



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

RURAL AND REGIONAL AFFAIRS AND TRANSPORT
LEGISLATION COMMITTEE

Reference: Importation of salmon products

FRIDAY, 18 FEBRUARY 2000

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is <http://www.aph.gov.au/hansard>

To search the parliamentary database, go to: <http://search.aph.gov.au>

SENATE

RURAL AND REGIONAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE

Friday, 18 February 2000

Members: Senator Crane (*Chair*), Senators Forshaw (*Deputy Chair*), Senators Ferris, McGauran, Mackay and Woodley

Substitute members: Senator O'Brien for Senator Mackay and Senator Calvert for Senator McGauran

Participating members: Senators Abetz, Bartlett, Boswell, Brown, Brownhill, Calvert, Chapman, Coonan, Crossin, Eggleston, Faulkner, Ferguson, Gibson, Greig, Harradine, Hutchins, Knowles, Lightfoot, Mason, McKiernan, McLucas, Murphy, O'Brien, Payne, Schacht, Tchen, Tierney and Watson

Senators in attendance: Senators Bartlett, Calvert, Crane, Forshaw, Murphy, O'Brien and Watson

Terms of reference for the inquiry:

The effectiveness of the legal and regulatory regimes governing the Australian Quarantine and Inspection Service (AQIS) and the need to ensure transparency, consistency, scientific rigour and the highest standards of protection of the environment, the local fish population and the fishing and recreational fishing industries of Australia, having regard, in particular, to the administrative procedures and decision-making processes involved in the recent AQIS decision to allow the importation of salmon products into Australia.

WITNESSES

FINDLAY, Ms Vanessa Louise, Principal Scientific Officer, Fish Quarantine Policy Unit, Australian Quarantine and Inspection Service.....	380
GASCOINE, Mr Digby Frank, Director, Policy and International Division, Australian Quarantine and Inspection Service.....	380
HICKEY, Mr Paul William, Executive Director, Australian Quarantine and Inspection Service.....	380
HIRD, Miss Joan Margaret, Director, WTO Dispute Investigation and Enforcement Section, Department of Foreign Affairs and Trade.....	396

HUSSIN, Mr Peter Anthony, First Assistant Secretary, Trade Negotiations Division, Department of Foreign Affairs and Trade	396
KAHN, Dr Sarah, Director, Fish Policy Unit, Australian Quarantine and Inspection Service	380
O'CONNOR, Mr Peter Gregory, Assistant Director, Compliance, Legal and Evaluation Branch, Australian Quarantine and Inspection Service	380
ROWE, Mr Richard Anthony, Legal Adviser and Assistant Secretary, Legal Branch, Department of Foreign Affairs and Trade	396
ZANKER, Mr Mark Andrew, Assistant Secretary, International Trade and Environment Law Branch, Attorney-General's Department	391

Committee met at 10.10 a.m.

CHAIR—Welcome. I declare open this public hearing of the Senate Rural and Regional Affairs and Transport Legislation Committee. The committee is meeting today to continue its inquiry into the effectiveness of the legal and regulatory regimes governing the Australian Quarantine and Inspection Service and the decision to allow imports of salmon products into Australia. It is anticipated that the committee will make its report on the reference to the Senate by 16 March. All hearings are public and open to everybody. A *Hansard* transcript of the proceedings is being made and will be available in hard copy from the committee secretariat next week or via the Parliament House Internet home page.

The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the order of the Senate of 23 August 1990 concerning the broadcasting of committee proceedings. Before the committee commences taking evidence, let me place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities are attached to parliament or its members and others necessary to the discharge of functions of the parliament without obstruction and without fear of prosecution. Any act by any person which may operate to the disadvantage of a witness on account of evidence given by him or her before the Senate or any committee of the Senate is treated as a breach of privilege. While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Senate. The Senate also has the power to order production and/or publication of such evidence. I should add that any decision regarding publication of in camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing.

Resolved (on motion by **Senator Forshaw**):

That this committee authorises publication of the proof transcript of the evidence taken on 22 November 1999 by Mr David Bucke and also the submissions received from Australian Quarantine and Inspection Service earlier this week.

[10.13 a.m.]

FINDLAY, Ms Vanessa Louise, Principal Scientific Officer, Fish Quarantine Policy Unit, Australian Quarantine and Inspection Service

GASCOINE, Mr Digby Frank, Director, Policy and International Division, Australian Quarantine and Inspection Service

HICKEY, Mr Paul William, Executive Director, Australian Quarantine and Inspection Service

KAHN, Dr Sarah, Director, Fish Policy Unit, Australian Quarantine and Inspection Service

O'CONNOR, Mr Peter Gregory, Assistant Director, Compliance, Legal and Evaluation Branch, Australian Quarantine and Inspection Service

CHAIR—Welcome. In view of the further submission received, I now invite you to give a summary of any issues you wish to raise. You have answered a number of questions from our last hearing, which you may want to raise now.

Mr Hickey—Thank you. As you have noted and have agreed to publish, we have provided a further supplementary submission which addresses issues raised in testimony to the committee at its public hearing on 11 November 1999, the video recorded testimony of Mr David Bucke on 22 November 1999 and also further submissions of the Victorian Trout Association and the Tasmanian Salmonid Growers Association which were forwarded to AQIS in December 1999. The VTA and TSGA submissions were sent to AQIS's scientific reviewers for comment and the results have been provided to the panel. The main point I would like to convey in summary is that this inquiry has now provided stakeholders with extensive opportunity to present new information relevant to the AQIS risk analysis processes and that a significant number of concerns about the outcomes have been raised with the committee. In our judgment, confirmed by the judgment of the independent scientific reviewers, no significant new scientific information has been raised that would have warranted re-examination of the fundamental position that we have reached in the risk analysis.

Specifically in relation to Mr David Bucke's testimony to the committee, we have reviewed his discussions and identified a significant number of ambiguities, misconceptions and inaccuracies in the evidence that was given, which we have evidenced in our submission. We believe that his evidence as given to the committee needs to be considered against the response that we have provided to a large number of those matters. Subject to those comments, there is nothing further I would wish to add at this stage.

Senator O'BRIEN—In your submission at pages 6 to 7 you talk about the Danish authorities' view on the route of entry of BKD. You say:

Because of the extensive disease testing performed on salmonids in Denmark, Danish authorities are confident that BKD would be detected, if present, and was not in fact present before 1997.

I think what you are suggesting in your submission is that it was introduced in the ova of Atlantic salmon. Do I understand you correctly?

Mr Gascoine—Yes.

Dr Kahn—Yes, we are reflecting advice from the Danish ministry officials and that was the tenor of their advice.

Senator O'BRIEN—They were the ones who performed the testing that was designed to detect diseases?

Dr Kahn—That is right.

Senator O'BRIEN—Do we know which specific tests would have detected the disease if it had entered in eviscerated fish?

Dr Kahn—The advice they gave us was mainly in relation to testing for VHS and IHN. It was in the context of that testing program that they said they would have detected BKD if present.

Senator O'BRIEN—They did not perform any specific test for BKD. They say they would have discovered it with other tests. Is that what they are saying?

Dr Kahn—Yes, and in the course of clinical inspections. Because they have been engaged in an eradication campaign for VHS, for example, they do a good deal of clinical inspection of fish at farms and they specifically target dead or dying fish and subject them to a range of tests, including for VHS.

Senator O'BRIEN—Your submission at page 7 talks about whirling disease in New Zealand. You have quoted Dr Winton. The purpose of putting that up is to suggest that there is another explanation; is that right?

Dr Kahn—That is correct.

Senator O'BRIEN—I want to ask some questions on a matter which I pursued previously and with other witnesses. It concerns the way that the ALOP is determined – that is, the appropriate level of protection. How long has our current ALOP been constant? When did it last change?

Mr Hickey—In any of the published policy statements of governments and statements by ministers going back in the past that I have had access to, the Australian quarantine policy stance has always been described as very conservative, highly conservative, extremely conservative – in those general terms. The concept of ALOP as a concept in its own right, I guess, came formally into existence with the conclusion of the Uruguay Round in 1995. The most contemporary expression of government policy on quarantine post the Uruguay Round would be the Nairn review committee processes, culminating in the statement by the former Minister for Primary Industries and Energy. I think it was in December 1997. I might be wrong about the date of that statement. It is the government's response to the Nairn committee processes and the fish task force report.

Senator O'BRIEN—So if there was a change, it occurred in 1997. Is that what you are saying?

Mr Hickey—I do not believe there was a change.

Senator O'BRIEN—So if there was not a change in our view on an appropriate level of protection, how does it come about that the importation of uncooked salmon was not able to meet our tests under the appropriate level of protection in 1996, but with the qualifications you put in your IRA it does meet the appropriate level of protection as of the date of finding in 1999?

Mr Hickey—The conclusion of the WTO in relation to the 1996 risk assessment was that it was not a proper risk assessment for the purposes of the SPS agreement in that it did not adequately address the probability, as distinct from the possibility, of the various steps in the disease chain being addressed. The 1999 risk assessment fundamentally reviews the entire risk profile against the findings of the WTO and the provisions in the agreement.

Senator O'BRIEN—The OIE defines acceptable risk as 'the risk level judged by member countries to be compatible with the protection of animal and public health within their country, taking into account epidemiological, social and economic factors'. How does this definition fit with the concept of an appropriate level of protection?

Mr Gascoine—That definition is consistent with the definition that appears in the SPS agreement, although the words obviously differ. But the thrust of the definition is the same.

Senator O'BRIEN—The risk level judged by member countries to be compatible is our judgement, but some would say it is not really our judgement. We established an appropriate level of protection. We set our measures in place under that finding. We defined what is an acceptable risk and we judged that risk level ourselves to be compatible with the protection of animal and public health within our country. It seems to me that that is not really true. We have a very limited right to make that judgment. The judgment is certainly reviewable outside the country.

Mr Gascoine—The SPS agreement recognises that it is a matter of national sovereignty to determine what is the appropriate level of protection. It points out that that term has the same meaning as 'acceptable level of risk'. There is partly the correspondence with the OIE definition. What we do when we make a risk analysis is to assess risks and if the assessed risks exceed the acceptable level of risk then we specify control measures and other restrictions which would reduce the risk so that it falls within the acceptable level of risk or, in WTO terms, 'meets our appropriate level of protection'. The appropriate level of protection is something which we can determine on a national basis. Indeed, the SPS agreement obliges us to know what our appropriate level of protection is at the national level and then to apply that in a consistent way. The implication of this framework is that the risk assessment and the measures applied to control risk and the appropriate level of protection must have a plausible relationship to each other.

Senator O'BRIEN—Okay. Tasmania has argued that the decision to import uncooked salmon –

Senator MURPHY—Who wrote that? Sir Humphrey?

Senator O'BRIEN—Tasmania argues that the decision to import uncooked salmon – even with the restrictions – breaches the memorandum of understanding between the Commonwealth and the states on animal and plant quarantine measures. Would you like to comment on that claim?

Mr Hickey—The memorandum of understanding has to be read in conjunction with our obligations under the WTO agreement. Our view is that the decision taken does not breach the MOU.

Senator O'BRIEN—Is that what the MOU says – that it has to be read with that? Or, is that an interpretation of the effect of the memorandum?

Mr Hickey—I am not sure that I understand the difference you are trying to get at, Senator.

Senator O'BRIEN—I am simply asking you does the memorandum specify that, whatever the agreement is, it is subject to other things. Or, is that a matter of interpretation?

Mr Gascoine—The memorandum of understanding refers to the SBS agreement and the Australian government's obligations as a member of the WTO. It goes on to say that in the light of those obligations, and in particular the obligation of article 13 of the SBS agreement, which requires the Australian government to

take the measures reasonably available to ensure that state governments do not apply measures inconsistent with our WTO obligations, it sets out several provisions where the states and the Commonwealth agree that states will not apply measures which are inconsistent with our WTO obligations. It also has some other provisions about consultation and so forth.

Senator O'BRIEN—If there were a dispute about the action of a state under that agreement, that matter would be determined, I suppose, by the High Court. Is that correct? Do I understand that correctly? If there were a dispute which could not otherwise be resolved by agreement between the Commonwealth and the states, that matter could only be determined with reference to the High Court?

Mr Hickey—If there is no possibility of a negotiated agreement, which is the hypothetical position you are putting –

Senator O'BRIEN—Yes. I think we have to ask hypothetical questions about matters such as that because I need to get to the point I want to get to.

Mr Hickey—Then, in those circumstances, there are two courses available. One would be a legal determination of the rights of both of the parties involved through the courts. The other would be for legislation to be enacted which clarified any confusion or uncertainty about the respective rights of the parties.

