acts and documents.

Complementary New Zealand legislation was introduced in the New Zealand parliament on 21 September 1993. The arrangements relating to subpoenas will apply in proceedings except criminal proceedings and family law proceedings. These exclusions were sought by New Zealand. The other arrangements will apply in all kinds of civil and criminal proceedings.

The States and territories were consulted in the development of these arrangements, and gave broad support to them. To provide flexibility for states and territories the arrangements for trans-Tasman subpoenas and taking evidence by video link or telephone will not apply automatically to state and territory courts. They will apply to prescribed state and territory courts, as well as to all federal courts.

The provisions of the bill relating to judicial notice of New Zealand laws and proof of New Zealand public and official acts and documents will apply to all Australian courts. Appropriate safeguards and protection are provided for persons who are involved in proceedings under the bill.

Australian Subpoenas

Under the bill an Australian subpoena can be served in New Zealand if leave for service is given by a superior court judge. In deciding whether to grant leave, the judge must take into account the significance of the evidence to be given or the document or thing to be produced by the witness, and whether it could be obtained by other means without significantly greater expense, and with less inconvenience to the witness. Safeguards for witnesses include:

- the subpoena must be served no later than a day specified by the judge and must be accompanied by a copy of the order granting leave, and an information notice setting out the witness's rights and obligations under the subpoena; and
- the witness's reasonable expenses of complying with the subpoena must be paid or tendered to the witness a reasonable time before the time for compliance.

In addition, a special procedure is provided for a person served with a subpoena to apply to it aside. An application to set aside may be made by fax to the appropriate court. It may be determined without a hearing if neither party

objects, and must be conducted by video link or telephone if the person served so requests. The subpoena must be set aside if the person cannot reasonably attain necessary travel document or compliance would expose the person to criminal or civil sanction—exception a civil penalty under the Trade Practices Act. Grounds on which the subpoena may be set aside include hardship or serious inconvenience. If the subpoena only requires production of documents or things, it must permit compliance by producing the documents or things at a registry of the High Court of New Zealand.

New Zealand Subpoenas

The bill obliges persons in Australia who are served with a New Zealand subpoena in accordance with the bill and with New Zealand law to comply with it. Failure to comply without proper excuse is taken to be a contempt of the Federal Court.

Video link or telephone evidence from New Zealand

The bill enables courts to direct that evidence be taken or submissions made by video link or telephone from New Zealand where it is more convenient to do so. Such a direction may only be made where suitable facilities are available or can reasonably be made available. Courts are authorised to make orders for the payment of expenses incurred in connection with taking evidence or making submissions by video link or telephone.

Video link or telephone evidence from Australia

- The bill authorises New Zealand courts to receive evidence or submissions by video link or telephone from Australia. In relation to the taking of video link or telephone evidence by a New Zealand court from a person in Australia, the bill:
- authorises a New Zealand court to administer an oath or affirmation to a witness in Australia;
- confers the same protection on persons participating in the proceedings as such persons would have a proceeding before the Federal Court;
- applies section 35 of the Crimes Act 1914, which relates to false evidence, to evidence; and
- creates offences relating to misconduct while evidence is being given in Australia by video link or telephone.

Judicial notice of New Zealand laws and proof of New Zealand public official acts and documents

Under the bill all Australian courts are to take judicial notice of the content and commencement of New Zealand laws and of proclamations and orders made by the Governor-General of New Zealand. It also includes provisions to facilitate the proof in Australian courts of New Zealand public and official acts and documents.

Conclusion

The bill, especially its provisions relating to subpoenas and video link evidence, will make a significant reduction to the cost of litigation before Australian courts involving trans-Tasman elements and also improve the quality of evidence available to courts in such cases. The bill is expected to have little impact on

Commonwealth expenditure or revenue. I table the explanatory memorandum for the bill. I commend the bill to the House.

