
The Parliament of the Commonwealth of Australia

Report 61

The Australia – United States Free Trade Agreement

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Canberra

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Members Hon Dick Adams MP

Mr Kerry Bartlett MP

Mr Steven Ciobo MP

Mr Martyn Evans MP

Mr Greg Hunt MP

Mr Peter King MP

Hon Bruce Scott MP

Senator Andrew Bartlett

Senator Linda Kirk

Senator Gavin Marshall

Senator Brett Mason

Senator Santo Santoro

Senator Ursula Stephens

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Resolution of Appointment

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

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the Committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the Committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

ACCD	Australian Coalition for Cultural Diversity
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFTINET	Australian Fair Trade and Investment Network
AMA	Australian Medical Association
AMWU	Australian Manufacturing Workers Union
ANF	Australian Nursing Federation
ANZCERTA	Australia – New Zealand Closer Economic Relations Trade Agreement
ATSIS	Aboriginal and Torres Strait Islander Services
AUSFTA	Australia – United States Free Trade Agreement
AWG	Australian Writers Guild
CAC Act	Commonwealth Authorities and Companies Act
CCA	Cattle Council of Australia
CER	Closer Economic Relations
CIE	Centre for International Economics

COAG	Council of Australian Governments
CoPS	Centre of Policy Studies (Monash University)
CTC	Change in Tariff Classification
DFAT	Department of Foreign Affairs and Trade
FIRB	Foreign Investment Review Board
FMA Act	Financial Management and Accountability Act
FTA	Free Trade Agreement
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
ISP	Internet Service Providers
MEAA	Media, Entertainment and Arts Alliance
NAFTA	North America Free Trade Agreement
NIA	National Interest Analysis
NFF	National Farmers' Union
NTEU	National Tertiary Education Union
R&D	Research and development
PBAC	Pharmaceutical Benefits Advisory Committee
PBPA	Pharmaceutical Benefits Pricing Authority
PBS	Pharmaceutical Benefits Scheme
PMV	Passenger motor vehicles
RIS	Regulation Impact Statement
ROOs	Rules of Origin
RVC	Regional Value Content

SAFTA	Singapore – Australia Free Trade Agreement
SPS	Sanitary and Phytosanitary
TCF	Textile, clothing, footwear
TCFU	Textile, Clothing and Footwear Union
TFIA	Textiles and Fashion Industries of Australia
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organisation



List of recommendations

3 Overview of the Treaty

Recommendation 1

To enable the Australian Parliament to assess the economic impact of the AUSFTA, the Committee recommends that a review of its implementation be conducted by the Productivity Commission five years after the Agreement enters into force.

Recommendation 2

The Committee recommends that there be more consultation with State and Territory Governments in the final stages of negotiations of Free Trade Agreements.

The Committee further recommends that the outcomes of any Agreements be made available to State and Territory Governments at the conclusion of negotiations.

4 Administrative Framework and Dispute Resolution

Recommendation 3

The Committee recommends that, before binding treaty action is taken, Australia gives serious consideration to the negotiation and issue of a further side letter to clarify obligations made under Article 11.16 of the Agreement, such that 'change of circumstances' is defined and able to be clearly understood by both Parties.

Recommendation 4

Should the Agreement enter into force without amendment or issue of side letters to clarify understanding of Parties' obligations at Article 11.16, Australia should ensure that such clarification is sought by requesting the Joint Committee established under Article 11.12(e) to issue an interpretation with regard to Article 11.16.

6 Annex on Pharmaceuticals

Recommendation 5

In establishing the independent review of PBAC processes (for PBS listing under Annex 2-C of the Agreement), the Committee recommends that, in order to ensure that the fundamental integrity of the PBS is retained, the following principles be taken into account:

- the review should focus on the issues of concern rather than re-opening the whole application
- the review should be undertaken by a specialised subcommittee comprising experts relevant to the subject of the requested review
- the subcommittee should consider only that information provided to the PBAC, and relevant to the requested review
- the subcommittee should report back to PBAC, and not directly to government
- the review process should be pragmatic, and facilitate, not delay, the PBAC approval processes for PBS listing of pharmaceuticals
- the review process be transparent and the findings and reasons for decisions made publicly available.

Recommendation 6

The Committee recommends that Australia's policy of self-sufficiency in blood products continue to be maintained.

7 Agriculture

Recommendation 7

The Committee notes with interest the opening statement of the Honorable Bill Thomas, Chairman of the US Ways and Means Committee, that the exclusion of sugar from the AUSFTA was a mistake. Noting this, the Committee recommends that the Australian Government

actively pursue after ratification through all available channels and in all available fora including the Doha Round, increased market access for Australian sugar into the United States.

8 Sanitary and Phytosanitary Measures

Recommendation 8

The Committee recommends that the Department of Agriculture, Fisheries and Forestry Australia and Biosecurity Australia undertake widespread consultations with stakeholders during the initial implementation phase of the AUSFTA, with a view to maintaining a high level of confidence in Australia's quarantine standards and their preservation.

9 Technical Barriers to Trade

Recommendation 9

The Committee recommends that the Australian Government, in consultation with the wine industry, actively pursues the issue of blending and labelling through the Chapter Coordinators or other working groups.

11 Cross Border Trade in Services

Recommendation 10

The Committee recommends that the issues of mutual recognition of qualifications and movement of business people be made a priority within the Professional Services Working Group.

Recommendation 11

Notwithstanding the operation of the Professional Services Working Group, the Committee recommends that the Australian Government pursue through all other available diplomatic channels the issues of the mutual recognition of qualifications and the movement of business people between Australia and the United States.

Recommendation 12

The Committee recommends that the Government take immediate action to incorporate the current quota levels for local content under the *Broadcasting Services Act 1992* which are subject to the 'ratchet' provisions of the Treaty as schedules under the Act so that they can only be changed by a deliberative decision of the Parliament.

Recommendation 13

The Committee acknowledges the need for flexibility in the AUSFTA given the new and emerging technologies at the intersection of e-commerce, telecommunications and multimedia. The Committee recommends that the Australian Government be responsive to the need to ensure that future domestic legislation is consistent with the AUSFTA and the requirements of innovators and consumers and in particular that future regulation of such technologies will have to be more carefully targeted as a consequence.

Recommendation 14

The Committee, noting evidence that terminology regarding audio and/video services is ambiguous, recommends that future reviews of the AUSFTA need to ensure that terminology can encompass emerging technology.

15 Government Procurement**Recommendation 15**

That DFAT uses its US mission to encourage remaining States to sign on to the AUSFTA.

16 Intellectual Property Rights and Electronic Commerce**Recommendation 16**

The Committee recommends that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions' to readily and cost effectively access material for academic and related purposes.

Recommendation 17

The Committee recommends that the changes being made in respect of the *Copyright Act 1968* replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair-use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time-shifting and space-shifting that is currently absent.

Recommendation 18

The Committee recommends that the Attorney General's Department and the Department of Communication, Information Technology and the Arts review the standard of originality applied to copyrighted material

with a view to adopting a higher standard such as that in the United States

Recommendation 19

The Committee recommends that the Attorney General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition.

Recommendation 20

The Committee recommends that in respect of the changes to the *Therapeutic Goods Administration Act 1989* and with respect to the valuable input of the innovator companies, care is to be taken in the implementation to recognise the unique position that generic pharmaceutical companies provide to the Australian community through health programs.

And, accordingly it is essential that in drafting the legislation, there should be no mechanism that will cause undue delay of the entry to the market of generic pharmaceuticals.

Recommendation 21

The Committee recommends that a scheme that allows for copyright owners to engage with Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet be introduced in Australia that is consistent with the requirements of the AUSFTA. In doing so, the Attorney-Generals Department and the Department of Communications, Information Technology and the Arts should

- take note of the issues encountered by the US as outlined in this Report
- tailor a scheme to the Australian legal and social environment
- monitor the issue of peer to peer file sharing.

17 Labour and Environment

Recommendation 22

The Committee recommends that the Government undertake a review of the environmental impact of the Agreement and that legislation be introduced which will ensure that all future free trade agreements

contain results of an environmental impact assessment prior to final agreement.

18 Conclusions

Recommendation 23

The Committee recommends that binding treaty action be taken with respect to the Australia - United States Free Trade Agreement.

Introduction

- 1.1 This report considers the proposed Australia – United States Free Trade Agreement, agreed at Washington on 8 February 2004, signed at Washington on 18 May 2004.
- 1.2 Negotiations which resulted in the agreed text commenced with a joint announcement by the Prime Minister of Australia, the Hon John Howard MP, the Australian Minister for Trade, the Hon Mark Vaile MP, and the US Trade Representative, Mr Robert Zoellick, on 14 November 2002.
- 1.3 Consultations regarding the Agreement were conducted by the Department of Foreign Affairs and Trade (DFAT) prior to the Agreement. The process involved in these consultations will be discussed in Chapter 2.
- 1.4 Negotiations between trade representatives from Australia and the United States of America took place in five rounds between March 2003 and February 2004 in Canberra, Honolulu and Washington DC, with the final round extended from 5 December to 8 February 2004.
- 1.5 The Australia – United States Free Trade Agreement (hereafter the AUSFTA, or ‘the Agreement’)¹ was tabled in the Australian Parliament on 8 March 2004.²

1 The Committee was advised that the text which was available at the time of its tabling in Parliament was a draft version, and subject to legal review for accuracy, clarity and consistency. The Committee advertised it as such and conducted all negotiations on this basis. Shortly before this report was adopted, the ‘legal scrubbing’ process was concluded.

2 *House of Representatives Votes and Proceedings*, 4 March 2004, p. 1484.

Role of the Committee

- 1.6 The Joint Standing Committee on Treaties was established in 1996 and since that time has reviewed all treaty actions proposed by the Government, as part of the parliamentary review process. The role of the Treaties Committee is to consider whether proposed treaty actions are in the national interest. It is usual practice for the Committee to receive submissions and evidence relating to the detail or scope of the proposed treaty, as well as the process involved in its negotiation (including consultations). The Committee in the majority of cases has therefore limited its observations and recommendations to the issues surrounding the impact of the proposed treaty.
- 1.7 This inquiry however has attracted unprecedented levels of concern in the community and interest across a wide range of business, industry and community sectors. The Committee is aware of several other areas which are worthy of examination and discussion. Some of these issues were in the public domain well before any negotiations commenced, as a result of media interest, community activism and business influence.
- 1.8 Because of the extent of community involvement and public debate on some of these issues, the Committee has stepped a little beyond its usual role. It will not seek to make firm recommendations in these areas, but the Committee felt that many views should be reflected in its report where those views were sometimes not strictly related to the text of the proposed treaty. Therefore, the Report will include within its consideration of the proposed treaty action a brief review of the debates about the relative merits of bilateral and multilateral trade agreements, and the role and outcome of economic modelling which has been conducted during and after the agreement's completion.

Conduct of the inquiry

- 1.9 The Committee's inquiry was first advertised in *The Australian* on 17 March 2004.³ Further advertisements were placed on 30 April 2004. Letters inviting submissions were sent to over 140 organisations on 11 March 2004.⁴ Following usual practice, the Chair of the Committee

3 *The Australian*, 17 March 2004, p. 2.

4 A list of organisations consulted is at Appendix C.

invited comment from Premiers and Presiding Officers of all Australian State and Territory Parliaments.