Senator O'BRIEN—So, whether an action was or was not consistent with our obligations under the SBS, the High Court might find something different from what an international body might find.

Mr Hickey—I do not think we could really answer that question.

Senator O'BRIEN—It is speculative, but what I want to know is this: if there were a finding by the High Court which was not consistent with the finding of some panel – going back into the past as to what was necessary to satisfy our requirements – where do we end up there?

Mr Hickey—I do not think any of us is qualified to answer that. It might be a question you might want to put to the next set of witnesses.

Senator O'BRIEN—I accept that. I do not want to ask you to answer questions that you feel are inappropriate for you.

Mr Hickey—We are not in a position to weigh up High Court decisions against international treaty obligations. They really are matters that are beyond our expertise.

Senator O'BRIEN—I understand what you are saying. You proffered a couple of solutions for the resolution of a dispute. I am simply following that line of questions and trying to get clarification as to what might happen if we reached a certain point. If you are unhappy about dealing with that, I am happy with your suggestion.

Mr Hickey—We would prefer to defer to the Attorney-General's Department on that matter.

Senator O'BRIEN—I am happy to do that.

Senator CALVERT—I noticed in your submission that you talk about the quantitative versus qualitative methods for risk analysis and the discussions that went on at the conference in Paris. You say that two AQIS officers attended the OIE conference. Is either of those officers here today?

Dr Kahn—Yes, one of them is here today.

Senator CALVERT—Did you actually go?

Dr Kahn—No. Vanessa Findlay attended the conference and she is here.

Senator CALVERT—I just wanted to ask on a general basis what were some of the major concerns that were raised at that conference. The basis of the conference was about risk analysis and how it affects different countries. Was there anyone there with major concerns that you did not expect to see or something that happened that perhaps stands out in your mind as to the value of this conference?

Ms Findlay—There was nothing that particularly stood out. I guess the major issue that was brought out was the lack of scientific data available for aquatic animal risk analysis.

Senator CALVERT—So there is a lack of scientific data leading to risk analysis not being able to be prepared as well as it could be.

Ms Findlay—Using a quantitative method.

Senator CALVERT—So that is why most of the risk analysis is conducted under qualitative –

Ms Findlay—That is correct.

Senator CALVERT—Was there any discussion at the conference about the rights of countries to refuse access to a product, knowing it to be diseased, from another country?

Ms Findlay—No.

Senator CALVERT—There was not. So basically the whole conference was based around methods of conducting risk analysis, and there were no other discussions between countries about the spread of disease or how ISA is going and what sort of scientific knowledge is being gained on that? There were no other discussions about fish diseases. It was all to do with risk analysis, was it?

Ms Findlay—The first day of the conference concentrated on methodology of risk analysis. The subsequent two days covered more technical issues. Some of them went into the diagnosis and how diseases were tested for. From the content of the conference, the last two days were not directly applicable to the methodology of risk analysis. It was more looking at the data and the lack of scientific data that underpinned a quantitative risk analysis that was available.

Senator MURPHY—You said ‘quantitative risk analysis’. This has been a matter that has been discussed to some degree with regard to how AQIS actually went about preparing its risk analysis. Indeed, there was some criticism of AQIS in its original preparation of the 1996 analysis, which was the final risk analysis, I suppose, with regard to some aspects of how it was done. In respect of ISA, for instance, what were the quantitative measures there?

Dr Kahn—We considered what quantitative data are available on ISA. But the measures that are put in place cannot really be described as ‘quantitative’ or ‘qualitative’ measures. Those descriptions relate more to the method used in the risk analysis rather than the to the conclusions or the measures that are put in place.

Senator MURPHY—With regards to the communicative measures in the 1996 risk analysis, was there not a criticism by the panel of experts that you did not have in it any data in respect of disease communication?

Mr Hickey—The primary concern of the dispute settlement body in relation to the 1996 risk analysis was that there were elements of assessment of probability – whether that is done quantitatively or qualitatively – but that a good deal of the assessment that was done was on possibility, not probability. So it was not so much a focus on a question of whether there was sufficient quantitative data there. The focus was on the issue of whether it had adequately addressed probability or likelihood as against possibility.

Senator MURPHY—I am just looking through the transcript of the panel that was set up at the time to look at it and then provide the WTO with an opinion. The only reason I am asking about this is that, when we started off in this process, we were told that we as a country were one of the main drivers in getting an SPS agreement, that we were up there negotiating the various articles and application of an SPS agreement. One of the things I have had great difficulty with, having that in the back of my mind, is how we then proceeded to prepare a risk analysis that was in fact wrong. That led us to then have to prepare another one in a rather hurried way. That has then subsequently led us to end up before appeals panels and to reformulate the restrictions that we had in place. And they have now been further contested.

Mr Hickey—The use of the word ‘wrong’ there would be something that I would contest. The original decision was found to be deficient in the sense that, having identified possibilities, it did not then go on to address probabilities. The word that is used in the SPS agreement is the ‘likelihood’ of various things happening. It is certainly the case that the SPS agreement, as I think Mr Hussin had said, is written in with some terms in it which are general or descriptive in nature and not precisely defined, and that the science – if I could put it that way – of risk assessment methodology is emerging as countries move to implement their obligations but also in response to specific case law.

In this respect I do not think risk assessment methodology would be different from any other administrative process which is finetuned to reflect contemporary decisions of courts and other appeal bodies about the interpretation of various provisions of the sort of governing administrative framework. What we have been through with salmon is increasingly, if I could put it in my simple terms, a micro-focus not only on the measures that we apply but on the risk methodology rationale for arriving at those measures. We are seeing an emerging picture of case law or precedent in decisions by dispute settlement bodies, not just in relation to salmon but also, for example, in relation to hormones and apple varieties into Japan, which all national quarantine authorities are going to have to take into account in their risk assessment methodologies and processes in future. We are no different in that respect, as I say, from other areas of government administration and from any other national quarantine authority.

Senator MURPHY—Science and diseases are quite often an evolving process. What happens in the case of discovery of new diseases or different strains of existing diseases? Are we able to apply to review the restrictions that we have in place at a particular time on the basis of an occurrence or because of a development in the discovery of a new disease or a mutation of existing disease? Are we able to then proceed to conduct a review and say to the WTO, ‘We are now changing the restrictions that we have in place in light of these things’?

Mr Hickey—Yes, we are. The formal process is that, if we were to adopt interim measures in response to a significant new disease occurrence or if we were to change our measures, there is a formal requirement for us to notify our intention to change measures to the SPS committee.

Senator MURPHY—If we were confronted with a situation where the current proposed measures were found to be acceptable, what would be the process thereafter?

Mr Hickey—Found unacceptable by whom?

Senator MURPHY—If those 12 measures that we currently have are found to be unacceptable, what do we have to then do?

Mr Hickey—Found unacceptable by whom?

Senator MURPHY—Isn't it the case that the implementation panel is looking at those?

Mr Hickey—If there are rulings through the formal dispute processes in the WTO that a country's measures contravene the terms of the agreement, there is an obligation on that country to review those measures to bring them into conformity.

Senator MURPHY—Whom do we have to satisfy in respect of that conformity?

Mr Hickey—The appellant organisation, and ultimately the WTO.

Senator MURPHY—We do not have to satisfy the appealing country?

Mr Hickey—As I said, either the appellant country or ultimately, through one mechanism or another, into the WTO.

Senator MURPHY—In this case, with regard to Canada, if, for instance, we were asked to review the measures and we went back with a set of reviewed measures, and Canada said that they are still not acceptable, what happens?

Mr Hickey—I think they are matters of process, issues that we would defer to the Department of Foreign Affairs and Trade on, but my understanding would be that, at the point where no agreement with the appellant country was possible and that country continued to apply measures that we regarded as being unacceptable, there was potential for recourse for us to the WTO.

Senator MURPHY—This may be a question for the Department of Foreign Affairs and Trade as well. There is a retaliatory action case, currently adjourned, by Canada, isn't there?

Mr Gascoine—Yes. Canada has obtained the right to retaliate against us and it has been suspended.

Mr Hickey—Pending further processes.

Senator MURPHY—What was the quantum of the figure claimed in there?

Mr Hickey—By Canada?

Senator MURPHY—Yes.

Mr Hickey—As I understand it – and Mr Gebbie may be able to help us – they gazetted a range of products to a value of \$Can45 million.

Senator MURPHY—As I understood it, the process is that they can actually make a claim for up to the value of the damage done or the assessed damage done. In this case, it would be the assessed damage done. I am asking this for clarification: is it the loss they would suffer in terms of the salmon that they could have expected to import into this country?

Mr Hickey—You are getting beyond my area of expertise. I think it might be a question for the Department of Foreign Affairs and Trade.

Senator MURPHY—I have a question as to consistency. It has been said before that we have to have a consistent approach but, where there are diseases that are species specific, we are allowed, are we not, to take a specific approach?

Mr Hickey—Yes. We are entitled to deal with specific disease threats, but to do that in a consistent way against a range of possible entry paths.

Senator MURPHY—Yes, I understand that. With regard to the issue of ISA, is it not the case that salmon farms that have been detected with ISA are still allowed to process fish that show no visible signs of contamination?

Mr Hickey—Do you mean within their own countries, or for export to Australia?

Senator MURPHY—We will get to the export question in a minute. But, within their own country, is that not the case?

Dr Kahn—It varies from country to country, but in some countries that would be the case.

Senator MURPHY—We have proposed a measure in respect of ISA that, where it is identifiable that ISA exists, we would not allow the import of fish from that area or that farm. I think it is the farm and area within a distance. What is the period of time once that farm has been cleared, for instance?

Dr Kahn—The certification really depends on the nature of controls that the exporting country puts in place, but as long as the farm is regarded as either infected with or under official suspicion of infection with ISA, it would not meet our requirements as set out in our certification conditions.

Senator MURPHY—If there were a farm that was infected with ISA and had not come under the notice of the competent authorities and which had been selling fish that showed no visible signs of being contaminated with ISA and we had imported that fish into this country, given your response that we are not going to have any testing methods, how would we ever detect anything?

Mr Hickey—The general position is that we have to have confidence in the surveillance systems of the country concerned. Part of the preliminary assessment process is to look at the general monitoring and surveillance procedures that are in place to give us that level of confidence. So there is a starting point that says if those systems in our view are not adequate to detect the sorts of circumstances that you are suggesting could theoretically arise –

Senator MURPHY—They have arisen with respect to ISA.

Mr Hickey—Yes.

Senator MURPHY—Not in this country, but there is plenty of evidence to suggest that it has happened between and within other countries, and that the existing trust we are supposedly required to have good faith in, the competent authorities and the measures that they are supposed to apply, have not worked. There is plenty of evidence for that.

Dr Kahn—I think, though, in terms of ISA, it should be pointed out that, for the other countries of the world, providing the fish are eviscerated, that is sufficient safeguard against ISA. So in terms of countries meeting their obligations, I do not think we have any evidence that countries have not met that obligation.

Senator MURPHY—Dr Kahn, you never give up on this line, do you?

ACTING CHAIR (Senator Forshaw)—Excuse me, Senator Murphy. It might help if you just let the witnesses answer their questions and then you follow them – and, clearly, for *Hansard*.

Senator MURPHY—I said that Dr Kahn has one line and that line is that the internationally accepted standard is evisceration, et cetera. But the reality is something different. The reality is that this disease has spread both between countries and within countries and there is plenty of scientific evidence and opinion. It might be unacceptable to Dr Kahn, but it is there.

Mr Hickey—There is no reason to be personal about these matters, Senator. But the reality is –

ACTING CHAIR—I think we should get back to the questions, Senator.

Mr Hickey—Let us focus on what I have decided in terms of the measures rather than what Dr Kahn thinks.

Senator MURPHY—I am happy with that.

Mr Hickey—There is a set of considerations that have been applied to this whole process that reflect all of our responsibilities. That is a decision, ultimately, that I have had to make. So, if there are concerns about what AQIS has said to you – not what Dr Kahn has said to you – I would appreciate it if you would address them to me.

Senator MURPHY—I accept that. I do apologise to Dr Kahn. With regard to what AQIS has said – and at the end of the day, Mr Hickey, it is a matter of opinion: you will have an opinion and I will have an opinion and, in some cases, never the twain shall meet – but, nevertheless, there is scientific evidence, and it is a matter of fact, that this disease has spread between countries and within countries despite – and this is my point – these measures that we are supposed to have faith in. I want to know why is it the case that we are not able to apply tests. I think Dr Kahn said previously that we would not be applying tests. I am curious as to why we would not want to apply tests other than, I think, in the case of human health where there have also been concerns raised in respect of ISO.