Jurisdiction—Return of cultural heritage—Australian preparation of model legislation

The 1993 Meeting of Commonwealth Law Ministers issued a communique which read in part:

> The need to provide better protection for the material cultural heritage has been on the agenda of Law Ministers since their Colombo meeting in 1983. At Grand Baie, Ministers brought consideration of the matter to a successful conclusion, adopting a new Commonwealth Scheme for the Protection of the Material Cultural Heritage (which they expect will become known as "The Mauritius Scheme").
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> The Scheme, which complements work done in UNIDROIT and the European Community, governs the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another country contrary to its laws. The Scheme contains practical provisions relating to the export and import of items which take place after its adoption and implementation. The Scheme does not operate retrospectively but it does not detract in any way from the possibility but it does not detract in any way from the possibility of Commonwealth countries entering into bilateral discussions amongst themselves in relation to the repatriation of specific items of importance for the cultural heritage of the countries concerned.
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> Law Ministers saw the new Scheme as an important step to protect items of national importance because of their historical, archaeological, cultural or spiritual significance. They agreed that Commonwealth jurisdictions should take early steps to give effect to the new Scheme in their domestic law, while acknowledging that not all countries were as yet in a position to do so.
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> Ministers accepted the generous offer made by Australia to assist the Commonwealth Secretariat in the development of model legislation which would be of assistance to a number of member countries wishing to adopt legislation giving effect to the scheme in a timely manner.

Jurisdiction—Extraterritorial application of Australian legislation—Trade Practices Act and inward liner trades

On 4 June 1993 the Acting Chief General Counsel of the Attorney-General's Department, Mr Henry Burmester, wrote to the Secretary to the Review of Part X of the Trade Practices Act a letter which read in part:

> 2. This letter sets out a preliminary identification and assessment of jurisdictional issues which may arise through the extra-territorial application of Australian legislation, particularly in relation to possible changes to the degree of regulation of Australia's inwards liner trades under the Trade Practices Act 1974 (TPA).
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> 3. I understand that a more detailed analysis may be sought at a later date but that Mr Brazil when he travels overseas later this month intends to meet with regulators in Europe and North America to discuss a number of such preliminary matters.

4. Australia would not dispute as a general proposition the right of a state to seek to regulate extra-territorial conduct by foreign parties which has a *direct* effect on matters within their own territory. This will often lead to there being a concurrent jurisdiction, and such a situation arises in the area of trade to and from Australia. Nevertheless, the relevant acts of shipping conferences involved in trade to and from Australia have such a direct effect and there appears, in principle, no reason why Australia could not, consistently with international legal principle assert jurisdiction over them. In relation to the actual enforcement of such jurisdiction, it is recognised that certain practical constraints exist and the question of possible conflict with foreign jurisdictions with equally valid jurisdictional claims may arise (see further paragraph 9 and following below).

5. The thrust of this advice, and of international developments in this area, is necessarily pragmatic. It highlights the need to explore avenues for avoiding or moderating the effects of potential jurisdictional conflicts well in advance of costly litigation, by making decisions at governmental and administrative level at the earliest possible stage. This is preferred to leaving the resolution of such issues to judicial interpretation of notions of comity and other doctrines such as act of state, foreign sovereign compulsion, Noerr-Pennington and the "balancing of interests" as developed by the US courts where foreign governmental interests have an uncertain and unsatisfactory place.

6. A number of points are noted as background to the following assessment:

- The major amendments in 1989 to Part X TPA in relation to international liner cargo shipping produced a form of regulation of the activities of *outwards* shipping, including loyalty agreements, providing for partial and conditional exemptions from restrictive trade practices proscribed by Part IV.
- At present, the "blue water" component of freight carried on *inwards* liner shipping is exempted from the restrictive trade practices provisions of Part IV except for the misuse of market power provisions in s46 and the *per se* "third line forcing" offences in sub-ss 47(6) and (7).
- The general approach to extra-territorial jurisdiction in sub-ss 5(1) and (2) TPA is to give Parts IV, IVA and V of the TPA an extra-territorial reach in respect of conduct by Australian incorporated bodies and companies carrying on business in Australia (with a similar application to natural persons). There is an extended operation for ss 47 and 48 that catches conduct outside Australia by any persons. This extended operation in subs 5(2) can be likened to an "effects" test. However, the definition of "market" in s 4E of the TPA restricts the effect to "...a market in Australia" (the extra-territorial regime in the s 50A offshore merger provisions aside). The Federal Court of Australia (Lockhart J) in the New Zealand Steel Case (*TPC v AIS* (1990) 22 FCR 305) held that s 5, *expressio unius*, gave the TPA its entire extra-territorial application.
- If it should be proposed to change the degree of regulation of inwards liner shipping, it may be necessary to consider amending s 4E to catch the market for the acquisition of shipping services to Australia which exists in the country of departure.
- The Hilmer inquiry appears likely to report prior to the completion of the Review, including possibly suggesting the repeal of Part X TPA and leaving the competition aspects of liner shipping subject to Part IV