- 1.10 The Committee received an initial briefing on 2 April 2004 from officials of the DFAT and representatives of other government departments which were involved in the negotiation process. The Committee then held public hearings in several locations as follows
- Sydney 19 April 2004
 - Melbourne 20 April 2004
 - Hobart 21 April 2004
 - Adelaide 22 April 2004
 - Perth 23 April 2004
 - Canberra 3 and 4 May 2004
 - Brisbane 5 May 2004
 - Sydney 6 May 2004
 - Canberra 14 May 2004
- 1.11 During the course of the inquiry, the text of the Agreement was available from the DFAT website and the Committee's website.⁵ The size of the Agreement and accompanying documentation meant that its distribution in hard copy to members of the public was not possible.
- 1.12 The Committee is aware that members of the public experienced difficulties accessing the text of the actual Agreement, and therefore ensured that information about its activities were readily available from the secretariat. During the course of the inquiry, the Committee issued regular email alerts and media releases in an attempt to gain more widespread coverage in the electronic and print media. Based on the amount of media coverage received by the Agreement and the inquiry, the Committee was satisfied that interested parties were able to receive relevant information from appropriate sources as required.
- 1.13 At the time of writing, 215 submissions and several exhibits have been received from individuals and organisations. These documents covered almost all of the aspects of the agreement and were published

5 <http://www.aph.gov.au/house/committee/jsct/usafta/index.htm>, and http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html, both viewed on 20 June 2004.

electronically on the Committee's website.⁶ Transcripts of public hearings were also available from the Committee's website throughout the course of the inquiry. Several form letters were also received. While they were not accepted as individual submissions, the Committee noted their number and content.

- 1.14 Appendix A of this report lists submissions received by the Committee and Appendix B provides the names of witnesses who appeared at public hearings for this inquiry.

Scope and structure of the Report

- 1.15 Further to comments at paragraph 1.8, the Report will firstly look at some of the background of the treaty's negotiations, including economic modelling, the consultation process and the timing of the Committee's inquiry, before each chapter of the proposed Agreement is examined, in an order that the Committee thinks appropriate. Based on the size of the chapters in the Agreement, and the extent of evidence received by the Committee, clearly some chapters will be more detailed and of greater length than others. Some Agreement chapters have been combined where there is a complementarity of issues.
- 1.16 Depending on the nature of evidence received and information available, the Committee has comments of a more general nature in certain chapters. For example, in its discussion of possible costs as a result of the changes proposed to the copyright regime in Australia, the Committee has used evidence available to it at the time of the tabling of this report, including evidence supplied in economic modelling.
- 1.17 It should be recognised that the approach of this inquiry has been to view the acceptance or rejection of the Agreement is based on it being 'all up or all down'. Further to paragraph 1.6, the role of the Committee is to assess the proposed treaty action *as a whole document*. At several points throughout its inquiry, and with regard to several sectors of the Agreement, the Committee received requests or demands to remove sections of the Agreement which were felt to have negative effects, high costs, or greater risks for Australians. In

6 <http://www.aph.gov.au/house/committee/jsct/usafta/subs.htm>, viewed on 20 June 2004.

cases cited throughout the examination of the Agreement's chapters, the Committee has accepted the concerns of members of the community but may not have made specific recommendations to address them.

- 1.18 Following the examination of specific chapters of the Agreement, the Committee looked at some further areas where it received evidence on the proposed impact of the Agreement on different groups or in different sectors, specifically, on Indigenous Australians. Some general conclusions are then drawn about the Agreement itself, its impact on the Australian national interest, and its role in the ever-changing global trade environment. The Committee also considered some directions which may be followed as both Parties' parliaments consider related amending legislation.

Clarification of terms used in the Report

- 1.19 As stated on page 1, when the Committee commenced its consideration of the Agreement, it was in draft form, subject to a process known as 'legal scrubbing.' The final version of the Agreement was received by the Committee on 11 June 2004. The Committee has received evidence from DFAT that no changes were made to the rights and obligations of the Parties to the Agreement during the legal scrub.⁷
- 1.20 Under the 'implementation' heading in Chapter 3, the Report includes advice provided by DFAT on changes to legislation which are required to enable Australia to comply with the terms of the Agreement. Throughout this Report, several references are made to the relevant changes to different laws.
- 1.21 At the time of this Report's writing, legislation which would serve to bring Australia into line with the Agreement had not been introduced to the Parliament. Therefore, consideration of proposed legislation which took place during the course of the inquiry, both in evidence received and in the Committee's deliberations, was based on the Committee's understanding of the parts of legislation required to bring the Agreement into force. In the Committee's treatment of those discussions for the purposes of this Report, the definitive language

7 DFAT, *Submission 211.2*.

used should not be taken to infer that the subsequent introduction or passage of relevant legislation is assumed or guaranteed.

- 1.22 Further to the first paragraph of this Chapter, the proposed Agreement will be referred to as ‘the Agreement’ or ‘the AUSFTA’. Where any other Agreements are referred to, they will be mentioned by their entire title. As stated in the above paragraph, this should not be interpreted as an assumption by the Committee that the Agreement is anything other than a proposed treaty action, similar to any of the others reviewed by the Committee before action is taken to bind the Parties to the treaty’s terms.
- 1.23 Where spellings differ between the Australian and American (e.g. World Trade Organization), the Australian spelling has been used. Where not specified, monetary amounts refer to Australian dollars.

Other inquiries into the AUSFTA

- 1.24 Together with the consideration by this Committee, there have been two other parliamentary committees which have examined or are examining the proposed AUSFTA. The Senate Foreign Affairs and Trade References Committee commenced its inquiry into the General Agreement on Trade in Services and an Australia – United States Free Trade Agreement in December 2002 and tabled its report in November 2003.⁸
- 1.25 While the Senate Committee report concluded before the text of the AUSFTA was finalised, it has provided a useful foundation for the Treaties Committee’s inquiry. The Committee also considers that it was of assistance in increasing public awareness of the international trade environment in general and the proposed AUSFTA as its negotiations proceeded.
- 1.26 The Committee notes with interest that concerns raised within the Senate inquiry process last year have continued to be raised throughout this inquiry process. These issues include the ramifications for inter-country investment flows as a result of the increased integration of the Australian and US economies, the difficulties with negotiating access to agricultural markets, quarantine

8 Senate Foreign Affairs and Trade References Committee, *Voting on Trade – The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, tabled 27 November 2003.

matters being regarded as a disguised trade barrier, and the protectionist effects of tariffs, quotas and trade subsidies.

- 1.27 Both committees have received evidence demonstrating Australians' concerns about the regulatory impact of a free trade agreement with the US on controls over the environment and investment, to the detriment of domestic interests.
- 1.28 The Treaties Committee notes the recommendations of the Senate Committee with regard to the extent of parliamentary involvement in the treaty-making process and while it does not propose to consider the recommendations of that Committee in detail within this report, it considers the review of the role of Parliament in those processes timely, given the increasing numbers of trade treaties currently under negotiation. As stated throughout this Report, the Treaties Committee also supports transparency; the consideration of the Senate Committee of transparency in the negotiation process of treaties is noted.⁹
- 1.29 The Senate Select Committee on the Free Trade Agreement between Australia and the United States of America was established on 10 February 2004.¹⁰ According to its second term of reference, that Committee shall
- examine the Agreement
 - provide a democratic and transparent process to review the Agreement in its totality to ensure it is in Australia's national interest
 - examine impacts of the agreement on Australia's economic, trade, investment and social and environment policies, including, but not limited to, agriculture, health, education and the media.

9 Report of the Senate Foreign Affairs and Trade References Committee, *Voting on Trade – The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, tabled 27 November 2003, Preface, p. xii.

10 *Senate Journal*, 11 February 2004, pp. 2997-9.

Background - How did we get here?

- 2.1 This Chapter will consider some of the current debates in the international trading environment, examining some of the circumstances surrounding the AUSFTA. The Committee acknowledges the recent report of the Senate Committee on Foreign Affairs Defence and Trade and the issues it covered regarding the history of the GATT, GATS and the WTO.
- 2.2 While it may be the case that ‘debate about multilateral versus bilateral trade liberalisation is now academic in regard to the AUSFTA’¹, it is worth noting the level of debate in the context of evidence received by the Committee.
- 2.3 The Committee notes that commentary on the world trading environment occupies a large amount of print and television news. It also informs public opinion, as can be seen by the column inches devoted to it in the print media, the hours of discussion on television and radio, and the letters and petitions sent by members of activist groups who wish their concerns to be noted. The Committee acknowledges that the impact of trade policies is seen throughout Australian society and the issues are broader and more complex than can be given in any review of this size and nature.
- 2.4 Given the extent of evidence received during the course of this inquiry which made specific or general mention of trade policies in the context of this Agreement, the Committee considers that it is of benefit to recognise the range of positions held.

1 Allen Consulting Group, *The Australia – United States Free Trade Agreement: Potential Impacts on South Australia*, October 2003.

- 2.5 The Committee is not qualified to present a wide-ranging and comprehensive analysis of debates about the history and influence of international trading arrangements on national economies and societies, nor is it tasked to. It will however offer some comments in acknowledgement of the range of opinions which have been expressed concerning the Agreement.

The ‘multilateral vs bilateral’ debate

- 2.6 The Senate Report tabled in November 2003 gave a useful background to the Committee’s understanding of the issues facing the Parliament as it debates legislation which, when passed, serves to enable Australia to comply with the obligations contained in trade agreements.
- 2.7 The Committee also notes the ongoing work by the Parliamentary Library which prepares analytical papers discussing the impacts and influences of an increasing number of trade agreements as well as shifting norms in trade organisations and institutions.
- 2.8 It is largely recognised that there is an increasing focus on bilateral and regional agreements as multilateral agreements stall. The increasing numbers of members of the WTO mean that consensus is more difficult to achieve so nations look to increase market access in bilateral or regional agreements.

Regionalism

- 2.9 The Committee notes that the last decade has also seen an increase in Regional Trade Agreements (RTAs); the Committee was interested to learn that more than half of world trade occurs within existing or prospective RTAs. Scholarly opinion remains divided over whether such preferential trade agreements are ‘building blocks’ or ‘stumbling blocks’ towards freer global trade. What does seem clear is that a ‘domino effect’ towards RTAs has developed, with many countries concerned about being left out of new arrangements.²

2 John Kunkel, ‘Australian trade policy in an age of globalisation,’ *Australian Journal of International Affairs*, Vol. 56, No. 2, 2002, p. 245.

Criticisms of bilateralism

2.10 The Committee notes the critiques of bilateralism including the increasing number of differences between agreements and their consequent impacts. The Committee considers that the findings of a recent US Congressional Committee can be equally applied in an Australian context.

A minority believes that, though not a fault of the Agreement, there is a concern that the current melange of global, regional and bilateral international trade agreements have different, congruent and conflicting substantive, procedural and enforcement provisions. This creates confusion and uncertainty and encourages global forum shopping and multiple proceedings. Congress should look at this patchwork quilt in its entirety, not only one piece at a time and consider the long term impact these agreements will have on American interests over the long term.³

2.11 The Committee also notes commentary which refers to a 'spaghetti bowl' approach; the more FTAs that are signed, the more incompatible standards and rules of origin emerge. This can have a negative impact on the efficiency gains made by any move towards free trade, creating administrative difficulties with the implementation of agreements with different standards for various trading partners.