Mr Hickey—The starting point for all of the measures that we implement – and I know we might never agree on this – is the international standard, and the international standard is for evisceration, including in respect of ISA. So that is the starting point for the SPS agreement and the decisions that we have to make. We are not just relying on certification by an overseas authority. There are 12 measures in total that we have applied to imported fish into this country which are currently the subject of review at the moment through the WTO processes. One of those measures is not a mandatory import testing regime. That is correct.

That is the advice that we have given to this committee in the past. It is advice that I am confirming now, which is not to say that if there were changed circumstances that emerged different from those that pertained when we did the risk analysis, those additional measures could not be imposed. Indeed, if you go back to significant disease outbreaks at the time of the pilchard deaths in 1995, we instituted a sampling system for imported pilchards coming into the country at that time. We did not impede the trade. We took samples from

those consignments. There are response mechanisms that are available in the light of significant changed circumstances.

Senator MURPHY—Do we have mandatory testing in respect of any other animal and/or plant that comes into this country?

Mr Hickey—I do not know whether the officers can think of something. We do have some mandatory inspection requirements for insects associated with fresh fruit and vegetable imports, for example.

Senator MURPHY—What about animals?

Mr Gascoine—We do have testing requirements especially in relation to imports of live animals and genetic material into Australia.

Senator CALVERT—I have a question which is also a bit of statement. As a committee, over quite a period now we have been reviewing thousands of pages of evidence and we have had hours and hours of questioning. I was going to ask a question about a statement made in your submission that no witnesses have presented evidence to support the claim that trade in salmonid or other fish products causes the spread of disease, but Senator Murphy has covered that reasonably well. If that is the case, I would like to know how these diseases are spreading around the world – if they are not being spread by trade in salmonid or other fish products. That is the question. After all the evidence we have had and everything that has been said we find that, with the WTO, as a country we do not have the right to be able to refuse fish coming into this country that may be diseased or come from an area that is diseased. I refer back to a question that I have asked Dr Kahn before. It really concerns me that we do not seem to have the power under the WTO rules to stop the importation of salmon or any fish product that comes from an area that has disease or from a farm that is known to have disease or could have disease. It is a difficulty that you face as our quarantine experts but, in a broader sense, we have a country that is free of disease in our wild fishery, basically, and in our farming fishery and we would like to keep it that way. But it seems that is at risk because of WTO rules.

Mr Hickey—I refer to the two elements of your question. I may have misinterpreted what Senator Murphy was saying, but I understood him to be arguing that diseases have spread. That is not arguable. That is a fact. It is the method by which those diseases have spread that there is no agreement on. I refer you, in the interests of time, to paragraphs 19 and following on opinions that exist about whether those diseases might have spread as a result of movement of product for human consumption as opposed to movement of genetic material, live fish or ova. There is still a great deal of debate and uncertainty about the transmission paths.

On the second point, the issue that we have had to confront has been a consistency one. I have kept saying – and I am sorry if I have to repeat myself – that we are not deciding measures in relation to salmon and its impact on Tasmanian Atlantic salmon production capacity alone. The consistency issue forces us to have regard to other risks which are real risks that do exist, in that pests and diseases can get into this country. We are no better and no worse than any other regulatory authority in preventing that sort of behaviour from happening. Does the Customs service absolutely prevent the importation of drugs, firearms or other illegal products into this country? Does any police force actually prevent the commission of crime?

The facts are that there is an underlying rate of incursion of pests and diseases into Australia which happens every year. Generally, the transmission paths are well-known to be the enormous amounts of tourism and trade that come into this country, complex issues like ballast water and its discharge into the Australian marine environment, as well as the movement of particular commodities that we assess from time to time. When we make decisions, we have to be consistent in a way that has regard to the fact that there are other potential transmission routes. That is the sort of legal environment that we have got into through the WTO processes. You are right to say that, to the extent that we do accept those obligations as a country by being a member of the WTO, we have to abide by the case law as it has been determined and is emerging. There is no argument about that.

Senator CALVERT—But the problem I have is this: we have the right to stop meat coming in from an area that has foot and mouth disease but we do not have the right to stop fish coming in from an area that has disease.

Mr Hickey—That is correct. It is because the starting point under the rules is the international codes and standards. The question you are raising, which is a valid one, is whether there is actually consistency amongst the standards themselves across a whole range of products. That is an entirely separate and very complex set of questions that we grapple with. Our response to that has to be to be involved in international processes, like the ones that Ms Findlay has been involved in, which ultimately feed into international standard determination processes. We have to seek to influence those processes in ways that best meet our requirements, but we are not starting from a perfect position. We concede that.

Senator O'BRIEN—In the submission, on page 5 at point 12, you give us details of current permits on imports. Do all of those relate to uncooked salmon product? If not, can we get a breakdown as to how much relates to smoked and the other processes involved?

Mr Hickey—We can give you the details of the permit applications.

Senator O'BRIEN—I see the figure of 16, 605 kilograms for salmon imported from New Zealand. Is that all uncooked salmon or does that include smoked products?

Mr Hickey—I would need to check. I believe that is uncooked.

Senator O'BRIEN—Is that still the only country from which we receive uncooked product?

Mr Hickey—As of this date, yes.

Senator O'BRIEN—Ms Findlay, in relation to the OIE conference, I think you said that on the last day papers were presented on the lack of scientific data on which to base quantitative risk analyses, so there is a significant debate on whether there is enough scientific data available to actually carry out a quantitative risk analysis. That is the essence of what you told us, isn't it?

Ms Findlay—That is correct. The issue was that the models that have to be formulated to underpin a quantitative risk analysis are somewhat subjective if there is not enough numerical data to underpin. That is definitely the case with aquatic animal risk analysis, and this was well recognised during the conference.

Senator O'BRIEN—Given that debate, where does that put our risk analysis? Does that very debate expose our risk analysis – and any others, for that matter, that are in any way quantitative – to questioning?

Mr Hickey—Mr Gascoine might want to comment on this, but my understanding is that in the case law that has emerged through the –

Senator O'BRIEN—I mean scientifically.

Mr Hickey—There is no obligation on us to do a quantitative versus a qualitative risk assessment. As we have previously discussed, we attempt to inject as much quantitative data into a risk analysis as we possible can, but the reality is that all of the analyses that we do are essentially qualitative analyses, as is the case everywhere else in the world, to our knowledge.

Ms Findlay—If I could just add to that, David Vose is a recognised quantitative risk analyst, and he said that the worst case scenario would be to attempt a quantitative risk analysis where there was not the data to underpin it.

Senator O'BRIEN—In other words, you would be doing something that could not possibly have a proper scientific basis. Is that what you are saying?

Ms Findlay—That is correct.

Senator O'BRIEN—Thank you.

CHAIR—I have a series of prepared questions which I will put on notice because we are out of time. The other question I want to ask is related to the international division within the Attorney-General's Department, which will be appearing later. In terms of handling this, what use was made by AQIS and the legal expertise in terms of the rules of the WTO, bearing in mind that they ran the bluefin tuna case and won, with the Attorney-General leading the charge?

Mr Gascoine—The responsibility for running the legal case in the WTO on salmon is the responsibility of the Department of Foreign Affairs and Trade in the first instance, so you might want to address that question to them.

CHAIR—Yes, I will be addressing it to them. They will get asked, don't worry about that! But I am asking you whether or not there was any consultation whatsoever between AQIS and the expertise that exists in your legal side.

Mr Gascoine—My recollection of this is a little incomplete. Perhaps I could turn to Mr O'Connor and ask him if he could advise on this.

Mr O'Connor—As Mr Gascoine has foreshadowed, the responsibility for legal advisings was an issue that we left with the Department of Foreign Affairs and Trade for interpretation of WTO arrangements and so on. We use the Australian Government Solicitor as our legal adviser. From time to time we have sought some advice from the Australian Government Solicitor, which operates separately, I suppose, from the Office of International Law. That has been the source of our advice on specific quarantine rules and the application of the Quarantine Act in the Australian domestic context.

CHAIR—Could you give us a summary of the issues and the matters relating to contact between you and the Office of International Law in the Attorney-General's Department? I will put that on notice.

Mr Hickey—Covering which period?

CHAIR—The Office of International Law comes under the Attorney-General, does it?

Mr Hickey—Yes. We would be happy to take that on notice.

CHAIR—I will put the question on notice. Regarding the other questions on notice, some have been asked and some have not. The secretariat will delete those and write you a letter in that regard. We do not want to ask you the same question twice or three times.

Senator O'BRIEN—Maybe we can ask about the matters raised in estimates. Can you give us an idea of when we might have the material that you promised us. I know there is an estimates time line.

Mr Hickey—If there is a specific time frame you want to set on it, Senator, we would be happy to meet it. If you want it by next Wednesday, we would be happy to –

Senator O'BRIEN—That will do.

CHAIR—What Senator O'Brien was saying was this: after all those questions, take out the salmon ones first and answer them by next Wednesday.

Senator FORSHAW—I have one question that follows on from the response you gave to Senator Calvert's question about the different standards that apply as against this issue, and that is where the real problem is. Are there any mechanisms within the WTO forum where those issues could be addressed?

Mr Hickey—The issues really need to be addressed through the standard-setting agencies, in this case the OIE and the IPPC. We do have officers who work on reviews of various aspects of the standards from time to time. We have one officer who is secretary-general to the code commission that determines animal health standards. Through the proper processes, we try to influence the determination of those standards, when it is in our interests to do so.

Senator FORSHAW—It may be more of a question for DFAT. I took from your comments that this is a problem for Australia – whether or not we are looking at any means or moves to try and bring those sorts of issues onto the table and to see if we can get some consistency. From what I gather, what is being said is that we are being told we have to be consistent in our approach, that these things cannot be used as trade barriers. Yet to the layman out there, the average consumer and citizen, and even to us – and their views are very important – there is a big discrepancy in what people see as the approach being adopted in meat and livestock. Regarding what Senator Calvert said about prohibition, we know that the US and other countries have stopped shipments of our beef on the basis that they believe they are being contaminated. Yet it might appear that that option is not available to us in some other areas. Sooner or later, if this is a problem, someone has got to take the issue up with the WTO.

Mr Hickey—The question is whether it is a matter for the WTO, the SPS committee or international standard setting bodies. It is an issue that we certainly are confronted with. The starting point is the relevant international standard. Whether the process by which international standards have been developed and set needs to be fundamentally reviewed is something we should have an opinion about and be trying to do something about, recognising that there are a lot of other countries that are members of the WTO which may not share that view.

Senator FORSHAW—Or who may have particular interests in protecting particular industries. I will leave it there.

Senator MURPHY—The Fish Diseases Commission has developed – and, I assume, continues to develop – a list of notifiable diseases and the protocols and/or standards that it sets in respect of international trade in respect of those diseases. Do you have that list? Ms Findlay is nodding.

Dr Kahn—Yes, we do.

Senator MURPHY—Could I get a copy of that?

Dr Kahn—Yes.

Senator MURPHY—Thank you.

CHAIR—I thank the officers from AQIS for their contribution today. You will receive that letter from the secretary, with those other questions, and we will proceed from there. Thanks very much for your attendance.

Proceedings suspended from 11.16 a.m. to 11.32 a.m.

ZANKER, Mr Mark Andrew, Assistant Secretary, International Trade and Environment Law Branch, Attorney-General's Department

CHAIR—Welcome, Mr Zanker. Were you here when I read out things relating to privilege or are you familiar with it?

Mr Zanker—I am.

CHAIR—I will not repeat it. I invite you to make an opening statement.

Mr Zanker—By way of an opening statement, I should explain what the function of our office is. It is to conduct international litigation and arbitration, to provide advice involving Australia's or another country's obligations under international law, and advice on treaty negotiations. We also do advice on implementing treaties. Bills that involve international law issues or which are drafted to implement international law in Australia are referred to us by the Office of Parliamentary Counsel for an opinion on whether they adequately implement our obligations under the treaty. The office is also involved in domestic litigation involving significant public international law issues.

Senator O'BRIEN—Can you give us some more information in relation to the involvement of the Office of International Law in trade treaties?

Mr Zanker—It really depends very much on what sort of question we are asked. We may have no involvement at all in the negotiation of a treaty or we may have some involvement in terms of briefing the line department. A particularly controversial multilateral treaty that we worked closely with Treasury on was the Multilateral Agreement on Investment. That was a major one. We were not actually involved in the negotiations but we were quite often asked by Treasury for advice about what particular provisions of that agreement would mean.