TPA—for the purposes of the present analysis, we will not address this matter further.

7. In briefly examining the history and current developments in the regulation of international liner shipping and its interaction with Australian policy aims to achieve efficient and stable shipping services, certain questions arise such as:

- Is there any international objection to significant regulation of inwards traffic?
- What should be done when one country's laws and regulations require or authorise certain conduct and another country prohibits it?
- Do we want a regulatory scheme, and a regime for dealing with conflicts, which applies consistently to inwards as to outwards traffic?
- Where is the market?

8. This advice does not seek to provide final solutions to such questions but raises them as issues and suggests possible intervention mechanisms for addressing potential international jurisdictional conflicts.

Dealing with international jurisdictional conflicts

9. There has been a degree of convergence on international thinking on jurisdiction issues since the high point of jurisdictional conflict between 1970–1984. The more extreme US claims have been modified by the development of the jurisdictional "rule of reason" *(Timberlane* and *Mannington Mills* cases) as well as the cementing of other ameliorating doctrines such as "foreign sovereign compulsion". On the other hand, the UK's integration into the EC system has led them to modify their insistence that every exercise of jurisdiction affecting their territory was a breach of UK sovereignty. Several bilateral antitrust cooperation agreements have been negotiated by the US including with Australia, Canada and the EC, and the US Government is more aware of foreign sensibilities in this area. Foreign governments and the EC are aware of the need for a pragmatic approach to the extra-territorial application of business laws in an era of growing internationalisation of trade and of the need to deal with conflicts of laws before they elevated to the diplomatic arena.

10. In formulating a proposition concerning what is an acceptable assertion of extra-territorial jurisdiction, Australia would not deny the appropriateness of regulating extra-territorial effects on domestic markets but not if the effects are on our foreign trade or commerce. The provisions implemented in the EC under Articles 85 and 86 of the Treaty of Rome take a similar approach. The US, however, has recently reaffirmed its willingness to apply the antitrust laws to conduct by foreigners in foreign markets affecting US export trade (see para 15 below). In the US, assertions of extra-territoriality are complicated by the threat of treble damages, jail terms and by tenuous personal jurisdictional connections. Wide discovery "fishing expeditions" against companies related to US companies, wherever located, can cause problems, especially if they relate to records of dealings between governments and shipping conferences. In shipping matters, Government regulatory bodies are often parties. The "no costs for successful defendants" rule and contingency fee system can encourage vexatious litigation. If anything, this indicates the need to deal with jurisdictional conflicts *before* the litigation stage.

11. Australia has generally promoted the following principles to minimise international conflicts involving extra-territorial legislation:

(a) the overseas conduct to be regulated should have a direct, substantial and foreseeable connection with Australia:

(b) the conduct should create adverse consequences for Australia such as would generally be regulated by other countries in similar circumstances;

(c) the legislation should not proscribe conduct that is mandated by the law of the country where the conduct takes place;

(d) if there is no direct or apparent conflict but two countries have concurrent jurisdiction (one by reason of the locus of the conduct and the other by reason of its consequences), then provision should be made by legislative or administrative means to resolve potential conflicts before they arise. To this end, remedies and discretions should be in the hands of the Government and not private litigants so that foreign interests can be taken into account before these are exercised;

(e) private prosecution should be excluded, or be limited in the same way as is provided for in S. 163(4) of the TPA (which requires the Minister's consent to be obtained); and

(f) sanctions should be comparable with those available under the laws of other OECD countries.