2.12 The Committee further notes that a WTO Trade Policy Review of the US, released in January this year, raised questions about the increased use of bilateral trade agreements by the US, noting that

care should be taken that negotiating and administrative resources are not distracted away from the multilateral system and that vested interests are not created that complicate multilateral negotiations.⁴

3 US-Singapore Free Trade Agreement Report of the Trade and Environment Policy Advisory Committee (TEPAC), February 27, 2004.

4 WTO, *Trade Policy Review of the United States*, 16 January 2004, WT/TPR/S/126

Bilateralism won't affect the multilateral process

- 2.13 The Committee notes contrary views which suggest that fears that FTAs will undermine the multilateral approach are unfounded. The Committee is aware that several countries, Australia included, have concluded bilateral agreements while continuing to conduct multilateral negotiations. It notes an observation made that the US government signed pacts with Israel, Canada and Mexico during the Uruguay Round negotiations from 1986 to 1994 without reducing its commitment to a final multilateral agreement.⁵
- 2.14 The Committee also notes the view that FTAs can provide useful templates for broader negotiations.

As membership of the WTO grows, reaching consensus becomes more difficult. Negotiators can be forced to consider only the lowest common denominator. Negotiating with one nation or a small group of like-minded countries can allow more meaningful liberalisation in areas such as sanitary and regulations, technical barriers to trade, service trade and investment, electronic commerce, customs facilitation, labour and environmental standards and market access for politically sensitive sectors. Those talks can blaze a trail for wider regional and multilateral negotiations ... Despite their peculiarities and incremental nature, the agreements can serve the cause of freedom and development by breaking down barriers to trade between nations.⁶

Australia's place in the world trade environment

- 2.15 It has been long-recognised that Australia has one of the most open economies in the world. The Committee notes the progress that Australia made to reduce tariffs during the 1980s, making it one of the world's most open economies.
- 2.16 Australia has been a world leader in trade liberalisation in bilateral FTAs such as ANZCERTA, regional fora such as APEC and pushing for liberalisation within multilateral institutions such as the WTO.

5 Daniel Griswold, *Financial Times*, 27 July 2003. Dr Griswold is Associate Director of the Center for Trade Policy Studies at the Cato Institute.

6 Daniel Griswold, *Financial Times*, 27 July 2003.

Australia also established the Cairns Group of agricultural nations, and has been active in regional trade fora in the Asia Pacific region.

ANZCERTA

2.17 Few Australians realise that one of the most advanced regional trade agreements already exists between Australia and New Zealand.

Like most new model FTAs, ANZCERTA extends well beyond goods trade to services, investment, harmonisation of standards and even the (relatively) free movement of labour, thus now bordering on being a fully fledged common market. This cross-Tasman integration process, beginning modestly in the 1960s, was motivated primarily by a mutual benefit in the need for structural adjustment and a common fear of being 'left out' in a regionalising world.⁷

2.18 Recognising the breadth of the AUSFTA and the number of bilateral and regional treaties currently either in force or being negotiated, the Committee considered it timely to examine in brief a widely acknowledged example of one of the world's most comprehensive and integrated free trade agreements, the Closer Economic Relations Treaty with New Zealand (also referred to as CER or ANZCERTA). The Committee received some advice from DFAT on the changing nature of this agreement since it came into force in 1983.

2.19 Mr Alastair Maclean from the Department of Foreign Affairs and Trade (DFAT) stated that the ANZCERTA was originally built on a series of preferential trade agreements between Australia and New Zealand, including the 1966 free trade agreement between the two countries. He explained that by the late 1970s, those agreements led to the removal of tariffs and quantitative restrictions on about 80 percent of trans-Tasman trade. In March 1980 the concept of closer economic relations—CER—between the two countries was introduced, culminating in the negotiation of the CER, which entered into force on 1 January 1983.⁸

2.20 The Committee notes that the CER has developed quite considerably in the years since. A significant protocol called 'the acceleration of free trade and goods', sped up the phase down of tariffs and quantitative

7 Graham Dunkley, 'There goes the neighbourhood! The regional free trade adventure', Chapter 5 in *The Free Trade Adventure*, Melbourne 1997.

8 Mr Alastair Maclean, *Transcript of Evidence*, 14 May 2004, pp. 32.

restrictions five years ahead of the original schedule. Services were brought into the CER from January 1989.

2.21 The Committee understands that

since July 1990, some seven years after it initially entered into force, all goods meeting the CER rules of origin have been free of tariffs and quantitative restrictions, and there are now very few restrictions on services. Whilst CER is the principal agreement that supports the trans-Tasman economic relationship, there are a number of other agreements and arrangements which have been developed since.⁹

2.22 The Committee understands that these arrangements include:

- the 1996 customs cooperation arrangement which assists in the harmonisation of and cooperation in customs policies and procedures, with significance for the administration of the rules of origin, which underlie the CER trade arrangements
- the 1998 Trans-Tasman Mutual Recognition Arrangement (TTRMA), which was an important development in deepening the economic relationship
- the open skies agreement signed in November 2000, which established seventh freedom rights¹⁰ and allowed Australian and New Zealand international airlines to operate across the Tasman and beyond to third countries without restriction.

2.23 The Committee was advised that CER issues such as business law reform and tax imputation are currently being advanced. DFAT advised of the existence of other areas of cooperation in science and technology, biosecurity, quarantine, industry and competition issues.

2.24 The Committee understands that the TTMRA is currently being reviewed by the Productivity Commission and the two governments have signalled their commitment to the further development of a single market between Australia and New Zealand.

2.25 The Committee heard from Mr MacLean that

We have consistently observed the fact that the CER remains one of the world's most open free trade agreements. I think the figures point to it having been extraordinarily fruitful in

9 Mr Alastair Maclean, *Transcript of Evidence*, 14 May 2004, pp. 32.

10 Seventh freedom rights allow a dedicated freight carrier to operate services directly from another country to third countries without operating out of their home countries.

improving and extending trans-Tasman trade and investment links. Since 1983, two-way trade with New Zealand has expanded about 500 per cent, with annual growth of around nine per cent over the past decade. So it outstrips total growth in trade. Obviously the difference in the size of the economies means there are some differences in the relative profiles of Australia for New Zealand, and alternatively of New Zealand for Australia. New Zealand, despite the difference in size, is still Australia's fifth largest market. It takes 5.9 per cent of our total exports—that includes goods and services—and total bilateral trade with New Zealand was more than \$16.2 billion in 2001-02, including \$3.8 billion in services.¹¹

Australia's involvement in other trade agreements

- 2.26 Apart from the ANZCERTA discussed above, the Committee notes that Australia signed a bilateral free trade agreement with Singapore in February 2003. It is a broad agreement, covering trade in goods, services, investment and a range of other sectors, although agriculture and cultural issues were specifically excluded. While the Committee does not intend to make a comparison between the SAFTA and the AUSFTA in this Report, it notes that the Committee has had a previous opportunity to review some of the issues which have arisen in this inquiry process. The presence of the SAFTA is also noted in the context of Australia's current and recent involvement in other bilateral trade negotiations.
- 2.27 The Committee also notes that a free trade agreement between Australia and Thailand has been concluded and is currently the subject of parliamentary review. A report is expected from this Committee later in the year. Australia is also conducting preliminary discussions with Japan and Korea about potential trade agreements and the Committee will monitor this situation with interest.

Impact of the AUSFTA on Australia's relations with the rest of the world

- 2.28 The Committee notes the comments on Professor Ross Garnaut in evidence received by this inquiry. The Committee further

11 Mr Alastair Maclean, *Transcript of Evidence*, 14 May 2004, p. 32.

acknowledges Professor Garnaut's contribution to debate in the wider community. Professor Garnaut believes that bilateral trade agreements exclude or disadvantage other trading nations and can be of limited value even to those who sign them.

The completion of an Australia-US free trade agreement at a time of high insecurity for our country is more likely to diminish than expand Australian economic opportunity. And it may weaken Australian security in important ways ... The agreement would be a significant new factor in the contemporary pressures for the unravelling of the open, multilateral trading system and the reversion globally to re-World War II patterns of bilateral and small-group preferential arrangements. It will be the first big scalp of the new US strategy of seeking to pursue its trade interests through many bilateral agreements. And it will be the first free trade agreement linking substantial economies from different regions ... Such an agreement would increase the risks of Australia being left outside preferential trading arrangements that include as members its major trading partners in East Asia.¹²

- 2.29 Professor Garnaut views are supported by Peter Lloyd, who is similarly dismissive of the real value of bilateral agreements. While Professor Garnaut claims that bilateral agreements should be resisted because of the damage they cause to the multilateral system, Mr Lloyd recognises that regional 'street gangs' are pushing countries into a series of bilateral deals. Australia must join in, or risk being beaten up.¹³ The Committee notes Professor Lloyd's statements as reported in *The Australian* newspaper in November 2003.

Quoting another economist, Professor Lloyd said: 'Regional trading agreements are like street gangs: you may not like them, but if they are in your neighbourhood, it's safer to be in one.'

And

We may not like regional trading agreements, but if our export competitors like Chile or Canada, and possibly in the future South Africa...if those countries get preferential access

12 Ross Garnaut, *The Australian*, 4 March 2003.

13 Michael Bachelard, *Weekend Australian*, 15 November 2003, p. 25.

to our major markets, we will be at a severe disadvantage. So we joined the street gang.¹⁴

- 2.30 This view was opposed by Professor Garnaut, who claimed that bilateral agreements would destroy the economic and political support for multilateral trade, damage the multilateral system and lock some disadvantaged countries out of the new system. The Committee similarly notes his view that

Medium-sized countries like us end up getting beaten up pretty badly if it becomes gangsterland.¹⁵

Australia's approach

- 2.31 Most observers agreed that multilateral trade liberalisation was preferable to bilateral trade liberalisation. The Committee notes the evidence from Ms Joanna Hewitt from DFAT that

It is very clear from the portfolio perspective that we see the WTO process, in a trade policy sense, as a first best option and indeed Australia's top priority. That has long been the case. We have been putting and continue to put a tremendous amount of effort into the Doha process. We have to take stock of the fact that last September in Cancun we had quite a serious setback in the WTO process. There was a standoff following that setback in Cancun that lasted for some months. Only last week I was in Geneva with colleagues for the first serious round of reengagement in the negotiations. We had an agriculture session in Geneva. There are some encouraging signs about the possibility of parties getting back together and being able to put together a framework text for the Doha negotiation. That would not be a full, detailed outline of what will be achieved in the end but rather a sort of skeleton agreement. We are hopeful that that will be possible, but I have to say to you that there are also still very big gaps and differences between the parties—between major developed economies and increasingly between developed and developing economies—in the WTO process. WTO now has 148 members. The very process of reaching agreement is cumbersome and difficult, which does not make it any less important. We feel strongly that, from an Australian point of

14 Michael Bachelard, *Weekend Australian*, 15 November 2003, p. 7.

15 Michael Bachelard, *Weekend Australian*, 15 November 2003, p. 7.

view and indeed from a global and development point of view, a process where you have liberalisation of markets on a coordinated basis, where everybody moves together, is obviously the way you are going to get the biggest and most lasting legally binding results. But it has become more and more difficult to move through those processes quickly. We recognise that it is going to take time, but it is still worth investing our major effort in trying to achieve that. There are some things that can be done in the WTO—I am thinking particularly in the agriculture sector, which is so central for Australia. It is just not possible—as we have seen in our negotiations with the Americans and what we see of others—to negotiate down export subsidies, for example, or the whole raft of agricultural support unless that is done in a parallel way between the major subsidisers. The WTO is the only place where that can happen.¹⁶

- 2.32 The Committee agrees that multilateral trade liberalisation should continue to be pursued within the Doha round.