Senator O'BRIEN—In terms of actually providing an advocacy service, I understand that Attorney-General's does provide an advocacy service in certain international fora. Can you give us some information about that?

Mr Zanker—The most recent example where the office has been involved in advocacy in international law has been in the southern bluefin tuna dispute between Australia and New Zealand on the one hand and Japan on the other. The interim stage of that case was held before the International Tribunal of the Law of the Sea in Hamburg. There was an officer from the Office of International Law who was the lead advocate. The Attorney-General also appeared. The Chief General Counsel in the Australian Government Solicitor, Henry Burmester, was also one of the advocates, and Professor James Crawford from Cambridge University. If we do not carry out advocacy services ourselves, then we arrange for outside advocates.

Senator O'BRIEN—In relation to WTO, you have given us an answer and Mr Cornall gave us an answer about the WTO and, in particular, the salmon cases as described. Could you tell us what experience, if any, the Office of International Law has with World Trade Organisation dispute settling procedures?

Mr Zanker—In practical terms?

Senator O'BRIEN—Yes.

Mr Zanker—One of our officers was made available to the Department of Foreign Affairs and Trade during the salmon dispute. She travelled to Geneva. That is the sum of recent practical experience.

Senator MURPHY—What was her experience with regard to World Trade Organisation matters?

Mr Zanker—I could not tell you. She had academic qualifications, specialist academic qualifications, and she had written a number of articles and things like that, but as to what she actually did during the salmon case, I think you would have to ask the Department of Foreign Affairs and Trade.

Senator O'BRIEN—In terms of some matters that I was pursuing earlier, I referred to a memorandum of understanding between the states and the Commonwealth with regard to quarantine issues. You may have heard the exchange.

Mr Zanker—No, I am sorry, I didn't.

Senator O'BRIEN—If there was a dispute under a memorandum of agreement between the states and the Commonwealth, the Commonwealth, in the absence of a legislative solution, would need to take that to the High Court, wouldn't it, to resolve it? That is my understanding, but correct me if I am wrong.

Mr Zanker—If it is a political agreement it would not be justiciable, I do not think. If there was a contract or something between a state and the Commonwealth –

Senator O'BRIEN—What is a political agreement? I have heard of political agreements, but you might be talking about things that are quite different from the ones I have heard about, so tell us what you mean.

Mr Zanker—An intergovernmental agreement that each government will do particular things or abide by particular understandings is really my conception of what a political agreement is.

Senator MURPHY—With respect to quarantine measures, how would the Commonwealth deal with the issue of Tasmania having in place quarantine measures that are considered by an international organisation to which the country is a signatory to be inconsistent with a judgment of that organisation, and there is a requirement on the country to ensure that its states comply with it? How would we deal with that? Is that justiciable?

Mr Zanker—If there was some need to change legislation to ensure that Australia's domestic legislation complied with the requirements of a treaty, the legislation could be enacted at Commonwealth level and under the Constitution any inconsistent state legislation would be of no effect.

Senator O'BRIEN—I understand that. What I was referring to was the memorandum of understanding between the Commonwealth and the states on animal and plant quarantine measures.

Mr Zanker—I am not familiar with the memorandum.

Senator O'BRIEN—No, but would that be a political agreement?

Mr Zanker—In terms of it having any legal force, I doubt it.

Senator O'BRIEN—So agreements of that nature between the Commonwealth and states have no legal force?

Mr Zanker—That is right.

Senator O'BRIEN—So, if Tasmania argued that the Commonwealth had breached such an agreement, you are saying Tasmania would have no means of pursuing the Commonwealth for breach of the agreement.

Mr Zanker—I do not believe so, no.

Senator MURPHY—Even if compensation measures were contained in that agreement they would potentially not be able to pursue compensation?

Mr Zanker—Again, it would depend on whether the agreement was legally binding, but it probably isn't, and it would then be a matter of negotiation.

Senator O'BRIEN—So how would such an agreement become legally binding? It would have to be the subject of legislation, would it?

Mr Zanker—Yes, I would imagine it would.

CHAIR—I have a number of questions. The first is on how you establish the dividing lines between the role you have in international law and the cases you run, what DFAT does and what AQIS does.

Mr Zanker—The Attorney-General has issued directions on tied areas of Commonwealth work. The matters of international litigation and arbitration, advice on international law treaty negotiation and advice on implementing treaties are the shared responsibility of the Attorney-General's Department, the Australian Government Solicitor and the Department of Foreign Affairs and Trade. In terms of the involvement of the Office of International Law in these matters, that will depend entirely on the client agency. If we are asked to do something in relation to any of those particular matters we will do it, but it is customer driven, if you like. If we are not asked to do something, we would not necessarily be aware of it.

CHAIR—You say in your letter in reply to us, signed by Robert Cornall:

Within resource constraints, the Office would be happy to assume a greater role in the conduct of Australia's WTO litigation.

Were Trade and AQIS aware of that?

Mr Zanker—I really could not speak for them, I am afraid. I do not know.

CHAIR—Let me put the question another way: did you inform them that you would be happy to assume a greater role in the conduct of Australia's WTO litigations?

Mr Zanker—I think the position is that we are available to do it. That is part of our mandate –

CHAIR—That is not my question. My question is: did you inform them. If you want to take it on notice, please do so.

Mr Zanker—I do not think we did.

CHAIR—In other words, what are the communication links between the legal components of the various departments?

Mr Zanker—I do not believe so, but that is about as far as I can take it.

CHAIR—Let me ask you another question in regard to that. It seems to me in this whole thing that the only party that can claim independence from the issue is you. The Department of Foreign Affairs and Trade has a dual responsibility. The main emphasis, as I would read it and understand it, is on issues of trade – promoting trade, facilitating trade and all those types of things – yet they go in there to defend the principal defender of Australia in terms of a quarantine issue. That must lead to a conflict of interest looking into the future as well

as the past in some of these negotiations. You have AQIS responsible for quarantine and trade, and they have very different roles. Do you see that in fact there is a potential for conflict of interest in doing two things?

Mr Zanker—There are arguments on either side. Another view could be that disputes in the World Trade Organisation before the dispute settlement panels and the appellate bodies are integral aspects of Australia's overall trade policy and for the trade people in the Department of Foreign Affairs and Trade to be closely involved in those matters is essential for the proper conduct of trade policy in Australia.

CHAIR—I am not saying that they should not be involved and I am not saying that they do not have an interest. What I am saying is that, in terms of their particular position in trying to do both tasks, it could well be better in future if we had the independence of your department or –

Mr Zanker—You could certainly have additional legal skills brought to bear if that is considered to be a desirable course of action.

CHAIR—Concerning expertise, you made a comment that you can utilise outside advocates. Were you talking in terms of outside advocates within the whole of government or were you talking about advocates from the private sector, or both?

Mr Zanker—Obviously international litigation is a pretty rare bird. As I indicated, the case on southern bluefin tuna involved us engaging four advocates: one from my office, the Chief General Counsel from the Australian Government Solicitor, an Australian academic based at Cambridge University and also the Attorney-General. All of the people involved have particular advocacy skills and are highly qualified and respected international lawyers. What we are interested in is to present Australia's views in these cases as best we can, in the hope of securing a victory.

CHAIR—I hope that is the case. If you do not have the expertise within the whole of government, do you have the capacity to take advocacy from the private sector? Can you do that? Are you limited?

Mr Zanker—We are doing it at the present time.

CHAIR—Were the four you named then within government or was there outside advocacy in that? I did not get that clear.

Mr Zanker—Professor Crawford is from Cambridge University and he does a large amount of international litigation, as well as performing his academic role.

CHAIR—Thank you for clarifying that for me. We are concerned about what we have here and it is fairly obvious that we are going to have a number of trips to the WTO in future. The next trip could be about apples. If that workload increases – I believe it will – do you have the capacity within your structure now to play a much greater role, or would you have to increase resources?

Mr Zanker—The cases are very intensive and require an enormous amount of effort. There would be a resource issue from our point of view if we suddenly had to assume a much greater role than we have at the moment.

CHAIR—I will leave it at that for the moment.

Senator FORSHAW—You might not be aware but can you comment on the way in which other countries approach these issues in terms of coordinating and their representation? For instance, do the Canadians have a team of lawyers in there as well as everyone else?

Mr Zanker—That is my understanding. Certainly the writings that I have read relating to the WTO dispute settlement process have said that it is generally moving towards a more lawyerised process, if you like. I think that was one of the underlying intentions of the Uruguay Round – that there should be a strong rules based system governing international trade. From my own knowledge – I could not say directly – that is certainly what I have read amongst materials that have been written on the subject.

Senator FORSHAW—We can take it up with the department of foreign affairs later. It is an observation that has been put to me. I can no doubt test it out. When it comes to the resources that we put into some of these things compared to our major trading competitors, we could do better. I will let the department respond to that later.

CHAIR—Why did the southern bluefin tuna case end up your responsibility?

Mr Zanker—For a long time there have been difficulties in the commission for the conservation of southern bluefin tuna. There have been difficulties with Japan in agreeing on matters like total allowable catch and so on.

CHAIR—Yes, we are fairly familiar with that. We heard a lot in estimates committees about it. Why did it end up as your responsibility?

Mr Zanker—The decision was made ultimately by the lead department – Agriculture, Fisheries and Forestry Australia – that enough was enough and that we had to take some dispute settlement action with Japan

over these issues that had not been able to be resolved by agreement. Then, because one of our functions is the conduct of international litigation and arbitration, once that decision had been made, we stepped in to take over the running of the case. That is how we are involved. As I said before, it is client driven. Once a decision is made to initiate this sort of litigation, it is our role to take it on and deal with it.

CHAIR—So it was AFFA that referred it to you or engaged you to represent them in terms of this particular case?

Mr Zanker—That is right.

Senator FORSHAW—Is that the same practice for other international bodies such as the ILO or would the relevant department use their own internal departmental lawyers to argue a case for the ILO, defending the current industrial relations laws for instance?

Mr Zanker—If there was some sort of dispute I very much doubt –

Senator FORSHAW—It happened in the last few years. The actions sometimes have been taken by bodies within Australia.

Mr Zanker—Yes.

Senator FORSHAW—I am wondering if this is the normal sort of practice, once it gets a requirement for legal representation – that it goes to A-G's?

Mr Zanker—As I said, the Attorney-General has issued these directions on tied areas of Commonwealth work and, in relation to international litigation, that is a matter that is tied and can be performed by the Attorney-General's Department, the Australian Government Solicitor or the Department of Foreign Affairs and Trade. The Department of Foreign Affairs and Trade generally deals with these World Trade Organisation matters that we have been talking about. But, if there was a possibility that the government, through one of its departments or agencies, was going to become involved in some sort of international dispute settlement process, that is a matter which should ordinarily come to our office for consideration as to whether the decision to proceed with the litigation is a sound one, and what the prospects of success might be – that sort of stuff.

Senator FORSHAW—Could you tell me whether that happened in the ILO matters that have been dealt with in the last few years? If you cannot now, take it on notice.

Mr Zanker—No, I cannot tell you. Could you perhaps tell me –

Senator FORSHAW—There were challenges when the previous Labor government was in power to some of the changes in the industrial relations laws with respect to collective bargaining, I think. I can get you the specific details.

Mr Zanker—I would be grateful if you would.

Senator FORSHAW—There have been more recent cases in regard to representational or organisational rights under the act, and the ILO has a tribunal which can rule upon whether or not a country's laws are in conformity with, or in breach of, ILO conventions or principles.

CHAIR—Could you either give us the cases that you have been involved in representing Australia internationally in the last five years, or the last 10 cases, whichever might be the easier?

Mr Zanker—Yes, certainly.

CHAIR—I am not asking you to go back forever because I do not know how long you have been in existence. In fact, I have only recently learnt that you do exist. But can you give us the last 10 cases in the last two or three years, or over the last five years.

Mr Zanker—There are not 10 cases. I just cannot think of all of them off the top of my head.

CHAIR—Just take it on notice if you would, please.

Mr Zanker—All right, I am quite happy to do so.

Senator MURPHY—With regard to Attorney-General's and trade disputes, does the Attorney-General's office review, and has the Attorney-General's office reviewed, any of the legal proceedings that have occurred in trade disputes?

Mr Zanker—It depends on whether we are asked.

Senator MURPHY—You can take the question on notice because I asked you, 'Have you,' or you can tell me if you have. Have you reviewed any?

Mr Zanker—In the sense of?