12. The approach in (d) above is consistent with international comity and with the OECD Council Recommendation of 21 May 1986 concerning cooperation between Member countries on restrictive business practices affecting international trade. The Recommendation provides a notification and consultation mechanism to assist in resolving such conflicts without affecting questions of sovereignty and recognises "the need...for moderation and self-restraint in the interest of co-operation in the field of restrictive business practices".

13. Guidelines developed by the OECD Committee on International Investment and Multinational Enterprises (CIME) also evidence the international trend. In 1984 the OECD Council particularly endorsed CIME recommendations and conclusions on "Conflicting Requirements imposed on Multinational Enterprises" and adopted an understanding that "consultations would be facilitated by notification at the earliest stage practicable". Although shipping conflicts do not necessarily give rise to exactly the same considerations as, for example, conflicting requirements in relation to subsidiaries of multinational enterprises, the international character of conflicting requirements in shipping matters should attract the same general considerations ("moderation and restraint") and practical approaches (cooperation, notification and consultation, mostly on a bilateral basis) in accordance with international principles (comity, sovereignty etc).

14. The conclusions and decisions were approved as a Ministerial document at the OECD Council meeting. Any legislative action, to be consistent with the OECD/CIME guidelines, would need to take into account the legitimate interests of other countries. Australia could be subject to criticism in the OECD if it did not give effect to the approved conflict avoidance principles.

15. It should be noted that on 3 April 1992 (Pub. No. 92–117), the US Department of Justice (DOJ) reverted to its pre–1988 extra-territorial anti-trust enforcement policy extending to foreign business conduct which harms US exports when such conduct would have violated US law if it had occurred

domestically (based on the protection of US consumers and exporters from the effects of anti-competitive activities). However, such an aggressive extra-territorial policy may jeopardise international cooperation in anti-trust enforcement. On 4 April 1992, Japan announced its intention to "bring...its case against US policy to international organisations such as the [OECD]".

16. The DOJ's prosecutorial discretion may be moderated by "considerations of comity among nations" in determining the reasonableness of prosecutions and its 1992 policy statement agreeing to notify and consult with foreign governments in anti-trust proceedings (although this should be read in terms of a willingness to "work with" importing countries who are "better suited to remedy the conduct, and [are] prepared to act"). Jurisdictional standards applied by the US judiciary will also mitigate any expanded extra-territorial reach of the Sherman Act. However, plaintiffs suing in private treble-damages actions are less likely than government bodies to take into account foreign relations implications.

17. Finally, in the sphere of private international law (conflicts of laws) and the judicial/adjudicative exercise of jurisdiction (or non-exercise on the basis *forum non conveniens*) in cases of service of process outside the jurisdiction as well as service within the forum, a majority of the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (1990) 65 ALJR 83 adopted a "clearly inappropriate forum test" in preference to an earlier "clearly more appropriate forum" test. Although the new test is seen "to shift the balance in favour of plaintiffs suing defendants outside the jurisdiction further than in any other Commonwealth country", it avoids the need for the Court to engage in a strained balancing process between the competing interests of different fora. Such judicial trends at the highest level in Australia should also be borne in mind in considering extra-territorial developments, thus reinforcing the need to, as far as possible, avoid conflict of public law situations reaching the Courts.

Australian and international shipping regulations and jurisdictional conflict

18. There has been conflict in international shipping arrangements going back at least to the 1950's. The earliest "blocking" legislation in this area (to prohibit the production of shipping documents to authorities of foreign countries in certain circumstances) in response to United States assertions of extra-territorial enforcement jurisdiction was the *Shipping Contracts and Commercial Documents Act 1964* (U.K.). This legislation was followed by several other countries in Europe and Scandinavia from 1965–1980 (see Appendix IV to the Report from the Joint Committee on Foreign Affairs and Defence, "Australian-United States" Relations: The Extraterritorial Application of US Laws", November 1983).