Trade diversion

- 2.33 The Committee notes evidence which suggested trade would be diverted. Professor Garnaut stated that

... a preferential area is not all about movement in the direction of free trade. The other, contrary movement in a preferential area is in the direction of trade diversion, because one thing that happens in a preferential area which does not happen in a genuine movement to free trade is that some low-cost production from a partner country is replaced by high-cost production from the trading partner. For example, Australia imports some brands or types of cars from Japan because they meet Australian consumer needs more cost-effectively than equivalent products from the United States. However, if you took away the 15 per cent tariff on American production but kept it on Japanese production then it might be cheaper to bring in a car from the American subsidiary of Nissan rather than from the company in Japan, even though the cost of production in the American subsidiary was higher than in Japan. In that case, the preferential area would lead to

16 Ms Joanna Hewitt, *Transcript of Evidence*, 2 April 2004, pp. 5-6.

the replacement of a low-cost source of supply—in this case, Japan—with a high-cost source of supply—in this case, the United States.¹⁷

2.34 Australia has just concluded FTAs with Singapore and Thailand, and embarked on a study of an FTA with China. The Committee notes a report which suggests that the negotiation of the AUSFTA may actually *encourage* future bilateral arrangements rather than threaten them. The Committee notes the view of Mr Andrew Stoler in this regard.

Just recently, an Indonesian minister, hearing of the FTA results, suggested that his country might be next in line for an agreement with Australia ... The idea that the AUSFTA has distracted Australia from the Doha round, and that this is why the round is in trouble, is almost too silly an argument to consider ... Far from being left out of the deal, most Australian agricultural sectors should do quite well under the AUSFTA. Far too many people are quick to forget that in this modern Australian economy, nearly three-quarters of people work in the services sector where the AUSFTA clearly promises more competition and cost savings in Australia, and enhanced access for services exporters to the US.¹⁸

2.35 The Committee also notes the views of Mr Peter Hartcher¹⁹, who suggested that three threshold questions should be asked in relation to the AUSFTA.

- Is trade liberalisation good for Australia in principle? Australia has become one of the world's most open economies and has survived the collapse of Asian growth, and continued to grow while the US fell into recession. The answer is yes.
- Can Australia pursue trade liberalisation? It would be better to do so through multilateral deals. When this approach isn't available, it is best do so through bilateral approaches.²⁰ Bilateral and regional

17 Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 59.

18 Andrew Stoler, *Australian Financial Review*, 25 February 2004, p. 55.

19 'With no multilateral choice, the answers must all be yes', *Sydney Morning Herald*, 1 May 2004.

20 Hartcher notes that 'given that [the multilateral] approach is not available, the world's governments have responded with a frenzy of activity in the only avenues open to them – bilateral and regional deals. In 1990 there were 40 such deals. By 2002 there were 250 and more than 30 more are under discussion.'

deals are messier than a clean global agreement, but they represent the only realistic way forward. So, the answer is yes.

- Does this particular deal represents a net benefit for Australia? While the traditional way of calculation represents a tiny benefit, a bigger benefit is found by ‘using a newer method that tries to capture the overall “dynamic” effects, as investors reallocate resources to pursue the most profitable endeavours.’ Therefore, the answer is yes.

Additional arguments in favour

2.36 Some of the commentary made in recent months concerning the AUSFTA is the period in which it has been negotiated. It has been reported in some circles that it is a rare opportunity for Australia to negotiate an FTA with the world’s largest economy, largely due to the strength of the bilateral relationship.

2.37 The Committee also notes that former Australian Consul General to New York, Michael Baume AO, believed that there was a narrowing window of opportunity to bring the AUSFTA into force.²¹ The Committee notes his comments given in evidence at a public hearing, and also in print media:

...negotiators cannot be given more time as the process would then blow out until 2005, by which time the special goodwill Australia enjoys in the US Congress, which must approve any deal, may have diminished somewhat.²²

Consultation with the public

2.38 Consultation will be discussed in the next chapter, and will arise as a separate issue at various points throughout the report in relation to specific chapters. What should be recognised in general is the extent of positive feedback from witnesses and in submissions about the level of consultation conducted by DFAT *before* and *during* negotiations.

2.39 DFAT noted the extent to which earlier consultations informed and gave direction to the negotiating teams. The Committee therefore

21 Michael Baume, *Transcript of Evidence*, 6 May 2004, p. 54.

22 Michael Baume, *Australian Financial Review*, 17 November 2003.

notes that while the Agreement did not deliver gains to all sectors as hoped, gains that were made were likely to have been assisted by the involvement of industry and community groups lobbying for the outcomes they wanted. The Committee notes departmental comment that from the beginning of the negotiations, the Government sought to ensure adequate opportunities for interested individuals and organisations to provide comment, including through public submissions, and that this process assisted in formulating objectives and negotiating positions.²³

Concluding observations

- 2.40 The Committee notes evidence it received relating to the relative merits of multilateral and bilateral trade agreements, and claims made by several parties with regard to the impact of one type of treaty or the other on the international trade environment. Most evidence agreed that multilateral liberalisation was preferable to bilateral liberalisation.
- 2.41 The Committee accepts that in the absence of progress in the WTO it was reasonable to pursue a bilateral trade agreement with the United States. The Committee believes it is important that Australia continue to work for progress on multilateral liberalisation within the Doha round.

23 DFAT, NIA and RIS, Consultations.

Overview of the Treaty

- 3.1 This Chapter will look at some general issues with regard to the AUSFTA. It is usual practice for the Committee, in its reviews of proposed treaty actions, to consider evidence based in the supporting documentation supplied by the line agency that is proposing that a treaty action proceed. These documents accompany the treaty text when it is tabled in the Parliament. In the case of this treaty, the documents are the National Interest Analysis (NIA), the Regulation Impact Statement (RIS) and the *Guide to the Agreement*, which is designed to be a plain-English explanation of the treaty's articles.
- 3.2 Given the significance of the treaty, the breadth of its obligations and the level of interest in the Australian community, the Committee's usual overview of evidence from those documents will be broadened. From Chapter 4, particular areas of the Agreement will be reviewed, but in this Chapter some more general issues can be examined to give a general overview of the Agreement in its entirety.
- 3.3 Therefore, issues which the Committee would normally cover in the body of its report, such as potential economic benefits (including economic modelling which has been conducted), consultation and implementation, which do not fall into a particular chapter in the Agreement, will instead be looked at here.
- 3.4 The Committee acknowledges the importance of issues regarding the involvement of State and Territory Governments in the consultation and implementation aspects of the treaty, and therefore will outline some of those concerns. While assessing the overall impact of the Treaty and issues surrounding its development, the Committee will

also present some evidence received relating to the potential impact on Australia's Indigenous population.

Summary of outcomes

- 3.5 The NIA states that the Agreement will remove 'almost all barriers' to Australia's exports of goods to the United States and provides for a very high degree of economic integration of the Parties' markets through comprehensive commitments on a range of areas including trade in services, investment, government procurement, intellectual property, electronic commerce and competition policy.¹
- 3.6 An initial feature of the Agreement to note is its 'GATS-plus' description. The Committee first examined this kind of agreement when it reviewed the Singapore - Australia Free Trade Agreement (SAFTA) in 2003. The Committee understands that for services and investment issues, a GATS-plus agreement means that
- the parties negotiate, via the offer and request process, an agreed list of exceptions to which the obligations in the FTA do not apply. This so-called 'negative list' is set out in annexes to the services and investment chapters.²

Market Access

- 3.7 One of the main outcomes presented by DFAT negotiators as presenting significant economic gains for Australia is the increase in market access. The NIA states that extensive consultation and industry submissions formed the basis of the Australian objectives for negotiations. According to paragraph 7, the Agreement will remove a significant number of direct and indirect trade barriers and will create new market access opportunities.

Agriculture³

- 3.8 Duties on two-thirds of agricultural tariffs will be eliminated from the day of the Agreement's entry into force. Duties on a further 9 per cent of tariff lines will be eliminated within four years. Greater access has been negotiated for beef and dairy, including immediate elimination of in-quota tariffs. The single-desk marketing arrangement for Australian commodities has been preserved, and Chapter 8 of this

1 National Interest Analysis (NIA), para. 5.

2 DFAT, Briefing 3, 2003.

3 Information in the following paragraphs is taken from the NIA unless stated otherwise.

Report will demonstrate evidence received by the Committee regarding the maintenance of Australia's quarantine regime.

Manufacturing

- 3.9 Duties on more than 97 per cent of US non-agricultural tariff lines (excluding clothing), worth \$6.48 billion in 2003, will be duty free from day one of the Agreement. By 2015, tariffs on textiles, some footwear and some other items will be phased out, with all trade in non-agricultural goods free of duty. A mechanism to address non-tariff barriers will be established as well as other consultative measures dealing with technical regulations and standards.
- 3.10 Both Parties will eliminate customs duties on almost all automotive products from day one, including the 25 per cent US tariff on utes ('light commercial vehicles'). Australian duties on passenger motor vehicles (PMVs) will be phased out by 2010. Evidence received by the Committee on these issues is discussed at Chapter 5 of this Report.

Services

- 3.11 The Agreement binds liberal access for Australian service suppliers, including for professional, business, education, environmental, financial and transport services. A framework to promote mutual recognition of services has been developed. However, the Committee notes evidence which was critical of the absence of commitments on working visas for professional people, and the lack of mutual recognition arrangements, and has made recommendations that progress in those areas continue to be made.

Financial Services

- 3.12 The Agreement binds liberal conditions of access for Australian financial services providers to the world's largest financial market. Australia and the US will consider ways to integrate their financial services sectors further, through access for foreign securities markets and for foreign collective investment schemes. The Financial Services Committee which would be established under the Agreement would report on these issues within two years of the Agreement entering into force.

Investment

- 3.13 The Agreement contains a stronger framework for investment protection that should continue to promote our largest investment relationship. A range of trade and investment distorting performance requirements are prohibited under the Agreement. There is no investor-state dispute mechanism; ‘in recognition of the robust domestic legal systems in both countries’, there is no provision for investors to use international arbitration to pursue concerns about government actions. Also under the Investment Chapter of the Agreement, Australia is still able to screen foreign investments of significance.
- 3.14 Evidence regarding dispute settlement is discussed at Chapter 4. Evidence received on Financial Services and Investment is discussed at Chapter 12 of this Report.

Government procurement

- 3.15 The US Federal Government procurement market is estimated to be worth US\$200 billion, and is currently closed to Australian firms. Under the Agreement, access for Australian firms would be available for US federal government contracts over US\$58 550; and in construction over \$US6.275 million.
- 3.16 Evidence will be examined in Chapter 15 which weighs the relative ability of Australian firms to successfully conduct business in the US market.