Senator MURPHY—As a result of cases that have been before the WTO, and not necessarily Australian cases. But for the purposes of establishing what the case law might be, has Attorney-General's reviewed any of the cases, given that world trade is –

Mr Zanker—Yes, we have. Where some issue came up in work which we were required to do that involved an interpretation of a WTO agreement, we would look to see whether there were any panel decisions or appellate body decisions which were relevant. The normal procedure would be for us to just go to the WTO database on the Internet, where all the cases are available, and read through them.

Senator MURPHY—Was that done in the salmon case, for the purposes of Attorney-General's establishing whether our legal argument was good, bad or indifferent?

Mr Zanker—You would have to ask the Department of Foreign Affairs and Trade that question.

Senator MURPHY—But has Attorney-General's looked at it from its own point of view?

Mr Zanker—It may have been relevant in some requests for advice that we have received.

Senator MURPHY—No, I am not asking about requests for advice as the principal law officer of the country from time to time provides advice. Whether or not you have been involved in it – and by all accounts you were involved in this to a very limited degree – why would you not want to review the case to see whether the argument that was put was actually legally sound argument? I would have thought that might be of some assistance to us in the future, to understand whether we made a mistake or not.

Mr Zanker—As I indicated, the issue is we have involvement in these matters to the extent that we are asked. If we are not asked to provide advice on a particular matter, then we may not be aware of any issues that are of concern. But, if we are asked, we will provide the advice.

CHAIR—I can feel a recommendation coming on. I would have liked to have seen a review of the 12 points, for example, and, if the advice came back from an independent source that the consumer ready one, which is the one causing the problem now, had little or Buckley's chance of getting up in the WTO, is there any point in arguing it, because it takes the focus from some of the other issues and what have you? I am not saying a good or a bad job has been done, but I would think it would be rather difficult when you are caught in both situations of arguing a quarantine case and also trying to defend a trade position. That is something we have to think about. I am glad I found out about you. I am not sure whether the rest of the committee knew or not, but the secret has been broken.

Thank you, Mr Zanker. You have taken some questions on notice. If you have any other information, if you would get back to us we would appreciate it. If there is any other information we require, we shall be in touch.

Proceedings suspended from 12.02 p.m. to 12.52 p.m.

HIRD, Miss Joan Margaret, Director, WTO Dispute Investigation and Enforcement Section, Department of Foreign Affairs and Trade

HUSSIN, Mr Peter Anthony, First Assistant Secretary, Trade Negotiations Division, Department of Foreign Affairs and Trade

ROWE, Mr Richard Anthony, Legal Adviser and Assistant Secretary, Legal Branch, Department of Foreign Affairs and Trade

ACTING CHAIR (Senator Forshaw)—I welcome officers from the Department of Foreign Affairs and Trade. I think you know the preamble that we usually go through, so I do not need to do that. It has already occurred earlier in these proceedings. Would you like to make an opening statement?

Mr Hussin—I was not present, but we have given evidence earlier in the committee's proceedings, and I do not have any particular statement I wish to make at this point.

ACTING CHAIR—Okay. We will proceed to questions.

Senator O'BRIEN—I know we are awaiting the release of the WTO ruling on the Canadian complaint against our risk assessment and regime for the importation of uncooked salmon. That is the case, isn't it?

Mr Hussin—That is correct.

Senator O'BRIEN—I want to ask you some hypothetical questions, given that those matters are not yet on the public record. In the case that the appeal is unsuccessful, I take it that that is the end of the matter, or would there be a remaining right of appeal?

Mr Hussin—If our measures are found to be consistent with the SPS agreement, that would be the end of the matter. If any measure or part of the measure were found to be inconsistent, there would be a question of appeal to be looked at .

Senator O'BRIEN—If there was something that was inconsistent, you say there would be an appeal. Can you tell us what you mean by that?

Mr Hussin—Let me go back. I think either side would have the right of appeal, no matter what the finding was. If we were found to be consistent, Canada could appeal. If we were found to be inconsistent, we could appeal. There are rights on both sides that would have to be exercised in the next couple of weeks.

Senator O'BRIEN—So, whatever the finding, there are appeal rights?

Mr Hussin—Correct.

Senator O'BRIEN—Were there some finding with regard to our import restriction measures based on quarantine – and we have to be hypothetical at this stage – if any one or more of our 12 measures, which AQIS has set down as qualifications on the right to import uncooked salmon, were found not to be consistent with our obligations under the WTO, what rights do we have and what rights does the applicant, in this case Canada, have?

Mr Hussin—If any part of our measure were found to be inconsistent, the obligation would be on us to bring whatever element was found to be inconsistent into consistency with the agreement. That would be the situation. As I mentioned, we also would have a right of appeal to consider that issue. Equally, Canada could consider that issue if the measure were found to be consistent. That would be something that we could only really comment on in any detail once the findings were released.

Senator O'BRIEN—Let us take that a little bit further. Presumably we have adopted the position we have because AQIS believes that it is the appropriate set of measures to achieve the level of protection that we want to achieve. Is it competent for Australia to decline to vary the measures even though they may be found to be in breach of the WTO agreement?

Mr Hussin—The principal obligation of any WTO member is to bring themselves into conformity. If we were unwilling or unable to do that, there would be rights of the complaining party to either receive compensation or seek authority to retaliate against us up to the volume of the trade affected, and that right would continue until and unless we rectified that breach.

Senator O'BRIEN—When you say retaliate, what sort of retaliation would be permitted?

Mr Hussin—Retaliation normally has taken the course of penalty tariffs on a range of trade that is equivalent to an assessed volume of damage.

Senator O'BRIEN—Assessed by whom?

Mr Hussin—The normal course is that the complainant country would put out a claim. We would have the right to seek arbitration from the WTO panel which assessed this case as to the volume of any damage.

Senator O'BRIEN—Are there any precedents for this form of assessment?

Mr Hussin—There has been in the beef hormones case.

Miss Hird—In the bananas case as well.

Mr Hussin—In both cases the European Union was the respondent party. There have been assessments made.

Senator O'BRIEN—Is it fair to say that there are precise procedures which would be followed in these sorts of cases?

Mr Hussin—Yes, there are procedures. Normally it is the complainant country that lodges a proposal for the methodology of assessing damage. The respondent country then has the ability to put in its own views. There is usually provision for the parties to meet with the panel to argue their respective cases as to how damage might be assessed.

Senator O'BRIEN—Is there a set of guidelines in a manual that guides any WTO tribunal hearing such matters?

Mr Hussin—I am not sure that there is a set of guidelines. What I have outlined is the process that has been followed in earlier cases.

Miss Hird—There is no printed manual. The panel establishes working procedures and it would follow past practice, as it has done with bananas and hormones – submitting the methodologies, submissions and hearings.

Senator O'BRIEN—How do we know that they would follow past practice if no guidelines have been laid down?

Mr Hussin—In these cases, as in others, precedent does tend to determine at least procedures in these sorts of issues, so we would expect that the panel would look to past procedures and follow those.

Senator O'BRIEN—Isn't that the point? We are expecting it to follow procedures that have existed in previous cases, rather than having a precise pattern to follow – is that fair comment?

Mr Hussin—In the hypothetical case that this refers to, yes

Senator O'BRIEN—That is what we are talking about.

Mr Hussin—That is right. As I mentioned, it would also be open to us to suggest to the complainant that compensation would be a better course to follow.

Senator O'BRIEN—If the government believed that there had been some flaw in this process, what procedures could it follow to seek to correct that? One of the issues that has been discussed this morning is the fact that some of the older industries like beef have more defined disease protocols than later industries such as fish farming. What measures could a government follow to seek to address what it perceived as concerns as to how the process was operating in a case like this or even generally?

Mr Hussin—As I mentioned, the appeals process would be possible, but that would normally be on points of law that related to the previous processes. If there were a possibility to raise those sorts of issues in direct relation to the elements of the case that were being appealed, I guess it would be hypothetically possible to introduce such argument.

Senator O'BRIEN—At the moment, for the purposes of my questions, let us not pursue a particular case. It has been suggested, for example, that it is competent for Australia to refuse entry to beef that comes from areas where there is foot and mouth disease, as I understood the evidence this morning, but in the case of salmon we cannot say, 'This country has infectious salmon anaemia or some other infectious disease of the salmonid species, therefore we will not admit that product.' If Australia felt that pointed to a deficiency in the sanitary-phytosanitary agreement, could Australia seek to have that addressed? If so, how would it go about it?

Mr Hussin—In relation to the different standards set by standard setting bodies, I think it would be difficult to take this matter up. The SPS agreement allows that, where countries follow recognised international standards, they do not have to provide further justification for any measure they might take. They have to provide justification if they have a measure that is above the international standard. In the case you mentioned, foot and mouth disease – AQIS would be better placed than I am to comment on this – there are international standards which allow certain action to be taken. There is not, in this aquatic area. If one wanted to pursue the issue that standards across the different standard setting bodies were not consistent, I guess the opportunity to take that up would be in the phytosanitary committee, which is the ongoing committee which administers the SPS agreement.

Senator O'BRIEN—So it is competent for Australia to seek to have those matters raised. When would there be an opportunity for that to occur?

Mr Hussin—There are regular meetings of the SPS Committee through the year. I would make the point, though, that in this case over the last two or three years we have had quite an intense examination of what scientific evidence exists. Panels have called upon the key scientific advice that they can receive. The parties

themselves have called upon advice both from their own national constituencies and internationally. The science that relates to aquatic disease and measures to control it has been looked at very thoroughly, I think, in terms of the science that is available.

Senator O'BRIEN—I thought the evidence that this committee received indicated that, for example, there were a number of instances where disease had been transmitted but there was actually no precise knowledge as to how the transmission had taken place and that the knowledge base was not as complete as it could be.

Mr Hussin—I am not qualified to comment on that particular aspect. I think AQIS is better placed to comment on it. But I think it is recognised that the aquatic area is one that is a developing area in terms of the science.

Senator O'BRIEN—That is the point I made in the earlier question, is it not? The older industries have established protocols. Some of the newer industries like aquaculture are experiencing phenomena that, probably because of change in man's agricultural, horticultural or aquacultural field, others might have not yet come upon. We are newly farming fish. We have not farmed fish historically over the centuries, whereas we have farmed cattle.

Mr Hussin—My colleague reminds me that some of the points that you are making are certainly ones that we raised in argument before the panel.

Senator O'BRIEN—In arguing the case before the panel, I take it that it was an officer or officers of the department that presented the case?

Mr Hussin—Yes, that is correct. Over the period, several officers were involved.

Senator O'BRIEN—Although Attorney-General's had an adviser present, was it felt there was no need to engage any special advocacy skills?

Mr Hussin—I think we followed practices which are similar to those that a range of other countries follow. The WTO dispute settlement system is one that had developed from the preceding system under GATT. It has quite a long history to it. As the department most closely associated with trade policy issues, over many years we have been very closely involved in the disputes where Australia has been a party. Our practice has been that DFAT is the lead agency.

We do employ our own legal expertise in the department and we do call upon advice from other areas of our own department and the government where it is seen to be required. For example, as you mentioned in the salmon case, we had an officer from Attorney-General's Department seconded to DFAT as part of the team preparing our submissions, and that officer was part of the delegation that went to Geneva. We also had in the preparatory process seconded an officer from the legal office in the department which Mr Rowe heads. In that process on salmon also, AQIS called upon its own internal legal expertise and also had work done by the Australian Government Solicitor. So there was a good deal of expertise brought to bear on the preparation of the case and in its prosecution.

Senator O'BRIEN—Can you tell us how the applicant prosecuted its case? Who represented the applicant?

Mr Hussin—The applicant was represented by officers of the Canadian Department of Foreign Affairs and International Trade. They have in-house legal capacity. That, together with trade policy officers, was the nature of their delegation.

Senator O'BRIEN—Would it be fair to describe the proceedings as being conducted in a way that legal proceedings would be conducted? Is there some less formal interchange of information?

Mr Hussin—It is a less formal process. It involves a panel which normally has three members. In most cases in my experience the panellists themselves are people with trade policy expertise. It can be general or sometimes in the area that is being looked at, and of course the panel can call on expert advice. It involves the submission by both sides of submissions and countersubmissions. It is an interactive process with the panel at a couple of hearings usually during the course of the case. It is a different species than, for example, the International Court of Justice proceedings.

Senator O'BRIEN—To the department's knowledge, did the panel call for expert advice outside of the process that the department was involved in, or could they?

Miss Hird—The experts are chosen in consultation with the parties. It is a semi-negotiated approach. The effort is made to get consensus among the parties about the experts. The panel does have under the rules investigative authority. This is probably a little bit different from our normal court system here. They are free to go anywhere they want to get information, but in the more technical cases they will have a more structured process of formal experts appointed.