19. From 1979–84, Australia was involved in trans-Pacific shipping issues with the US. The major focus was on the request of the US Department of Justice for the production, pursuant to US civil investigative demands (CIDs), of confidential communications between Australian shipping lines and the Australian Meat and Livestock Corporation (AMLC) and other Australian Government agencies ("the Pacific Shipping Investigation"). Provisions for notification and consultation in the bilateral Australian-US Agreement entered into in 1982 ante-dated the Pacific Shipping Investigation. Nevertheless, US authorities did not even notify Australia pursuant to the OECD notification requirements. Moreover, the Australian Government's *amicus curiae* briefs to two US Courts of Appeal in connection with the investigation were not referred

to either in the joint brief of the US Departments of Justice and State nor in the judgments of the Courts of Appeal which were both adverse to Australia's interests.

20. Originally, Australia sought to regulate under the TPA only its outwards trade, recognising that it complemented international arrangements for the regulation of liner shipping. However, the possibility of conflict arises also in relation to outbound shipping. In the context of the Pacific Shipping Investigation, Australia sent a diplomatic Note to the US in May 1981 asserting primacy of right over outbound shipping at international law. The US response was very qualified, going no further than indicating a willingness to consult further while wishing to avoid, to the extent possible consistent with the proper enforcement of its own laws and policies, any adverse impact on the laws and policies of the Government of Australia.

21. In the area of international transportation there will always be a large degree of concurrent jurisdiction, given its connection with the territory of two or more countries. In line with international principles of comity, Australia seeks to avoid, if possible, any enforcement action that causes a conflict with the laws of foreign countries. Further, in line with the principle of sovereignty, Australia has recognised that, in the event of a conflict of obligations a sovereign would normally have the primacy of regulating conduct within its own territory. Pursuant to this approach, private litigants under the TPA cannot rely upon extra-territorial conduct without the written consent of the Attorney-General, pursuant to s5 TPA. However, as far as we have ascertained, Australia has never formally said in a Diplomatic Note or an *amicus* brief that it could deal jurisdictionally with outwards shipping only.

22. Other countries regulate their inwards trade. The US enforces its Shipping Act 1984 in relation to inwards shipping, and the EC also purports to regulate inwards traffic (some material on EC practice is being made available to you separately). In the EC investigation in 1987–88 into the Hyundai line (Republic of Korea), a non-conference operator in the Australia to Europe trade, Australia expressed concerns at possible jurisdictional problems regarding possible EC attempts to enforce extra-territorially regulations covering its inwards trade where this would have had the potential to affect the competitiveness of Australian exports. Australia acknowledged that the formal procedures contained in the EC regulations were essentially a matter for the European Commission and the Member States. However, as the country concerned at the other end of the trade, Australia indicated a need for consultations at policy level and expressed appreciation for the early notification of the Commission's decision to investigate the complaint against Hyunda.

23. Given the nature of international shipping, it is generally recognised by the international community that mechanisms are needed to deal with potential jurisdictional conflicts. There is a broad tendency to avoid conflicts and to pay attention to sovereign rights of a foreign country in relation to acts within its own territory. Even the United States, which has claimed the widest extra-territorial application of its laws, recognises in sub-s2(2) of its Shipping Act 1984 the need to be "in so far as possible, in harmony with, and responsive to, international shipping practices".

24. Where more than one country seeks to regulate liner shipping, both sets of regulation should be complied with where possible. Differences in standards or notice requirement should be less difficult to resolve than conflicts of a more

fundamental nature requiring changes to be made to the Conference arrangements or conditions and which would need to be sorted out through negotiations to achieve consistency.

25. Major intervention points prior to which mechanisms for moderating potential international jurisdictional conflicts can be employed, are:

(1) at the stage of legislation and policy development:

(2) at the stage of registration, when administrative and governmental discretion is available;

(3) at the investigatory stage, when independent regulatory bodies such as the Trade Practices Commission may be seised of a matter;

(4) in litigation, where the judiciary generally takes a more literal, black letter approach to its task (although the element of discretion is more apparent in some proceedings eg for injunctions under s80 TPA); and

(5) at the enforcement stage—when resort may be had to "blocking" and "clawback" legislation and the conflict situation can hardly be said to have been moderated.