Competition, telecommunications and e-commerce

- 3.17 The Agreement will enable even closer cooperation with the US on competition-related issues. According to the NIA, businesses and individuals will be treated fairly in enforcing competition law. Consumer protection agencies will work together in combating illegal activity. The Agreement will allow greater redress for consumers and investors who have been defrauded or deceived. This issue is covered briefly in Chapter 14 of this Report.
- 3.18 The Agreement contains ‘WTO-plus’ rules on major suppliers and pro-competitive regulatory frameworks for Australian and US firms. There will be a new high level avenue for Government and industry consultations on market access issues. This issue is covered briefly in Chapter 13 of this Report.

- 3.19 In relation to electronic commerce, the Agreement provides that there will be no barriers to trade conducted electronically and Australia will still be able to regulate for public policy purposes. This issue is mentioned at the conclusion of Chapter 16 of this Report, which deals with the possible effects of the Agreement on intellectual property rights.

Obligations

- 3.20 Obligations cover a range of areas under the Agreement. The NIA states that these provisions will 'liberalise and facilitate trade and investment' between Australia and the US. There will be initial commitments to eliminate tariffs on specified tariff lines that meet the agreed Rules of Origin (ROOs) criteria. There are also commitments and disciplines on government procurement, intellectual property protection, telecommunications, customs procedures, electronic commerce, competition policy, professional services recognition, standards and technical regulations, sanitary and phytosanitary (SPS) measures, labour and the environment.
- 3.21 Obligations will be examined more closely where they arise in each chapter of this Report, under their relevant headings.

Implementation

- 3.22 A number of legislative and regulatory changes will be needed for Australia to be able to fulfil its obligations under the Agreement. These were provided by DFAT at Annex 8 with the NIA and associated documents. Changes are reproduced here, for reference.
- 3.23 At the time of the consideration of the Committee's Report, there was discussion that proposed legislative changes were to be introduced in the current parliamentary sitting.
- 3.24 The AUSFTA will not come into effect until both Parties have completed their domestic approvals processes, amended and/or passed any necessary legislation, and agreed on a date for entry into force.⁴ The following points are taken from the NIA.

4 www.dfat.gov.au/trade/negotiations/us.html, viewed on 20 June 2004.

Goods, Agriculture and Textiles Chapters

- Amendments to *Customs Tariff Act 1995* by inserting provisions that will allow for a preferential rate of duty to apply to goods from the United States where they meet the rules of origin as set out in the Agreement.
- Amendments to the *Customs Act 1901* and the *Customs Tariff Act 1995* to allow Customs to implement safeguard action, which is a mechanism to stop or slow the decrease in tariff rates where preferential entry harms the local industry. The Productivity Commission will be the competent authority to conduct a safeguard investigation.
- Amendments to the *Customs Act 1901*, to give Customs the power to question and to audit exporters in regard to the production or manufacturing details of goods they are exporting, or have exported, to the United States.
- Amendment to the *Customs Act 1901* to implement the temporary importation provisions of Article 2.5 of the Agreement.
- Amendments to the Dairy Produce Regulations 1986 (Part 2 Export Control) to add as regulated dairy produce all of the items included under the new access arrangements and to identify any conditions that may be necessary for the export of specified categories of dairy produce to the United States. The *Dairy Produce Act* will not require change.
- *Australian Meat and Livestock Industry Act 1997* and the *Australian Meat and Livestock (Quotas) Act 1990* will not require amendment. However, the orders under the Act will need to be changed to reflect additional product category requirements for beef, specifically to administer the tariff rate quotas set out in the Agreement.
- The *Horticulture Marketing and Research and Development Services Act 2000* will not require amendment. However, a new order under the Act will need to be made to reflect additional product categories as regulated horticulture products.

Rules of Origin

- Rules of Origin (ROOs) determine the goods that qualify for preferential treatment under the Agreement. The Agreement will introduce a new system based on change of tariff classification

whereby each non-originating input must be transformed in the manufacturing process such that it undergoes a particular change in tariff classification. For certain products, the change of tariff classification rule is combined with a local content requirement. This model has also been adopted for the Australia - Thailand FTA. It differs from the ROOs under the Australia - New Zealand CER Trade Agreement which is based on a local content requirement of 50% of the ex-factory value.

- Amendments to the *Customs Act 1901* to outline the general ROOs provisions set out in Chapter 5 of the Agreement.
- The product-specific ROOs in the Annexes 4-A and 5-A will be incorporated in the Regulations made under the *Customs Act 1901*.

Services and investment

- Amendments to the *Life Insurance Act 1995* and Part 3 of the Life Insurance Regulations 1995 to allow US owned life insurers to operate in Australia through branches.
- Amendments to the *Foreign Acquisitions and Takeovers Act 1975* and Foreign Acquisitions and Takeovers Regulations 1989 to reflect the commitments made in the Investment Chapter in relation to screening of US investment through the Foreign Investment Review Board (FIRB). Specifically, amendments to address the increase in the threshold for FIRB examination of US acquisitions in non-sensitive sectors from \$50 million to \$800 million (indexed to the Australian GDP deflator), as well as to exempt US acquisitions of interests in Australian financial sector companies from notification through the FIRB process (such acquisitions will still be subject to the approval and other requirements of the *Financial Sector (Shareholdings) Act 1998* and other financial sector regulation.)

Intellectual Property

- Amendments to the *Copyright Act 1968* to address a number of obligations, including, but not limited to, copyright term extension, ISP liability and criminal penalties. Specifically, to address:
 - ⇒ a scheme for immunity of Internet Service Providers (ISPs) for potential copyright infringement in return for compliance with a scheme for the removal of allegedly infringing material on their networks

- ⇒ implementation of copyright term extension
- ⇒ enhanced measures against copyright infringement - particularly on networks, and in support of the technology used by owners in seeking to protect their material in electronic form and
- ⇒ broadening the scope of the remedies and criminal offences in the Act and amendments concerned with related limitations and exceptions.
- Amendments to the *Australian Wine and Brandy Corporation Act 1980* to address geographical indications and trade marks. Specifically to
 - ⇒ make provision for the cancellation of a registered geographical indication, and
 - ⇒ make provision to allow a trade mark owner to oppose an application for a geographical indication.
- Amendments to the *Therapeutic Goods Act 1989* to provide
 - ⇒ measures in the marketing approval process to prevent a person from entering the market with a generic version of a patented medicine before a patent covering that product has expired, unless they have the consent of the patent owner
 - ⇒ that a patent owner be notified of an application for marketing approval in those cases in which the person seeking the approval considers the patent invalid and intends to market a generic version of a patented product before the patent expires.
- Amendments to the *Agricultural and Veterinary Chemicals Act 1994* to change the scheme currently in place, including in relation to the time period for protection of agricultural chemical test data.
- Amendments to the *Patents Act 1990* to ensure that the ground for revocation of a patent will continue to be available.

Government Procurement

- Amendments may be necessary to the regulations issued under the *Financial Management and Accountability Act 1997* (FMA Act) and to the Commonwealth Procurement Guidelines, promulgated and used under the FMA Regulations.
- Specifically, minor changes may be required to the FMA Act and the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to

ensure compliance across all departments and agencies covered by the GP [government procurement] chapter.

Costs and benefits

3.25 It is the Committee's usual practice to review the costs and benefits of each treaty action tabled in Parliament, based on information provided in the NIA. The Committee notes criticism that the NIA does not contain specific financial information on costs and benefits.

3.26 Before embarking on a précis of what information the Committee has considered with regard to detailed economic modelling, it is noted that the NIA's statement on costs of the Agreement is stated at paragraph 15 of that document, and is excerpted here for reference.

The Treasury has estimated that the financial cost of the Agreement to the Australian Government will be around \$190 million in 2004/05, \$400 million in 2005/06, \$420 million in 2006/07 and \$450 million in 2007/08. This estimate is based on the expected loss of tariff revenue from imports from the US and assumes that the Agreement will enter into force on 1 January 2005. The estimates do not take account of the scope for additional lost tariff revenue that could arise if imports from the US displace imports from other countries. On the other hand, the estimates also do not take account the potential economic growth that the Agreement may generate and any additional taxation revenue resulting from this growth.⁵

3.27 The Committee received detailed and conflicting evidence on the use and outcomes of economic modelling which has been conducted concerning the Agreement. Modelling has been conducted by various agencies, some of which are discussed in this section, and has received widely varying reactions. Overall the Committee acknowledges the statement in the NIA that notes that costs and benefits are extremely difficult to quantify. The Committee notes the view of the Department that

while economic modelling can provide helpful indicators of the likely direction of change and provide evidence that supports or cautions against a particular course of action,

5 NIA, para. 15.

results are only estimates based on a range of assumptions about how the world works and how it will change in the future. No single figure for the gains from a free trade agreement can be generated with a high degree of certainty.⁶

- 3.28 As has been mentioned earlier in this Report, the Committee is aware of the extensive amount of public interest in most aspects of the treaty. This interest includes coverage of the economic analysis conducted to date.

Types of economic modelling

GTAP

- 3.29 The Committee understands that the GTAP model is comparative static in nature and does not incorporate the dynamic effects over time and the effects on investment and capital flows, but does incorporate a greater amount of sectoral detail than APG-Cubed.

APG-Cubed

- 3.30 According to Annex 9 of the NIA, the APG-Cubed model ‘does capture dynamic factors to a greater extent than earlier static models.’ The NIA also states that it may also be possible to provide some estimates of the impact of the effects of an FTA in terms of stimulating competition and productivity.

Even so, it is unlikely that a model can capture all the dynamic benefits of integrating Australia with the world’s largest, most dynamic and most competitive economy, as well as the extent to which Australian firms innovate faster, and find and exploit market niches that arise as a result of an FTA.⁷

Monash-Global

- 3.31 An economic study into the potential benefits of a free trade agreement between Australia and the US was conducted by Allen Consulting Group for the Government of South Australia. That report contained economic modelling data conducted by the Centre of Policy Studies (CoPS) at Monash University. CoPS simulation used the

6 NIA, Annex 9.

7 NIA, Annex 9.

Monash-Global model, which is based on GTAP but incorporated some additional dynamic variables.

Modelling conducted for this Agreement

Centre for International Economics Report

- 3.32 The Committee understands that the Centre for International Economics (CIE) prepared analyses of the AUSFTA both before and after the Agreement's finalisation. It is worth noting that, until the Dee Report (see below), the CIE had conducted the only definitive modelling since the Agreement was finalised: this is not to make a judgement as to its accuracy or to its predictive abilities, but to note that it was the first study which looked at completed economic modelling based on the *facts* of the sectors which were included in the Agreement. It is for this reason that the Committee has given this report more focus during the course of its inquiry.
- 3.33 The CIE economic model showed gains in a range from '\$1.1 to \$7.4 billion per annum in 20 years time once all liberalisation and effects have worked through'.⁸ The report acknowledged that it was difficult to define a more accurate figure.
- 3.34 Key points of CIE's post-FTA analysis are
- while there are immediate benefits, there are also immediate adjustment costs which partly offset the benefits in the first year
 - investment liberalisation makes the biggest contribution to overall economic growth and welfare
 - merchandise and services trade liberalisation contributes an extra \$1 billion per year to both welfare and real GDP above what it might otherwise be a decade out. This is a large effect, which reflects
 - ⇒ both Australia and the US are already relatively open economies, with average tariffs of 4.5 and 3.6 per cent
 - ⇒ when tariffs are removed preferentially, there is some trade diversion and that offsets some of the gain
 - ⇒ services markets in both countries are also both relatively open; where barriers do exist, the Agreement establishes frameworks for potential further liberalisation. While these frameworks have

8 CIE, *Economic analysis of AUSFTA*, April 2004, p. x.

the potential for future gains, they do not, as yet, give quantifiable gains to include here.