Senator O'BRIEN—This case would have been a fairly technical case, I assume?

Miss Hird—Yes. They have done it in every quarantine case to date.

Senator O'BRIEN—I was just wondering whether you would have the chance to see or hear any material that was under consideration by the panel.

Miss Hird—We are present, we see all written material, we are consulted on the questions that might be put to the experts, and the oral sessions are totally open. So everything the panel consults the experts on, to the best of our knowledge anyway, on the record is with both parties present. So it is very transparent in that sense.

Senator O'BRIEN—Do you have any doubts as to whether there is contact beyond those processes? I might withdraw that question.

Miss Hird—Certainly we had no reason to assume that.

Senator O'BRIEN—You could not tell me if you did, I am sure.

Miss Hird—There are due process provisions here.

Senator O'BRIEN—It is just that you hear a lot of things and a lot of suggestions as to what might take place. I understand these panels – I am not restricting it to this particular case – are drawn from people who have experience in trade policy. Is that fair comment?

Miss Hird—It is a mixture. Generally, the selection of panellists is negotiated with the parties as well and different names are put up.

Senator O'BRIEN—Is there a fixed panel from whom they are chosen?

Miss Hird—No. There is a roster of people, but they are not employed by the WTO. They are usually from other national governments. So the parties negotiate around names. In our case, we had a trade policy expert, who is a very experienced panellist, as a chair; we had a person with expertise in the SPS agreement; and a lawyer. That was deemed to be a balance of expertise.

Senator O'BRIEN—The case that you are presenting is a mixture of your trade responsibilities and AFFA's responsibilities for quarantine; so AQIS were involved. To what extent do trade considerations influence the way that you would present Australia's case? I suppose that is a very broad question. I am trying to think how I could ask for the information I want. I suppose – and tell me if I am wrong – that the department has to have an eye on our overall trade interests in pursuing matters such as this before a WTO panel.

Mr Hussin—Yes, that is right. We have a broad trade policy interest in these issues. Australia is an exporter as well as an importer. So, yes, we try to bring a broad view to these sorts of issues.

Senator O'BRIEN—I am wondering how that breadth influences the need for protection for a particular industry. Would it be fair to say that you might need to compromise the way you pursue one matter in the interests of the overall trade effort?

Mr Hussin—I would not think so. The SPS agreement does give countries sovereign rights and we certainly have an export interest in seeing that other countries do observe the agreement. But I do not think we are in the business of trading off one set of interests for another. We are very conscious that Australia's trade credentials in a lot of areas do depend upon having high quarantine standards here. We were very active in making sure to the degree we could that the SPS agreement is a balanced one.

Senator O'BRIEN—Which brings us back to the point that, if there were a finding in this process which was felt to compromise our determined position on our appropriate level of protection, there would be quite a quandary as to meeting our obligations under the agreement, on the one hand, and protecting from possible risk what we perceived as the interests of an industry or a group of industries here. How would you resolve that? Who would resolve that? Would it be the department or the government? How would you go about it?

Mr Hussin—All the interested areas of government would be involved. Obviously, the Minister for Agriculture, Fisheries and Forestry and the Minister for Trade would be the key ones who were involved, but in some cases it would go broader than that.

Senator O'BRIEN—To the cabinet?

Mr Hussin—To the cabinet perhaps.

Senator O'BRIEN—So, if at the end of today some time we have a decision which we do not agree with and which finds some fault with our quarantine regime, that issue will come under consideration, will it? Presumably the measures which were put in place in July last year by AQIS were thought to meet our minimum quarantine needs? Do I correctly presume that that issue will be considered by government?

Mr Hussin—Yes, that will be a matter for the government to consider if that does occur. The IRA was done and the measures were introduced, but we introduced to vary those measures on the basis of a panel process and it was always clear that it would go back to that process to be assessed as to whether everything that we were proposing to do was in conformity and necessary.

Senator O'BRIEN—But that is the tension, isn't it, if you come to a position that you believe is the bottom line, as it were, with regard to protection but cannot satisfy the panel for whatever reasons? We were just

discussing the tension between our obligations under trade policy and the government's obligation to maintain a secure quarantine barrier. Where there is a collision, we were discussing who would make the decision as to how we would handle it. I think you have been very clearly saying that that is a matter for government and not the department.

Mr Hussin—That is correct. Obviously, we would review the issues and provide advice, but it would be for government to consider any further measures. Of course, it is the director of quarantine in this process who takes the decision.

Senator O'BRIEN—But that would follow a determination by government on the issue?

Mr Hussin—That is correct.

Senator O'BRIEN—Presumably, whatever appropriate level of protection standard has underpinned the risk assessment process in the matter now before this inquiry is supported by government, so that would not need to be considered again?

Mr Hussin—The appropriate level of protection? No, I do not think that would be considered. The question would be whether or not, in light of the panel findings, the measure needed to be adjusted and could be adjusted in a way that would sufficiently meet that appropriate level of protection. One of the other elements that we would need to bear in mind, going back to the original panel, is consistency in our approach across a wider range of industries – similar industries and more broadly.

Senator O'BRIEN—Is it conceivable that, arising from the hypothetical case that we have been talking about, government could say, 'We believe we cannot change the AQIS decision; therefore, we have to look at alternative solutions for the matter and go down the compensation or sanction path,' or whatever the appropriate terminology is? How would a decision such as that leave us with regard to our international agreement and obligations?

Mr Hussin—There is a parallel in the beef hormones case with the EU where it has not implemented a panel report. There has been a retaliation against the EU by the United States and Canada. The situation there is that those retaliatory measures continue and will continue while the measure is still inconsistent with the EU's obligations.

Miss Hird—There is a surveillance and monitoring process in the dispute settlement body itself where WTO members have to report at regular intervals on what steps they are taking. Perhaps you could call it a 'red face' test where you stand up and you are grilled about what you are doing. So that continues. The Europeans continue on that, and on bananas – and the United States.

Senator O'BRIEN—The red face test?

Miss Hird—You are shamed by your peers.

Senator O'BRIEN—Do you think it is working in the EU case?

Miss Hird—They are proceeding down a certain path. It is taking a lot longer than people would desire and the United States is in a similar position in regard to shrimps and this is connected to turtles – the shrimp-turtle case.

Senator O'BRIEN—The environment versus trade measure case, yes.

Miss Hird—If you can describe it like that, yes.

Senator O'BRIEN—They are interesting concepts. Perhaps I should let someone else have a go.

CHAIR—I would like to clarify a couple of points from Senator O'Brien and I will come back to my questions later. I understood you to say – I think it was Miss Hird – that the proceedings which you operate under are not dissimilar or unlike the systems we are used to; that is, the Australian or British system, the Westminster system. Is that correct?

Miss Hird—I think when I mentioned the panel having investigative authority what I was attempting to contrast this with was where you have the judges in a normal case in, say, Australia. It is up to the complainant to deliver the information, but in WTO and more Roman law the judges have investigative authority a lot of the time. It is a concept more of Roman law, so the panels can proceed down their own path to examine something that a party may not have raised.

CHAIR—So it is an inquisitorial system?

Mr Hussin—It is an interactive system.

CHAIR—Is it like the French system?

Miss Hird—I am not that familiar with the French system.

CHAIR—In France you have to prove you are not guilty. Or is it a mix between the German and the British systems?

Mr Hussin—It is probably best described as a mix between many systems.

Miss Hird—But the burden of proof rests on the complainant.

CHAIR—Quite honestly, I think we need a better answer than that. Maybe you should take the question on notice. If we are going to understand this process and how it operates and look into the future, we have to know how it works.

Miss Hird—Perhaps I could answer, Senator Crane. The burden of proof is very clear throughout the WTO agreements. The burden of proof rests on the complaining party, unless otherwise specified. So you are not guilty until found innocent.

CHAIR—So that is Canada.

Miss Hird—Canada has the burden of proof. That is the essential difference from what you were saying – guilty until proved innocent.

CHAIR—I was not saying anything. I was trying to get you to say something.

Miss Hird—I did not mean not to.

CHAIR—We have got to have a clear understanding of how the process operates. When evidence or information is received, or whatever you want to call it, is that presented in a similar fashion to the law code, where one case puts it side and then the other one cross-examines, et cetera and you call witnesses?

Miss Hird—No, you do not call witnesses. You start off with a written procedure. First of all, you must only work in the framework of the terms of reference of the panel. You cannot go outside the terms of reference, which is basically the party's complaints about legal provisions.

CHAIR—That is like us, except we wander a bit from time to time.

Miss Hird—Yes. That actually is a constraint on a panel. It cannot go investigating outside the terms of reference or make rulings that are not within its terms of reference. So it has its own mandate, which is defined by the complainant, basically. The complainant then puts in a written submission. The responding party follows with another submission and then there are rebuttal submissions.

In cases like this there can be a series of questions from the panel or discussions from the panel – the parties are free to write to the panel at any stage – and then you have oral hearings, and you can follow up with other submissions after those. The standard procedures are actually set out in the Dispute Settlement Understanding itself, in the annex. They can be varied, as can the time frames, by agreement with the parties. So the steps – which submission comes first and which comes next – are in the Dispute Settlement Understanding itself.

Mr Hussin—Perhaps it might be useful if we do provide that annex so that you can see the structure quite clearly.

CHAIR—Yes, that would help us a lot.

Miss Hird—I think we might have done it in our submission, but I will check on that.

CHAIR—I have to confess that I have not read every word on this. There is a lot of paper. What actually is the legal status of that panel?

Miss Hird—The panel issues a report, it makes findings and it recommends that the dispute settlement body adopt those findings. It then comes before the dispute settlement body, which is all of the WTO members, but it meets in regard to dispute settlement, and the report will be adopted – there are certain time frames set out – within a certain time frame unless there is a negative consensus. That means that every WTO member would have to be opposed to adoption. So it is a semi-automatic process. The only way a report would not be adopted – absent or negative consensus – is for an appeal to be made. That blocks or suspends adoption.

Mr Hussin—Basically, unless the report were found by all parties to make a finding which everybody agrees is incorrect, that would have to include the complainant party for it to not be adopted.

CHAIR—Thank you.

Senator MURPHY—The SPS agreement, at article 4.1, says:

Members shall accept the sanitary or phytosanitary measures of other members as equivalent, even if these measures differ from their own or from those used by other members trading in the same product. If the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection, for this purpose reasonable access shall be given upon request to the importing member for inspection, testing and other relevant procedures.

To your knowledge, what access did we have to Canada and what testing did we conduct?

Mr Hussin—This really is a question of quarantine policy that might be more appropriate for AQIS to respond to. Where a country – say, Australia in this case – has a measure with a set of requirements outlined in that measure –

Senator MURPHY—I understand that, Mr Hussin. I will save you giving me a long answer. As one of the major parties involved in the negotiations of this dispute, I would have thought that the Department of Foreign Affairs and Trade would have had some knowledge of what we did in our endeavours to determine whether or not the member, that is, the exporting member –

Mr Hussin—Canada, in this case.

Senator MURPHY—Yes, Canada, in this case – whether or not their measures were sufficient to meet our level of sanitary and phytosanitary protection.

Mr Hussin—I will try to be brief. The purpose of that provision is where a country does not have a series of measures in place which meet the requirements of the importing country but can argue –

Senator MURPHY—But I am asking you this: do you know what access steps we took to go to Canada and what tests or procedures we involved ourselves in, as a country, to determine these things?

Mr Hussin—It was not really relevant for us to do that. What we did was impose requirements on Canada which are well above the international standard. As outlined earlier in this discussion, we have the international standard plus 11 other provisions in place. It would have been for Canada to come to us to say, ‘We cannot meet all the precise elements of the measure you have put in place but propose an equivalent measure of another kind.’ It is not a matter for the importing country to demonstrate equivalence; it is a matter for the exporting country.

Senator MURPHY—I did not say that, although I might not have posed the question very well. Say Canada come to us. They are the exporting country, they propose to us that they want to export salmon to our country and they say, ‘These are the measures that we have and that we believe meet your appropriate level of sanitary and phytosanitary protection.’ I am asking what you are aware of and also what Foreign Affairs and Trade is aware of. It says in article 4 that ‘for this purpose, reasonable access shall be given upon request to the importing member’ – I assume that is us – ‘for inspection, testing and other relevant procedures.’ I assume the purpose of that exercise is to see whether or not they are telling pork pies about what they are proposing to us.