26. Australia's inwards liner cargo shipping was subject to Part IV TPA, to the extent s5 applied, prior to the 1989 amendments which introduced additional exemptions in Part X. It is difficult to envisage that there is not anti-competitive conduct (outside that exempted), but we are not aware that Part IV has ever been tested against inwards shipping. The Trade Practices Commission should be consulted on that score. The major problem is in obtaining documentary evidence. We understand from discussions with you that inwards agreements have not been seen by Australian regulators except in relation to the ANZAC consortium on the Europe/NZ/Europe route which contains the inwards and outwards arrangements in one agreement, where normally they all divided up.

27. Bringing inwards shipping further under Part X on the same terms as for outwards shipping would better enable deals and documents in relation thereto to be made public would provide a basis for Australia to control arrangements and make decisions relevant to the Australian economy. It could identify and strike at anti-competitive conduct that Part IV already proscribes, and exempt the beneficial aspects of the inwards conference system from Part IV.

28. But if Part X was to be so extended, for the reasons given above, some conflict avoidance mechanisms would appear necessary. Although the complaint can be made that administrative processes may be bureaucratic and cumbersome, pre-litigation intervention avoids numerous undesirable aspects including loss of executive time, damages and penalties, litigation costs and intrusive discovery procedures. One useful mechanism already exists, to some extent, in s5 TPA which requires Ministerial consent for private parties to proceed in relation to extra-territorial conduct. But this may not be enough. For instance, our courts may not take notice of conference agreements of other countries.

29. Intervention at the stage of registration, when the exercise of discretion is available, may also assist in avoiding conflicts. There are questions whether it is not preferable, given the international dimension, for Government bodies to make decisions on issues such as whether to approve registration, rather than independent regulators such as the Trade Practices Commission which are less amenable or sensitive to established international arrangements for the regulation

of shipping or to foreign relations aspects. In fact, their mandate is often solely enforcement-oriented.

30. Moreover, if reliance is placed on Part IV, some sections of which depend on definitions of a market in Australia, it may be possible for shipping arrangements to be organised so that the market for shipping services originated elsewhere and the TPA was avoided. The regulation of inwards shipping could become dependent on fine distinctions such as whether the contract was FOB (market located in Australia) or CIF (foreign market because foreign person controls supply of services overseas and property does not pass until delivered at this end). Nevertheless, any increased costs would inevitably be passed on to consumers in Australia, which would defeat the purpose of removing Part X.

Jurisdiction—Draft Convention on Jurisdictional Immunities of States and their Property—Statement to Sixth Committee

On 15 November 1993 the Representative of Australia, Mr Matthew Neuhaus, speaking also on behalf of Canada and New Zealand, made the following statement to the Sixth Committee of the UN General Assembly concerning the draft Convention on Jurisdictional Immunities of States and their Property:

Madam Chair,

In this statement on the subject of Jurisdictional Immunities, I have the honour to speak also on behalf of the Governments of Canada and New Zealand.

Our delegations had hoped that the Working Group would be able at this session to achieve general agreement on all outstanding major issues of principle arising out of the International Law Commission's draft Articles on the Jurisdictional Immunities of States and their Property. Although this hope was not fulfilled, our delegations are encouraged by the fact that progress has definitely been made. Much credit for this is due to the most distinguished Chairman of the Working Group, Ambassador Carlos Calero Rodrigues, and our delegations would like to express our sincere thanks to him for his skilful and able chairmanship, and for his tireless efforts in exploring new avenues of possible compromise.

Our delegations believe that it should remain our primary objective to secure a widely supported convention on this matter. In this age of ever increasing internationalisation of all aspects of human activity, particularly commercial activity, dealings between States and foreign natural and juridical persons are commonplace. Jurisdictional Immunities of States and their property is one of the areas of international law with which domestic courts and tribunals are most frequently called upon to deal. A widely supported international convention which ensured that in this area stable and uniform rules are applied by as many countries as possible would provide a degree of certainty and predictability that would benefit both States themselves as well as the individuals and juridical persons with whom they deal—not to mention their legal advisers. Additionally, of course, achievement of a successful convention on this topic would benefit the process of codification and progressive development of international law generally.