- the liberalisation of merchandise and services trade initially causes exports to expand faster than imports, but the effect of the investment liberalisation is to cause the opposite. Overall, the expansion of imports peaks a decade out, but exports continue to expand and therefore grow more quickly than imports over the longer term, in order to service the extra foreign investment.⁹

ACIL Tasman

3.35 There was also some debate during the course of the Committee's inquiry with regard to some economic modelling undertaken by ACIL, commissioned by the Rural Industries Research and Development Corporation. The Committee notes the statement in the NIA that

it never received endorsement as an official RIRDC report because of ongoing concerns that the modelling results were far from robust and highly implausible for a country the size of Australia. In particular, ACIL found that unilateral liberalisation of Australia's barriers would generate negative welfare gains for Australia, an outcome not supported by other quantitative analysis of the Australian economy. The logic of ACIL's analysis would suggest that Australia would be better off with increased protection, which is contrary to mainstream economic theory and evidence of the robust growth of the Australian economy over recent years following closer integration with the international economy.¹⁰

3.36 The Committee received evidence from Mr Greg Cutbush, from ACIL Tasman Consulting, with regard to work that ACIL had undertaken on the Agreement. Mr Cutbush stated that while ACIL and CIE had similar views on the economic modelling conducted during the negotiation stage, regarding the assumptions that had been made.

We did not share their view about a couple of assumptions. The particular one ... was their presumption that the service sector, over and above whatever other protections are written into the model, would have a 0.35 per cent productivity jump

9 CIE, *Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, Summary, p. ix.

10 NIA, Annex 9, p. 3.

in addition. We felt there was not a basis for that assumption and we did not make that in our own model. It is true that we got a small negative result. The result is not really all that dissimilar to the CIE's 2001 Report, but a lot of attention was drawn to the fact that it was below the line, and I think that formed the basis for our being named as opponents of the FTA most particularly.¹¹

The Dee Report

- 3.37 The Committee notes that towards the end of its inquiry, economic modelling which had been commissioned by the Senate Select Committee into the FTA was made available to the Committee. While the Committee notes that there were still positive gains identified by that Report (although not of the same order as those identified by CIE), the Committee recognises the general opinions it received that it is almost impossible to know what will happen in the economic future of two countries like Australia and the United States, and has opted to note the report but not get into close analysis in the time available for the Committee to report to Parliament.

Conclusions on economic modelling

- 3.38 Some evidence received by the Committee was critical of the decision by the Government not to commission economic analysis of the Agreement from the Productivity Commission. The Committee notes comments by Professor Ross Garnaut, among others, which suggest that the Productivity Commission would have been a preferable agency to complete a report on the economic costs and benefits of this Agreement.

In assessing the benefit for Australia, both before negotiations began and after the Agreement was finalised, the body relied on by successive governments to inform them and us about the effects on our future economic welfare was sidelined. Instead of seeking an assessment from the Productivity Commission in accordance with the approach endorsed by the Prime Minister, a private consulting firm was engaged on both occasions to assess the gains for Australia.¹²

11 Mr Greg Cutbush, *Transcript of Evidence*, 4 May 2004, p. 71.

12 Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 57.

- 3.39 The Committee also notes Professor Garnaut's statements relating to the time which would be required to complete a detailed analysis of the Agreement.

To do a really good job of analysis on this very complicated Agreement, which goes into far more areas than any other set of trade policy decisions in Australia, requires some time ... The Productivity Commission can be asked to report in limited time frames and, on occasions, has done so in the past. However, one has to be reasonable. If one wants a thorough job of analysis, one must allow them adequate time. This is a very complex agreement, with many dimensions, so, realistically, if we want proper analysis and not top of the head work, we have to allow reasonable time—and that is months, not weeks.¹³

- 3.40 The Committee looks forward to continuing debates on these issues, and trusts that any costs or benefits will continue to be monitored should the Agreement come into force.

Recommendation 1

To enable the Australian Parliament to assess the economic impact of the AUSFTA, the Committee recommends that a review of its implementation be conducted by the Productivity Commission five years after the Agreement enters into force.

Consultation

- 3.41 The Committee considers that consultation with stakeholders about the negotiation of treaties is of great importance and in recent years it has increasingly focussed on this issue. In many cases throughout this Report, where the Committee received evidence in relation to industry-specific aspects of the Agreement, people likely to be affected by the Agreement specifically commended the level of consultation by DFAT officials in regard to their particular area.
- 3.42 The NIA states at paragraph 3.17 that extensive consultations were held throughout the negotiations with agencies, industry groups,
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¹³ Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 63.

non-government organisations and other interested stakeholders through a range of fora and extensive individual meetings. The Committee notes the extensive list of consultations provided in documentation tabled with the NIA, and used the broad range of interested parties to seek feedback on the completed Agreement.

States and Territories

- 3.43 The AUSFTA will have an impact on States and Territories, and the Committee considers that evidence provided by those governments that have responded to the Committee's call for submissions is valuable in ascertaining the extent of that impact.
- 3.44 The NIA notes at paragraph 3.16 that within the Agreement, Chapter 10 on Cross Border Trade in Services, Chapter 14 on Competition-Related Matters, and Chapter 15 on Government Procurement will be the most significant to States and Territory Governments.
- 3.45 The Committee notes that the services and investment obligations of the FTA, in particular, cover areas of regulation for which the States and Territories carry sole or shared responsibility. Other provisions in an FTA with potential relevance to the States' and Territories' regulatory responsibilities include those on technical standards.

Economic effects on States and Territories

- 3.46 The Committee notes the CIE Report at page xi, which states
- All states gain from the liberalisation of trade in merchandise, services and government procurement. The largest gains are in New South Wales and Victoria.
- There are far more significantly localised effects. The partial opening of the dairy market benefits all dairy processing regions, but especially those with a heavy export orientation in south-eastern Australia. Similarly, all beef producing regions stand to benefit from the market opening.
- In manufacturing, the increase in motor vehicle and component parts manufacturing contributes to a relatively

large proportion of the increase in gross state product for Victoria and South Australia.¹⁴

Consultation with States and Territories

3.47 The NIA notes that

The States and Territories were consulted before, during and after negotiations through meetings in capitals, joint meetings in Canberra, and through other fora such as the National Trade Consultations and Commonwealth-State Standing Committee on Treaties processes.

3.48 The NIA also states that States and Territories participated closely in framing the negotiating objectives for the Government Procurement Chapter, and in ensuring the appropriate framing of reservations to the Cross-Border Trade in Services and Investment Chapters.

3.49 The Committee acknowledges the DFAT Briefing Paper's statement that

While State and Territory representatives have attended some international treaty negotiations, notably those relating to environmental issues, this was the first time of which we are aware that a States and Territories' representative was included in an Australian delegation to FTA negotiations.

3.50 The Committee notes the RIS's statement that

The inclusion of State and Territory representation reflects the Principles and Procedures for Commonwealth-State Consultation on Treaties agreed by the Council of Australian Governments (COAG) in June 1996. The COAG Principles provide that 'in appropriate cases, a representative or representatives of the States and Territories may be included in delegations to international conferences which deal with State and Territory subject matters.'¹⁵

3.51 The Committee notes DFAT has been conducting regular close consultations with the State and Territory Governments on FTAs over the last two years, particularly since the Singapore - Australia FTA negotiations entered full swing. According to the RIS, during 2003, there have been meetings or teleconferences with the States and

14 CIE, *Economic analysis of AUSFTA*, pp. xi-xii.

15 RIS, p. 12.

Territories before and after all six of the negotiating rounds, involving representatives of Premiers' departments and departments responsible for industry, trade and business. There have also been separate meetings with agencies responsible for government procurement.¹⁶

- 3.52 The Committee acknowledges the informative submissions from six State and Territory Parliaments covering a range of issues.¹⁷ Common to many were a discussion of the potential impacts across provisions in a range of areas such as pharmaceuticals, audio visual, intellectual property, environment, plasma fractionation services, government procurement and the ability of States to regulate services. Others made comments across the entire Agreement. Many of these issues will be raised in the relevant Chapters.
- 3.53 Most State and Territory Governments that made submissions to the Committee commended DFAT for their 'genuine efforts ... to be more inclusive than during previous negotiations'¹⁸ and for the level of consultation that was achieved.¹⁹ However, the Committee did receive evidence of dissatisfaction with the process, relating particularly to the final stages of negotiation and post-negotiation consultations.
- 3.54 The Committee notes a statement in the NIA that
- State and Territory representatives also joined the Australian delegation to the negotiations as observers. One State and Territory representative attended the third round of negotiations, three attended the fourth round, two attended the fifth round, and one attended the sixth and final round.²⁰
- 3.55 However, the Western Australian Government has stated that this is not 'a strictly accurate description'.²¹ The Committee notes evidence from that Government that the third round of negotiations were attended by an observer for the government procurement negotiations, who was a representative from the Australian Procurement and Construction Ministerial Council Meeting, not a

16 RIS, p. 12.

17 The Northern Territory and Tasmanian Governments did not make a submission.

18 Queensland Government, *Submission 206*, p. 2. See also Victorian Government, *Submission 91*, p. 5.

19 South Australian Government, *Submission 198*, p. 2. See also Western Australian Government, *Submission 128*, p. 10.

20 NIA, Annex 1.

21 Western Australian Government, *Submission 128.1*, p. 1.

‘State and Territory Representative’ as such.²² This same representative is referred to as a ‘state and territory representative’ in the NIA for subsequent rounds.²³ Further, in regard to the third round, it is noted that the nominated State and Territory representative was informed by DFAT ‘at the last moment’ that he was not able to attend the negotiations, and so therefore, there was no actual State and Territory representative at the third round.²⁴ The Western Australian Government has stated that there was no official ‘State and Territory Representative’ at the sixth and final round.²⁵ The ACT Government has also stated that there was ‘limited participation of two State and Territory representatives as observers at several but not all negotiating rounds.’²⁶

- 3.56 The Committee received evidence of a common complaint from State and Territory Governments that consultation did not occur during the final weeks of negotiations. The ACT Government has stated that

Despite assurances that the Commonwealth Government would ensure that States and Territories remained engaged during the final stages of AUSFTA negotiations, there was virtually no feedback or consultation during the final round of negotiations (except in the area of government procurement).²⁷

- 3.57 Similarly, the South Australian Government has noted that

South Australia was disappointed that states and territories were not kept abreast of developments in the final weeks of negotiations for the AUSFTA.²⁸

- 3.58 The ACT Government has stated that there were ‘significant deficiencies in [the consultation] process that limited genuine consultation between the Commonwealth, States and Territories’.²⁹ The Committee notes comments that

Despite a number of requests to DFAT for sight of working texts, States and Territories received access to only four draft