Mr Hussin—The question of equivalence would not be raised unless the exporting country, Canada in this case, proposed to us that it had equivalent measures which would meet our appropriate level of protection. What Canada was proposing, and I presume still proposes, was that we should use the international standard. We have said the international standard is not sufficiently rigorous to meet our appropriate level of protection and have said that they must do a range of other things. Article 4, as you have explained it, has not been triggered by Canada. There is certainly no obligation on us, an importing country, to do anything under article 4 unless there is a proposal by an exporting country that they can demonstrate that equivalent measures that they might put in place are sufficient to meet our appropriate level of protection.

Senator MURPHY—But how do we check what a country is proposing to us? It may say, ‘We have got this and that. We have weekly checks. We have testing every day of a particular product.’ How do we know whether or not that is accurate? I understand article 4 to say we can have access to go and inspect and test the procedures that they have in place.

Mr Hussin—Again, I think it is the question of the procedures that we have specified that other countries must follow. The degree to which they do that is really one that AQIS is better positioned to respond to.

Senator MURPHY—I find it very difficult to understand this, given that a country has had proposed to it a proposition on the part of another country to export product to it. You are saying to me that we do not have a right to go and check, to see whether or not the testing methods that they have in place are being carried out. It is like a verification process.

Mr Hussin—I am not saying that.

Senator MURPHY—What do you think article 4 means? Does the latter part of 4 mean that there is a verification right on the part of the importing country or not?

Mr Hussin—No, it does not. It is not related to verification rights. It is so that the importing country, under the measure that it takes, can specify what it believes is necessary to meet the elements of the measure that it has taken. That is a separate issue to article 4. To take the example of the shrimp-turtle case, if the United States requires that, to sell shrimp to the US market from an area where turtles are present, you must have an extruder device on the fishing boat, other countries might say, ‘We do not have an extruder device of the type that the United States uses to fish, but we have an alternative device.’ Article 4 provides that that country can go to the United States and say, ‘I would like you to assess my alternative device to see whether it is equivalent to the extruder device that the United States fisheries use.’ The obligation there is on the exporting country – any country that is applying – to allow the United States to come and look at the procedures in the exporting country and to test whether the measure they are saying is equivalent is, indeed, equivalent. So it is a different situation.

Senator MURPHY—I thought that was what I was asking – where the exporting member has indicated to the importing member that the measures that they have in place do meet the importing member's appropriate level of protection. So are you saying that, unless they invite you to go and inspect it, you have no right to demand that?

Mr Hussin—Article 4 does not relate to the sort of situation we are in now. There has been no proposal by Canada that it has equivalent measures, but I will also mention that, in setting the measure that we have, it would be for Australia as the importing country to determine how it wants to assure itself that the elements of the measure it has introduced are actually being respected.

Senator MURPHY—Can you explain article 5.2? It reads:

In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

Article 5 refers to the 'assessment of risk and determination of the appropriate level of sanitary and phytosanitary protection', and article 5.7 reads:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

Can you tell me what work we did in respect of infectious salmon anaemia?

Mr Hussin—Again, this is a matter that relates to quarantine and the application of scientific knowledge to quarantine decision making. That is really a matter for our colleagues in AQIS, who were involved in the risk assessment.

Senator MURPHY—Are you not aware of us doing any work?

Mr Hussin—I would think that we did some, but, again, I think you would have to ask AQIS about what work it did in that area.

Senator MURPHY—Can you explain to me, then, what article 6 means in respect of adaptation to regional conditions, including pest or disease free areas and areas of low pest or disease prevalence? Can you explain to me what that means in the case of an importing country?

Mr Hussin—I do not have that particular provision with me. My recollection is that that provision is to do with a situation where it can be demonstrated by the exporting country to the importing country that, although there is a disease in that country, there are areas that are free from disease and that imports should be allowed from that area which can be recognised as free from disease.

Senator MURPHY—Does that mean that we may be able to apply different measures to different areas of countries?

Mr Hussin—As for my recollection of this issue and the negotiation of it, the best example that I can come up with is fruit fly. In Australia, we might have fruit fly in one state –

Senator MURPHY—It has happened in respect of fruit fly, hasn't it?

Mr Hussin—I think it has happened in respect of fruit fly where a country will say that it will have a measure against the import of fruit from a country where fruit fly is present. There is provision in that article for a country to demonstrate to the satisfaction of the importing country that another part of that country – say it was Australia – is so geographically removed, protected and tested and so on that it should be allowed to export under lesser conditions than the measures that apply to a country where there is fruit fly endemic across all of its growing areas.

Senator MURPHY—At 6.3 the article says, in respect of the various other provisions in the article, that for this purpose reasonable access shall be given upon request to the importing member for inspection testing and other relevant procedures. So we can apply to run a verification process in that respect?

Mr Hussin—Yes. In the example I used, the country that Australia was exporting to might say, 'We won't accept that that area is a pest free area unless we can come and have a look at that particular area to satisfy ourselves.'

Senator MURPHY—I refer to the retaliation by Canada for \$45 million. If it is the case that the WTO finds that the measures that we are currently proposing are still in breach of the WTO's ruling, what is going to be the case in so far as the \$45 million retaliatory claim is concerned?

Mr Hussin—The list that Canada released could be seen as an ambit claim. It is simply an indication of the areas where it might be thinking about, if it were to move to retaliation, applying penalty tariffs. Quite often countries do that because they have consultations, because they have stakeholders too in the form of importers

who might want to have their views registered about such a broad list. The situation in that case, if that does occur, would be that we would seek to have arbitration, and that is available to us under the agreement, as to the volume of actual damage that could be assessed, such as the potential market loss for Canada.

Senator MURPHY—Given not only that period but also the period that it takes for finalisation of any measures that might be required to be changed, is it also open to them to continue that retaliatory measure?

Mr Hussin—It would be open to them to continue retaliation. Let me go back. There would be a process of arbitration as to the extent of any damage. Then the other country would seek authorisation from the dispute settlement body to actually take a retaliatory action. If that were given, that retaliation would remain in place until the breach of the obligations was rectified.

CHAIR—Can I deal with the issue which I raised when we had the officers from the Attorney-General's Department – the perceived or potential conflict of interest between your representing in effect a quarantine matter and your principal role of being a trade negotiator, promoter or facilitator. How do you handle that situation and how do you keep the two roles separate? How do you avoid or handle that conflict of interest?

Mr Hussin—There are two things I would say. One is to reiterate the fact that we, in terms of our trading interests, are very well aware of the importance that is attached to Australia maintaining a low level of disease or pest incidence in this country. That is obviously a very important issue in relation to our potential trading performance, so we are very conscious of that.

Secondly, these issues are not in the sole domain of my department; they involve other departments as well and it is basically a whole of government result. It is my department, DFAT, which has the primary carriage but the positions that are taken take into account all of the interests of various interested departments and in this case, as you know from other evidence, those arising from consultation with the various stakeholders.

CHAIR—Some of the submissions have argued that the decision making process has been influenced by political need to fulfil certain trade obligations and to demonstrate Australia's commitment to free trade. How do you respond to that?

Mr Hussin—I do not know who made those allegations but I do not think that they are justifiable.

CHAIR—But they are in some of the submissions. I have not got them in front of me but we can get them out.

Mr Hussin—I do not believe that they are justifiable criticisms.

CHAIR—In terms of dealing with this particular issue and given the concern out there, I am surprised that somebody in your department has not gone through and identified the particular criticisms.

Mr Hussin—There might always be criticisms by people who have differing points of view.

CHAIR—We understand that and that is what some of this process is about but I would have thought that the criticisms in some of the submissions that relate directly to the department of trade would have been found. I would imagine that, in appearing before us today, somebody would have had the job of researching the material before us – and the submissions are public – and would have taken cognisance of them. And we have had you appear before us before.

Mr Hussin—All I can say is that we have demonstrated over several years our steadfastness in defending Australia's measures. We have been doing that consistently for several years. I think anybody who has been involved in government or industry here in Australia would be aware of that.

CHAIR—We will bring the criticism to your attention if you have not followed it through yourself, but I would have thought it would have been in your interest to have done so.

Mr Hussin—If I might comment further, my colleague is reminding me that assertions might have been made but there has never been any documentation or elaboration of the assertions as far as we are aware.

CHAIR—I was referring to matters that were in some of the submissions that have come before us. For example, we did the Northern Prawn Fishery last week and one of the parties there had read the submissions and gone through them. They were an interested party and they asked that those particular matters be dealt with in a proper manner under our standing orders. They even went so far as to ask that some of them be expunged from the record. I would have thought, if there are inaccuracies or things that are not substantiated, it would be in the interests of your department to actually identify them and bring them to the attention of the committee. I do not want to spend any more time on that particular aspect, but you should make sure that you address those issues.

In terms of the independence of the process, you heard me quote the letter to the previous witness from the Attorney-General's Department. It says here:

The Attorney-General's Department was not afforded a significant role in the salmon case. It reviewed some of the documentation and an officer with specialist academic qualifications in WTO law and practice was made available to the Department of Foreign Affairs and Trade for a number of months.

Is there a particular reason why you did not utilise in a much more positive or strong way – not necessarily aggressive – the expertise that does exist within the Attorney-General's Department?

Mr Hussin—I mentioned earlier that, in the WTO, the dispute settlement understanding has been developed over many years. The current version of it came out of the Uruguay Round negotiations but there have been these sorts of processes going under the GATT that preceded it. We have been involved in quite a number of cases over the years, with a degree of success, in relation to the EU sugar policy, US sugar policy, and Japanese import restrictions. It is an ongoing process and it does involve quite a deal of our own resources. I mentioned that we have in my division a degree of in-house experience, not only in trade policy. We have 10 officers in my division who have legal qualifications. We have two officers in our WTO mission in Geneva who have legal qualifications. We have within the department a legal office whose services we can call upon. Mr Rowe is the head of that office. In the salmon case, as you have mentioned, the Attorney-General's Department were good enough to make available a specialist resource to us who assisted us for some months and also attended the hearings. We were also given assistance with the secondment of an officer from the legal office in DFAT to prepare the case. AQIS had called upon its own in-house legal expertise and also had work done by the Australian Government Solicitor. We do try to bring to bear a very broad range of legal experience and particular expertise in preparing to prosecute or defend cases.

CHAIR—Do not read my questions wrongly, because I certainly recognise some of the work that has happened in the past – it has been very important. But how many of the particular cases you have been involved in before were actually quarantine cases where a country was challenging quarantine standards?

Mr Hussin—To the best of my recollection, we have not defended such a case before.

Miss Hird—Perhaps I could add to that. The first real quarantine case that ever came into the GATT or WTO system was the beef hormones dispute. We were a third party in that dispute so we had access to submissions and appeared at oral hearings and at the appeals.

CHAIR—In the answer you have just given me, in a sense you make my case in this because the other things were direct trade issues where there were breaches concerned; whereas this gets this crossover problem with quarantine and the perception out there, which we have to deal with, that we are people sitting at this table in a political sense. What I am looking at is whether there are mechanisms – and I just use this as an example through the Attorney-General's and the information we got today and this particular letter – which in the future we can make at least a little bit further at arm's length from your dual roles. I do not want you to take that as a criticism. I want you to view it as a constructive way of us moving into the future.

Senator FORSHAW—If I can follow up the issue, this goes back to something I raised earlier with the representative from A-G's and also in an estimates committee the other day with AFFA. You just talked about the agency's representation that was involved in presenting our case. I appreciate that the number of people you might have involved in that or the size of the team might not necessarily determine the quality or the likelihood of success. Given that, how did we compare with, say, the Canadian team? From the limited experience I have had in looking at some of these issues in other areas, countries such as the US or Canada can bring a lot of resources into their representation and almost be overwhelming. That is a matter that really concerns me. What was the Canadian team made up of?

Mr Hussin—You have mentioned the United States and Canada. Both do service these sorts of cases with in-house capacity through either the US Trade Representative's Office or the Department of Foreign Affairs and International Trade, as in Canada's case. Yes, they do have significant resources. One of the reasons for that is that, under NAFTA, they do have between them dispute mechanisms. I am sure you are aware that the US and Canada trade relationship is sometimes quite a stormy one. So they service both the NAFTA panels and the WTO panels in that way. My recollection of the Canadian representation was that it was quite similar to ours, in that they had a blend of trade policy and legal expertise at the hearings.

Senator FORSHAW—You did not feel that you were being outgunned or that their pack was heavier? I do not expect you to be self-critical.

Mr Hussin—I do not think we did feel outgunned. I might add that we have increased resources in this area. I think it is fair to say that the WTO now is more inclined towards disputes. The numbers probably are higher than they have been in the past and we are reacting to that. We are third parties in many cases, which does give us the inside running, if you like, to see what the argumentation is.