It must be acknowledged that from the outset, the task was not to be a simple or straightforward one. On some issues there has been a stark division of opinion between States with different economic systems. However, even States with

similar economic systems, because of differences in principles of their domestic law, have had diverging views on certain matters. The International Law Commission spent more than a decade studying the topic, seeking an approach that would be generally acceptable. The draft Articles which it ultimately adopted on second reading have provided a valuable basis for discussion, and certain of the provisions have now been subject to detailed consideration by the Working Group at two successive sessions of the Sixth Committee. Differences between States on certain issues of principle may have been narrowed, but differences remain. It would be unfortunate if, following so many years of work, a diplomatic conference when convened either failed to achieve agreement, or resulted in a convention which subsequently failed to attract any significant number of ratifications. Our delegations continue, therefore to be firmly of the view that a date for a diplomatic conference should not be set until all outstanding issues of principle have been settled.

Madam Chair, the Chairman of the Working Group identified the main issues as:

- the definition of a "State" and of a "commercial transaction" in Article 2(1);
- the question of the criterion to be applied in determining whether a contract or transaction is a "commercial transaction", dealt with in Article 2(2);
- the issue of the legal distinction between the State and certain of its entities, dealt with in Article 10(3) of the ILC text, and addressed by the Working Group mainly in the context of Article 5;
- contracts of employment (Article 11); and
- immunity from measures of constraint

As regards Article 2(1)(b), Article 2(1)(c) and Article 11, it is the impression of our delegations that the elements of a general acceptable compromise have been identified by the Working Group and that agreement could probably now be quickly reached on these provisions. In relation to Article(1)(b)(iii) and (iv), dealing with sub-divisions, agencies and instrumentality's of the State, we would invite States to consider again the desirability of including a provision along the lines of that reproduced as Proposal B in the annex to the draft Report of the Working Group, but we would not wish to stand in the way of any agreement on Article 5, although some details will require further discussion, such as the proposal envisaging the possibility of piercing the corporate veil of a state enterprise or other entity in certain circumstances.

On the other hand, opinions remain divided on Article 2(2) dealing with the criteria of "nature" and "purpose" for characterising a transaction as commercial, and on the question of measures of constraint, especially Article 18. These two issues are of fundamental importance, and it is on these which I now wish to concentrate.

As regards Article 2(2), the Working Group went a long way in identifying and clarifying the issues. We note that the Working Group considered a proposal prepared by a small group of five delegations. This proposal involved placing the present text of Article 2(2) with four new paragraphs. Because the final paragraph of the small group proposal did not meet with general acceptance, the Chairman proposed a reformulation of that final paragraph. This provided that a court, in determining whether a contract or transaction is a "commercial

transaction", shall take into account its purpose, provided that the purpose is a relevant criterion under the law of the State which is a party to the contract or transaction and the other party was informed of that circumstance before the contract or transaction was concluded. The final stages of the discussion on this provision concerned the question of the circumstances in which the party should be considered to have been "informed of" the circumstance that purpose is a criterion under the law of the State concerned. In particular, the Working Group discussed whether the State should or should not be under an obligation to give express notice in writing to the other party to the transaction on every occasion.

The paramount concern of our delegations in relation to this provision is to ensure that both parties to the contract or transaction know with certainty, before it is concluded, where they stand. The Chairman's suggestion of removing the connection requirement in cases of post judgment execution, while retaining such a requirement for cases of interim or prejudgment attachment, may provide the basis for a compromise. Clearly the State entering into the contract will know that its own domestic law takes the purpose criterion into account, and it is a simple matter for it to inform the other party to that effect. We do not think it is reasonable to expect the other party to consult the legislation and case law of the state concerned or to have to make enquiries by other means. We do not consider it to be unreasonable to require the State concerned, if it wishes the purpose test to apply, to give notice in writing each time it enters into a contract or transaction. However, our delegations would be willing to consider other suggestions, if it is possible by other means to provide the necessary certainty in commercial relations.