22 Western Australian Government, *Submission 128.1*, p. 1.

23 Western Australian Government, *Submission 128.1*, p. 2.

24 Western Australian Government, *Submission 128.1*, p. 2.

25 Western Australian Government, *Submission 128.1*, p. 2.

26 ACT Government, *Submission 180*, p. 5.

27 ACT Government, *Submission 180*, p. 5.

28 South Australian Government, *Submission 198*, p. 2.

29 ACT Government, *Submission 180*, p. 5.

chapters (government procurement, cross border trade in services, financial services and investment) during the negotiations. Information on other aspects of the negotiations was limited to general briefings that were an insufficient basis on which to properly evaluate the likely national and regional implications of the Agreement.³⁰

3.59 The Queensland Government has stated that

At the conclusion of negotiations, States and Territories had only been provided with drafts of four chapters. These were the chapters on Cross Border Trade in Services, Investment, Government Procurement and Financial Services. It was extremely difficult, if not impossible, to assess the full implications of the treaty when details such as the general exceptions and horizontal commitments were not known. This compromised the Queensland Government's capacity to provide definitive input to the final aspects of the negotiations.³¹

3.60 The Victorian Government has noted that 'there are currently no clear mechanisms for national follow-up to free trade agreements.'³² Similarly, the Western Australian Government has stated that

It is disappointing that, despite agreeing to do so, the Commonwealth failed to provide the States and Territories with information on the outcomes of the negotiations or the draft text before these were made public.³³

Further

While the States and Territories were asked to provide their input into Australia's Annex II list (in early January), it is disappointing they were not kept informed of the results of the negotiations in the area, even when they specifically asked the Commonwealth for information during a teleconference after the agreement was announced. Consequently, Western Australia was unaware that the reservations it had requested (and informed by telephone

30 ACT Government, *Submission 180*, p. 5.

31 Queensland Government, *Submission 206*, p. 3.

32 Victorian Government, *Submission 91*, p. 5.

33 Western Australian Government, *Submission 128.1*, p. 3.

would be covered by Commonwealth reservations) were not in the final Annex II list until the draft text was made public.³⁴

- 3.61 The Committee agrees with the points made in the Western Australian and Australian Capital Territory Government submissions which suggested that greater use should be made of the Treaties Council. Its role as agreed to by COAG in 1996 is to ‘consider treaties and other international instruments of particular sensitivity and importance to the States and Territories’. Although it is supposed to meet every year, it has only met once, in 1997.

Recommendation 2

The Committee recommends that there be more consultation with State and Territory Governments in the final stages of negotiations of Free Trade Agreements.

The Committee further recommends that the outcomes of any Agreements be made available to State and Territory Governments at the conclusion of negotiations.

- 3.62 The Queensland Government has raised concerns that there was inadequate consultation with local government bodies, and that discussion between the local and State level governments was prevented by requests from DFAT that all information provided by the Commonwealth Government be kept confidential.³⁵
- 3.63 The Committee notes that most States and Territories are in support of the Agreement, notwithstanding the concerns they have raised in evidence. The Committee further notes that while the ACT Government has advised of its decision to participate in the Government Procurement Chapter³⁶ it has emphasised that this decision

does not constitute an endorsement of the agreement as a whole.³⁷

34 Western Australian Government, *Submission 128.1*, p. 3.

35 Queensland Government, *Submission 206*, p. 3.

36 ACT Government, *Submission 180.1*, p. 1.

37 ACT Government, *Submission 180.1*, p. 1.

Impact on Indigenous interests

- 3.64 The Committee received several submissions which discussed the impact of the AUSFTA on Indigenous peoples in Australia. Discussion of the impact of Chapter 17 (Intellectual Property) is contained in Chapter 16 of this Report, and there is mention of exceptions under the Agreement designed for cultural protection (see Chapter 5 of this Report). The Committee notes that under the Agreement, there are two specific exemptions relating to Indigenous peoples.
- 3.65 Firstly, in relation to Chapters 10 (Services) and 11 (Investment), Australia reserves the right to
- adopt or maintain any measure according preferences to any indigenous person or organisation or providing for the favourable treatment of any Indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the service sector.³⁸

Further

- Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or provides for the favourable treatment of any indigenous person or organisation.³⁹
- 3.66 Secondly, in Annex 15-G, Australia has exempted both measures for the ‘health and welfare’ and ‘economic and social advancement’ of Indigenous people from the operation of Chapter 15 (Government Procurement).
- 3.67 Lawyers from the Jumbunna Indigenous House of Learning submitted that ‘as a poorer socio-economic group, Indigenous people are vulnerable to economic shifts’,⁴⁰ and that any change to the delivery of health services and availability of pharmaceuticals, will, given the documented health problems in Indigenous communities,

38 AUSFTA Annex II-1.

39 AUSFTA Annex II-1.

40 Larissa Behrendt and Megan Davis, ‘Adverse effects of free-trade deal will hit indigenous groups hard’, *Sydney Morning Herald*, General News, p. 13, 8 March 2004, submitted in Jumbunna Indigenous House of Learning, *Submission 106*.

disproportionately affect Indigenous peoples.⁴¹ On this basis, the Jumbunna Indigenous House of Learning stated that

We acknowledge the importance of [the] exemptions yet submit that it is important for there to be an ongoing role in monitoring the operation and scope of these exemptions particularly in regards to indigenous peoples health and welfare.⁴²

3.68 The Committee received evidence from Aboriginal and Torres Strait Islander Services (ATSIS) that

The reasons for providing any exemption for Indigenous people is because of their unique status as the original occupants of Australia, with their history, culture—indeed their entire heritage—being connected solely to Australia. In addition, the Australian Government needs to be able to continue to adopt a wide range of measures to overcome the serious and pervasive social and economic disadvantage of Indigenous people without fear of breaching AUSFTA.⁴³

3.69 ATSIS stated that a broad exemption clause for Indigenous peoples would have been the preferable option.

The potential for unintended consequences, and exemption gaps which may inappropriately limit government policy options for Indigenous people requires, in our view, a broad overarching exemption clause for Indigenous people in AUSFTA. If this is not achievable, the alternative is for a comprehensive range of specific exemptions to be set out in AUSFTA.⁴⁴

3.70 In reference to the exemptions in the Agreement, Dr Paul Kauffman relayed to the Committee advice received by ATSIS

the pointy ends have been removed from the agreement concerning Indigenous people but they would have suggested—and in fact did suggest—more precise wording in the government procurement and trade in services chapters. They express some concerns as to the investment chapter ... our understanding is that the government have to weigh that

41 Jumbunna Indigenous House of Learning, *Submission 106*, p. 4.

42 Jumbunna Indigenous House of Learning, *Submission 106*, p. 5.

43 ATSIS, *Submission 188*, p. 6.

44 ATSIS, *Submission 188*, p. 6.

in trying to get an agreement with the United States and balance all interests as they see it.⁴⁵

3.71 The Committee notes comments by Mr Brian Stacey

Firstly, ATSI's view is that the government has had proper regard to the interests of Indigenous people in finalising this agreement. In particular, they have sought to include in it exemptions such that governments in the future are not stopped from adopting policies, programs or other measures to protect Indigenous people's interests. Secondly, we are comforted by the advice we have received from the Minister for Trade in response to the report to the effect that, in the government's view, there was nothing in that agreement which would stop them from adopting in the future whatever laws, policies or programs they thought were necessary.⁴⁶

45 Dr Paul Kauffman, *Transcript of Evidence*, 4 May 2004, p. 87.

46 Mr Brian Stacey, *Transcript of Evidence*, 4 May 2004, p. 85.

Administrative Framework and Dispute Resolution

Introduction

- 4.1 This Chapter reviews several Agreement chapters which are of an administrative nature. For the most part they do not appear to have been interpreted as controversial, and the Committee notes that few submissions have been received which deal specifically with the issues covered by these chapters. Although the Committee received little specific evidence on these issues, it proposes that in order to provide a comprehensive review of the AUSFTA, a brief overview should be provided. Unless otherwise stated, information in this Chapter is based on information contained in the National Interest Analysis and the User Guide.¹
- 4.2 The six Agreement chapters covered in this Chapter of the Report are
- Chapter 1 (Establishment of the Free Trade Area and Definitions)
 - Chapter 6 (Customs Administration)
 - Chapter 20 (Transparency)
 - Chapter 21 (Institutional Arrangements and Dispute Settlement)
 - Chapter 22 (General Provisions and Exemptions)
 - Chapter 23 (Final Provisions)

¹ Unless otherwise stated, the information in this Chapter is based on information contained in the *Guide to the Agreement*, viewed on 9 February 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/guide/index.html.

- 4.3 One Article which has caused some concern in the Australian community is contained in Chapter 21, and relates to dispute settlement provisions in the Agreement. It is discussed in more detail in the relevant section below.

Legal and Institutional Framework (Chapters 1, 22 and 23)

- 4.4 Following the structure of the DFAT *Guide to the Agreement*, this section covers legal and institutional framework of the Agreement: Chapter 1 (Establishment of the Free Trade Area and Definitions), Chapter 22 (General Provisions and Exemptions) and Chapter 23 (Final Provisions). Many of the points made in this section have been mentioned in the previous Chapter.
- 4.5 The Agreement consists of 23 chapters, several annexes and a range of side letters (exchanges of letters).
- As with other recent FTAs concluded by Australia and the United States, the reservations annexes will have a two-part structure. The first set of annexes lists measures to which a ‘standstill’ commitment will apply. These are permitted exceptions to the national treatment or market access commitments, but they cannot be made more restrictive with respect to service suppliers or investors of the other Party ... A second set of annexes will list reservations for activities or sectors for which a party retains full flexibility to introduce new, more trade restrictive measures.²
- 4.6 The Agreement will become part of Australian domestic law to the extent that the Australian Parliament amends or adopts legislation implementing the Agreement. The Annexes and any interpretive footnotes in the Chapters or Annexes are legally binding. The various side-letters may represent stand-alone, legally binding, treaty-level agreements; constitute part of the Agreement, or have no legal standing, depending on the language included in each individual letter.

Chapter 22 (General Provisions and Exceptions)

- 4.7 The Agreement, at Article 22.1, adopts the same general exceptions as have been adopted by the WTO in the General Agreement on Tariffs and Trade, (GATT) and General Agreement on Trade in Services (GATS). The Committee understands that this means that both the Australian and US

2 DFAT AUSFTA Briefing No. 3 2003.

Governments are free to enact laws, regulations or policies they consider are necessary, for example:

- protect public morals or maintain public order
- protect human, animal or plant life or health
- protect national treasures of artistic, historical or archaeological value
- conserve exhaustible national treasures.

4.8 The *Guide to the Agreement* also refers to the application of the Agreement to taxation. The Agreement prohibits export taxes on goods and replicates WTO protection against discriminatory taxes on goods. The Agreement does not apply to any existing taxes but does place limits on the ability of both governments to implement discriminatory taxes in the future.

4.9 Article 22.3 sets out how the National Treatment, Most Favoured Nation Treatment and Expropriation and Compensation obligations in the Agreement apply to taxes. In particular, it clarifies that the Double Taxation Convention between the US and Australia should apply where there are inconsistencies between the Double Taxation Convention and the Agreement.

Chapter 23 (Final Provisions)

4.10 This Chapter contains four articles relating to accession, annexes, amendments and entry into force and termination of the Agreement.

4.11 According to the Agreement and the NIA, the Agreement will enter into force sixty days after an exchange of notes confirming completion of the Parties' respective domestic procedures, or at such other date as the Parties may agree. The Committee understands that both governments are working towards entry into force on 1 January 2005, which would require an exchange of notes on, or before, 2 November 2004.