Senator FORSHAW—Except that could put us at a disadvantage too if the protagonists are the US or particularly the EU, such as with the beef dispute. Do you know what I am saying?

Mr Hussin—Yes. We are very active and we do constantly review the sorts of findings that are coming out of cases so that we are very well up to date in terms of the development of case law. Late last year Mr Vaile announced a new dispute investigation and enforcement mechanism which we will be introducing. The idea of that is to get more awareness and understanding around Australian industry members of the potential of the WTO to be used by them where they regard themselves as being discriminated against or facing unfair

obstacles. We are also hoping that will increase interest in this sort of area by the private sector, for example. We have brought WTO legal experts to Australia and have run programs for them and held seminars to try to have those people available to practitioners in Australia – in the government departments, the universities and the private sector. So we are conscious of this trend and we are reacting to it.

Senator FORSHAW—What period of time does the figure of \$45 million, which is the retaliation claim, relate to?

Mr Hussin—I do not think Canada has ever articulated what it would regard that as covering. It really is an ambit claim and I think was put out –

Senator FORSHAW—But is it sort of like a final claim or, if this problem was ongoing, are they able to say, ‘Ah, well, we’ll add another \$45 million on for another year or two’?

Mr Hussin—No. If we do get to that situation where there is a finding that we are inconsistent and if Canada were to trigger that issue, it would go to the panel for arbitration. They would come up with an arbitrated figure and the \$45 million would become history.

Senator FORSHAW—If they then arbitrate a figure, is that like a final award of damages?

Mr Hussin—It is an ongoing award.

Senator FORSHAW—What do we have to do? Does that mean that they get the benefit of the retaliation arbitration and we can continue to do what we have been doing, or are we still obliged to change, anyway?

Miss Hird—No.

Mr Hussin—If an award of an arbitrated figure were reached, Canada would then seek authorisation and presumably receive authorisation to retaliate against Australia up to whatever that arbitrated level was and they would continue to have that right until we had remedied the breach in our obligations

Miss Hird—The last two cases have been assessed at an annual figure of, say, \$30 million a year. That is how it continues.

Senator FORSHAW—So it is not a sort of either/or thing for the Canadians?

Miss Hird—No, it is not.

Senator FORSHAW—It is not an ‘in lieu’ that they can take the money and forget it?

Miss Hird—No.

Senator O’BRIEN—I wanted to follow on the hypothetical line of how retaliation is assessed. I was going to use that \$45 million figure as an example, but it does not matter what the figure is. When someone makes a claim, is it for an annual figure or just a figure they pick out of the air? You talk about it being ongoing. I assume it should cover some period.

Mr Hussin—It is unclear. I do not want to speculate too much about time periods and so on, in case we have to face that situation. Normally, as my colleague says, the arbitrator would come up with a figure of trade lost or damage to Canada on a per annum basis, and they would have the right to continue to penalise us to an equivalent monetary figure.

Senator O’BRIEN—When you say ‘trade loss’, is that the gross trade or net trade or profitability on trade? What are the factors that come into it? Are there guidelines?

Mr Hussin—No; there are really no guidelines for this. As my colleague mentioned earlier, the complainant would normally submit a methodology paper which it would want to have taken into account in assessing the damage. We would then in that case have the ability to respond. There would be submissions about that issue and a hearing, usually, with the panel to put views and counterviews about how that sort of thing should be assessed. But there is no precedent of precisely how a panel will reach a judgment. There is no formula.

Senator O’BRIEN—What about precedent in the beef hormone case?

Miss Hird—There are two that have been arbitrated to a level. The bananas arbitrator’s report is very clear. Professor Kym Anderson was one of the arbitrators. That may be useful for you to look at. It is on the home page. They were both related to trade performance where there had been a level of trade that was assessed – past performance and how whatever the measure was was impacting on it. That was the general benchmark and there were counterfactuals like market share of, say, the US or Canada. So it went on that way. There are a number of counterfactuals which are really things you deduct from an overall figure. But they were both related to trade performance where there had been recent trade.

Senator O’BRIEN—Which poses in this hypothetical case that we are talking about all sorts of factors which you are telling us have never been addressed.

Miss Hird—Yes. The only two cases that have been arbitrated have related to past trade performance.

Senator O'BRIEN—Being a senator from Tasmania, I have to ask some questions about the situation with the Tasmanian quarantine measures which have been put into place. Were they to be assessed as in breach of our trade obligations, whilst they remain in place, I think you are telling us that a complainant could mount a case for retaliation based upon those measures. Is that correct?

Mr Hussin—If they were found to be inconsistent.

Senator O'BRIEN—And they would be assessed in the same very indefinite way as any other matters might be addressed?

Mr Hussin—That is correct, Senator.

Senator O'BRIEN—Would it be fair to assume that the size of the marketplace in that state would be a critical factor in assessing any retaliation factor were that hypothetical case to occur?

Mr Hussin—Senators, as I said, we really do not have a great deal of precedent to work on in this sort of case.

Senator O'BRIEN—The example you gave of bananas talked about market share and the effect of previous experience and a subsequent experience in that marketplace. I was relating that back to say here we have a small market in the Australian context; in the world context, very small.

Miss Hird—When I said 'market share' it was between different suppliers to that market, say Ecuador, United States, whoever was supplying bananas to the European market. So you would identify the third country supplier's share. I was not talking about the import –

Senator O'BRIEN—Of a defined market?

Miss Hird—Yes.

Senator O'BRIEN—I am trying to get in my head how this matter might be addressed. So they would look at what sort of market they might be looking at in that case. Rather than the national market, they would be looking at the Tasmanian market; is that how it would be done or can't you tell us?

Mr Hussin—I think it will depend on what the findings are, the nature of the –

Senator O'BRIEN—I understand that and, because hypotheticals have been the order of the day this afternoon, I am trying to get an understanding so that, if it does eventuate, we do not have to call you back and ask you some more questions.

Mr Hussin—Precisely how we do not know, but they would certainly look at some sort of notion of what market penetration Canada would have expected. I am a bit loath to go any further than this because in that hypothetical situation, if it were to come to fruition, we will be in that situation of having to argue our case and I would not want to foreshadow what we might argue.

Senator O'BRIEN—I would expect that you would argue that there is no need for any compensation at all, quite rightly.

Mr Hussin—That would be a good position.

Senator MURPHY—Canada lodges a retaliatory claim against the country. That then has to have a process for determination because there is no precedent in this instance, but essentially it would probably run along the lines of economic loss or financial loss as a result of not being able to export the product and there would be an assessment made of that. ABARE have actually done some work on that, haven't they? From memory, the ABARE report broke it down state by state. In terms of overall consumption, I think they based their findings against the international market and the international market share of the relevant exporters. Is that right?

Miss Hird—I think the methodology that ABARE used would need to be discussed with them. It was an ABARE work, so I cannot really give any advice about the way they did it.

Senator MURPHY—But wouldn't that be the case, though, that that is essentially how it would work?

Mr Hussin—I think the difficulty we have is that we do not have a real precedent of this sort of case. We would think that the sort of thing you are talking about is what they would do: look at potential market penetration by Canada and reach some sort of figure. But how they would do that and against what criteria would be something that we would have to make submission on to the panel and argue the case for. We could not really predict exactly how they would do it. In the discussions we have had with people who have had some experience of these issues, it is clear that there is no set precedent or pattern that is followed, but something along the lines of what you suggest would be what we would expect to occur.

Senator MURPHY—If you were looking for a measure, saying, 'My claim is for this,' wouldn't you have to prove the value of the potential or the claimed loss? It is pretty limited how you go about proving that, isn't it?

Mr Hussin—There are different ways of doing it. I think that what you are suggesting is correct – that there would have to be some analysis of potential trade that has been lost. But how they would go about doing that –

whether they would do an econometric study, whether they would survey; just how they would do that sort of research – I do not know.

Senator O'BRIEN—I think you have clarified that we could look at a particular decision to get an idea of how the matter would be approached and that will set out in some detail the factors that might be taken into account in such circumstances were they to arise. After the hearing, could you supply the committee with the reference so that we can punch in the right numbers to get the information?

Mr Hussin—Yes.

Senator MURPHY—If the Tasmanian restrictions are found to be in breach, how does Foreign Affairs and Trade consider they might deal with that issue?

Mr Hussin—Under the agreement, Australia has an obligation, and the Australian government as the member of the WTO, to pursue with the subnational government to formulate and implement positive measures and mechanisms in support of the observance of the provisions of the agreement. In this case, were the Tasmanian measure to be considered and found wanting, we would need to be able to demonstrate that we had indeed met that obligation in respect of Tasmania. The memorandum of understanding between the Commonwealth and Tasmania would be the conduit through which we would pursue that issue.

Senator O'BRIEN—We were told earlier that that has got no force at law and is not enforceable.

Mr Hussin—I am not necessarily talking about its legal status. I am saying that that is the mechanism within which we would want to pursue the commitment of Tasmania to consult and to observe the provisions of the WTO. I am not commenting on its legal status.

Senator O'BRIEN—They say the Commonwealth has breached that by changing the position on the importation of uncooked salmon. It is getting a bit circular, this consultation, by the sound of it. What happens if consultation does not resolve it, which I think was Senator Murphy's question? Does that mean the Commonwealth has to enact legislation, for example, or does it have other remedies?

Mr Hussin—I think we are really deep into the hypothetical here. Let me say that we would have to be in a situation to demonstrate that we had taken all reasonable measures. Precisely what that might mean, in the case of a subnational government, has not really been tested. That is about all I think I can say. It has not been tested in the WTO.

Senator O'BRIEN—There are no cases that you could refer us to where this matter has been traversed?

Miss Hird—There have been some cases under the GATT system. The SPS agreement started with the WTO in 1995. There have been no precedents in regard to the SPS agreement itself, but there were some cases under the GATT involving mostly Canada – I think nearly all involved Canada – in its federal-state measures. We can get you the references to that, if you wish.

Senator O'BRIEN—Thank you very much.

CHAIR—Can I just have that clarified a bit more? Are you saying that there are some like cases pre the SPS agreement? How much of a landmark decision are we going to have landed on the table tomorrow when it is released? Is this really setting, under the SPS agreement, the direction of the future as far as these cases are concerned?

Mr Hussin—I think the hypotheticalness, or whatever the noun is –

CHAIR—I would not call that a hypothetical question.

Mr Hussin—My colleague is pointing out that there have been cases in the past where measures applied by subnational governments in Canada – and I think also in the United States – have been pursued in the GATT dispute settlement process –

CHAIR—Yes, I heard that.

Mr Hussin—and there have been findings against them. So, if there were to be such a finding in this case, it would not be altogether without precedent. But it would be the first, that I know of, under the WTO system, because it is one that started in 1994, where subnational measures were being assessed.

Senator MURPHY—Are you able to tell us what happened in respect of the cases that were dealt with under GATT?

Miss Hird—There were a series of cases involving the provincial liquor boards in Canada. This was under the GATT system, which also was not compulsory, so there was not the enforcement provisions or the semiautomatic adoption provisions. We were a third party in the Canadian provincial liquor boards cases because we had an interest. They went through a whole series. In the last case in 1989, it was found that Canada had not made enough effort to try and persuade its provincial liquor boards to change the measures. In another case, that of gold coins, that report was not adopted so it does not have a precedential value.

Senator MURPHY—What was the outcome?

Miss Hird—The Canadian provincial liquor boards changed most of their measures.

Senator MURPHY—And if there had not been an outcome of that nature, wouldn't we still be subject to retaliatory measures?

Mr Hussin—That is correct.

CHAIR—Are there any further questions? As there are none, I thank you all for your contributions at the hearings today. If you have anything else to add, please do so. We did send you a copy of the Attorney-General's letter yesterday but I do not know whether it got to your desk or not.

Mr Hussin—Yes, we received it, thank you.

CHAIR—Maybe you could respond to that particular letter and to the one question I asked about it with additional information and any points you wish to make. We would certainly appreciate that. There have been some questions taken on notice as well and if we could get the answers to them as quickly as is humanly possible – and I know you have other things to do – we can complete our report.

Senator MURPHY—On the retaliatory measure, I had the understanding that they could claim only up to the dollar value of the economic loss. Is that so?

Mr Hussin—I think that is broadly true, but as to exactly what the assessment would be, what would go into that and how much –

Miss Hird—I think the arbitrator's report in bananas might clarify that. It was a very complex case as well in terms of services and goods trade but it did go into a lot of detail over exactly what level should be struck.

CHAIR—Thanks very much. Thanks too to Hansard, the members of the committee and everybody here.

Committee adjourned at 2.26 p.m.