Turning to the question of measures of constraint, and Article 18 in particular, the position seems more difficult. Our delegations consider that the Chairman's suggestion of removing the connection requirement in case of post-judgment execution while retaining such a requirement for cases of interim or prejudgment attachment is an excellent compromise. However, in the Working Group, some States were clearly of the view that this suggestion afforded too little protection to the State concerned while others were of the view that the suggestion still made execution unacceptably difficult. Serious consideration will need to be given to how much differing viewpoints can be accommodated.

On the subject of final or post-judgment execution, our delegations draw attention to the fact that the Chairman's suggestion included a provision that no measures of constraint shall be taken against the property of the State before that State is given an adequate opportunity to comply with the judgment. Final execution would therefore only occur where the State concerned has had an adequate opportunity voluntarily to satisfy the judgment out of whichever assets it chooses, and has nonetheless failed to do so. In view of this provision, we do not see that there is any necessity to maintain the connection requirement in cases of final execution, in order to protect the interests of the States concerned. Certainly, in future consultations on Article 18, we consider that paragraphs (1) and (3) of the Chairman's suggestion need to be looked at together as two complementary elements of a compromise.

On the subject of pre-judgment measures of constraint, we recall that in the Working Group the possibility was raised of limiting such interim measures to certain agencies and instrumentality's of the State. This approach will also have to be given careful consideration as a possible means of reconciling the views of

those who would prefer to remove altogether the availability of interim measures, and those who want it retained.

Madam Chair, our delegations believe that the essential next step must be to identify clearly the precise extent of the progress that has been made in the Working Group this year. Various proposals were considered and in some cases potential solutions emerged. However, it has not been possible for all delegations to express final views on these proposals, and States will no doubt need to take time to reflect. Only when States have expressed their considered views will we know precisely how much has been achieved and exactly how far we have left to go.

The subsequent step, we believe, must be for consultations to continue next year within the framework of the Sixth Committee, concentrating on the results of the discussions of the Working Group. A meeting of experts might also be helpful at some point, and we would encourage States to send their experts to the consultations at the Sixth Committee next year. States must now be flexible in giving serious consideration to how mutually acceptable solutions can be found to the outstanding issues. This need not necessarily consist solely in different sides making concessions until some common ground is reached. With imagination, solutions may be found which can satisfactorily address all of the different concerns of States.

Madam Chair, because of the complexity of this topic, our delegations believe that it would be useful for States submit their written comments on the proposals discussed at the Working Group, and for these comments to be distributed by the Secretariat, in order to facilitate consideration of this question at the forty–ninth session of the General Assembly. We suggest that States should be requested to concentrate their comments on the suggestions put forward by the Chairman in the Working Group, having regard to the subsequent discussion of them by delegations. In relation to Article 2(2), we suggest that comments concentrate on the small group proposal, as amended in its final paragraph by the Chairman's subsequent proposal. This would enable us to identify more clearly the extent to which agreement has been achieved so far, and the manner in which the remaining issues can now best be addressed. Furthermore, because of the question of a dispute settlement clause is connected with the question of measures of constraint, we consider that it would be useful if the Secretariat were requested to draft alternative dispute settlement clauses drawing on the suggestions made in the Working Group, which could then also be considered by delegations at the forty–ninth session.

We also suggest that prior to the forty–ninth session, consideration of the issues could usefully be undertaken by appropriate regional gatherings of international lawyers, such as the Asian-African Legal Consultative Committee, and the regular consultations of international lawyers under the auspices of the Council of Europe, with particular aim of eliciting the views of as wide a range of States as possible on the proposals discussed in the Working Group.

Finally Madam Chair, I add that our delegations hope that at the forty–ninth session we will be able to move forward quickly. After further consultations, we will be in a better position to consider too the possibility of a diplomatic conference. In advance of these consultations, we do not consider it possible to say now whether an actual date for the conference will be able to be set next year. Our delegations recognise that a diplomatic conference at an appropriate

stage may be necessary. However, we reiterate that we should be careful not to go into such a conference unless it is clear a concrete result can be achieved at an early stage. To have a conference which fails would not only be an occasion "full of sound and fury, signifying nothing", to use the words of Shakespeare's Hamlet, but would also set back the progress we have made on this subject in an unhelpful way. We must be careful not to do that.

Thank you Madam Chair.