4.12 Under Article 23.4 of Chapter 23 (Final Provisions), either Party may terminate the Agreement by giving the other Party six months notice in writing. Termination of the Agreement would be subject to the Australian treaty process.³

3 NIA, para. 23.

Chapter 6 (Customs Administration)

- 4.13 The *Guide to the Agreement* explains the purpose of the Chapter as dealing with customs administration and cooperation and comprises 11 Articles including advance rulings, reviews of Customs decisions, cooperation between the Parties to achieve compliance, penalties for violations, the release of goods, and express shipments.
- 4.14 The Committee notes that this Chapter is largely administrative in nature and received little specific evidence on this Chapter.⁴

Chapter 20 (Transparency)

- 4.15 The DFAT *Guide to the Agreement* describes the purpose of this Chapter as the promotion of greater transparency in the making and implementation of laws, regulations and bureaucratic decisions, as well as the protection of the principles of natural justice and due process.⁵
- 4.16 The Chapter consists of six articles, relating to
- publication, requiring that all laws and regulations should be made publicly available. This obligation is consistent with the recently passed Legislative Instruments Act 2003
 - notification and provision of information, providing a mechanism for both Parties to consult about the effect of a particular draft law on their respective citizens' or companies' interests
 - administrative agency processes, which provides individuals or companies of either country certain rights and due process when they are subject to administrative and bureaucratic decision-making processes. Australia is already in compliance with this Article and no additional action is required by the Australian Government
 - appeals against administrative or bureaucratic decisions, in addition to the commitments on natural justice outlined in the preceding article. As

4 Dr Brent Davis from the Australian Chamber of Commerce and Industry made some comments on the risk assessment process at the public hearing on 3 May 2004, to the effect that ACCI did not foresee that the Agreement would have any significant effect on the quarantine and testing regimes.

5 http://www.dfat.gov.au/trade/negotiations/us_fta/guide/20.html, viewed on 9 February 2004.

with that article, Australian is also already compliant and no additional action is required by the Australian Government.

- 4.17 The Committee notes that this Chapter is largely administrative in nature and did not receive specific evidence on this Chapter.

Chapter 21 (Institutional Arrangements and Dispute Settlement)

What is often ignored in the analysis is the fact that this is going to be a living agreement, with many institutional arrangements that will make it possible for both Australians and Americans to pursue a whole range of future liberalisation opportunities as well as problem solving.⁶

- Mr Andrew Stoler

- 4.18 The Chapter on institutional arrangements and dispute settlement consists of 15 Articles, in two sections, and one Annex.

- 4.19 Section A (Article 21.1) provides for the establishment of a Joint Committee to supervise the operation of the Agreement. According to the DFAT *Guide to the Agreement*, this Committee will be central to the ongoing evolution of the Agreement and the early identification and settlement of disputes through consultation.

At its annual meetings, it will review the current functioning of the Agreement, consider any improvements or amendments that either country may wish to propose and, where further clarity is required, issue interpretations of the Agreement.⁷

- 4.20 The Joint Committee's consultations as the initial stages of the dispute resolution process were outlined by Mr Stephen Deady from DFAT in the context of a hypothetical challenge to the Australian copyright regime.

That dispute settlement mechanism is a government-to-government process. It would start with consultations. The first thing the Americans would do in a situation like that would be to put their case to us. We would put our case back. If it did go to a dispute process there is a chapter that deals with the mechanism that would deal with that dispute. That dispute settlement

6 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 12.

7 DFAT, *Guide to the Agreement*, p. 121.

mechanism process covers the whole of the agreement ... that is the process—consultations first.⁸

- 4.21 Section B of Chapter 21 outlines the provisions for the proceedings to settle disputes arising under the Agreement.

Importantly, it does not allow private investors to directly challenge government decisions under the Agreement, provides high standards of openness and transparency in the resolution of disputes between Australian and United States Governments, and provides for flexible compensation arrangements for resolving disputes.⁹

- 4.22 The Committee understands that American business interests were pushing for investor-state dispute settlement, which is described as a mechanism for redressing unfair treatment by governments.

In other free trade agreements signed by the US American companies have the right to take the host government to a ‘neutral’ tribunal and gain compensation in the event of nationalisation or expropriation of US interests or measures having equivalent effects to nationalisation or expropriation.¹⁰

- 4.23 But, according to the *Guide to the Agreement*, the Investment Chapter of the Agreement (Chapter 11 of the Agreement, Chapter 12 of this Report) does not establish an investor-state dispute settlement mechanism

In recognition of the Parties’ open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems.¹¹

- 4.24 Mr Deady advised the Committee that

The reason it is not there is because both sides agreed that we do have a rule of law that operates effectively and that this additional investor-state dispute mechanism was not necessary between two highly developed countries with these legal systems. What this language says is that somehow if those circumstances change—if in the future that is no longer the reality and somehow there has been a breakdown of the rule of law in either country—then the

8 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 54.

9 DFAT, *Guide to the Agreement*, p. 121.

10 Mr David Richardson, *Foreign Investment and the Australia-United States Free Trade Agreement*, ‘Current Issues Brief No. 7, 2003-04’, Economics Commerce and Industrial Relations Group, Information and Research Services, Parliamentary Library.

11 DFAT, *Guide to the Agreement*, p. 121.

other Party could come back and ask for the establishment of such a procedure.¹²

- 4.25 The Committee notes that individual investors are able to raise concerns about their treatment with their government, which is able to pursue these issues through traditional state-to-state dispute settlement. Section B outlines the scope of application of the Agreement, consultations, establishment of an arbitral panel, rules of procedure, and a range of penalties which apply in cases where a breach of the Agreement has been established.¹³

Investor-state dispute resolution mechanism in future?

- 4.26 Some evidence received by the Committee notes that while investor-state dispute mechanisms were not adopted in the Agreement, provision has been made for developing such procedures in the event of 'a change in circumstances'.¹⁴ Article 11.16.1 states

If a Party considers that there has been a **change in circumstances** affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultation with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures. (emphasis added)

- 4.27 The Committee received several submissions which expressed strong concerns about this Article, and the possibility that it 'has been put there as a sleeper and that it is a springboard for a future action to bring investor-state disputes to life'.¹⁵ Another basis for complaint about the review mechanism was made by Ms Theodora Templeton, representing WTO Watch Queensland.

The dispute process in the agreement contains all the faults of the dispute process of the WTO, which has been one of the main

12 Mr Stephen Deady, *Transcript of Evidence*, 2 May 2004, p. 62.

13 Further information can be found at the Dispute Settlement section of the DFAT *Guide to the Agreement*, at http://www.dfat.gov.au/trade/negotiations/us_fta/guide/21.html, viewed on 15 June 2004.

14 Ms Madelaine Chiam, *Submission*; Australian Fair Trade and Investment Network (AFTINET), *Submission* and other AFTINET associates.

15 Mr Brian Jenkins, *Transcript of Evidence*, 23 April 2004, p. 20.

planks of disagreement. The NGO community across the world—not just in Australia—has vigorously criticised the dispute process of the WTO, which is secretive and non-transparent and which decides matters of great importance to countries purely on the basis of trade and not taking into account considerations relating to health, the welfare of the people or the environment.¹⁶

- 4.28 In relation to the dispute resolution mechanisms, the Committee notes the concerns of AFTINET and similar groups, which are based around a central perception that

The disputes process in the agreement means that one government can complain about the regulation of another government, on the grounds that it is too burdensome or a barrier to trade, without proper consideration of health or cultural impacts, as the complaints are heard by a trade law tribunal which does not take those other issues into account.¹⁷

- 4.29 The Committee notes that the extensive consultation conducted by groups such as AFTINET and WTO Watch with community groups can only serve to increase awareness and debate within the community about international agreements which are of interest to them. The Committee supports their ongoing involvement in the process of public debate on the development, negotiation and review of treaties.

- 4.30 The Committee received evidence from Ms Madelaine Chiam from the Centre for International and Public Law at the Australian National University.¹⁸ Ms Chiam considers that the provisions outlined above (at paragraph 4.25) lack clarity, notably, while a direct investor-state dispute resolution mechanism is not included

it does enshrine a trigger mechanism which allows that dispute resolution to occur. Therefore, the crucial question is determining when this trigger will apply.¹⁹

- 4.31 Ms Chiam discussed the example of a case between the US and Mexico to illustrate the difficulties of working out under what circumstances the mechanism for establishing investor-state dispute resolution might be triggered; that it is not clear what ‘change of circumstances’ is required

16 Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 34.

17 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, pp. 32-33.

18 Ms Madelaine Chiam, *Submission 34*.

19 Ms Madelaine Chiam, *Transcript of Evidence*, 4 May 2004, p. 29.

whether it has to be a wholesale structural transformation within Australian governance in general or if it is enough to have a change that affects only one investor.²⁰

4.32 Ms Chiam suggested that Article 11.16.1 may be clarified, without requiring renegotiation of the text of the treaty. The Committee heard that either of the two options may serve to avoid the

unintended consequences of treaty language in the investment protections of the NAFTA that have given rise to so much controversy in the US, Canada and Mexico.²¹

4.33 The Committee found Ms Chiam's evidence both practical and pragmatic, and accordingly recommends that these options be given consideration before the treaty enters into force.

Recommendation 3

The Committee recommends that, before binding treaty action is taken, Australia gives serious consideration to the negotiation and issue of a further side letter to clarify obligations made under Article 11.16 of the Agreement, such that 'change of circumstances' is defined and able to be clearly understood by both Parties.

Recommendation 4

Should the Agreement enter into force without amendment or issue of side letters to clarify understanding of Parties' obligations at Article 11.16, Australia should ensure that such clarification is sought by requesting the Joint Committee established under Article 11.12(e) to issue an interpretation with regard to Article 11.16.

20 Ms Madelaine Chiam, *Transcript of Evidence*, 4 May 2004, p. 29.

21 Ms Madelaine Chiam, *Transcript of Evidence*, 4 May 2004, p. 30.

Concluding observations

- 4.34 The Committee supports the views of Mr Andrew Stoler, cited prior to paragraph 4.18, that the AUSFTA will be a living agreement, and acknowledges the role these Chapters will have in establishing a functioning and flexible trade agreement. The Committee also notes the evidence presented by Ms Meg McDonald, representing Alcoa Australia.

We believe the agreement will also support the long-term harmonisation of regulatory, investment and business systems, making it easier for companies like ours to do business between the two countries. In particular, the establishment of a government-to-government framework to manage the economic and investment relationship is important for smoothing the long-term relationship and working through issues

and

We think that the various forums and mechanisms established under the agreement and its auspices will be able to continue the work of streamlining the bilateral business environment and that the institutional arrangements to manage the economic relationship will match those of the defence and security ties. On many occasions, issues have arisen in the economic relationship for which there was no high-level government forum and no dispute resolution mechanisms within which they might be solved. The FTA establishes such a framework.²²

22 Ms Meg McDonald, *Transcript of Evidence*, 23 April 2004, p. 41.

National Treatment and Market Access for Goods, Textiles and Apparel and Rules of Origin

Introduction

- 5.1 This Chapter will consider three related Chapters together: the provisions in the Agreement relating to National Treatment and Market Access, Textiles and Apparel and Rules of Origin. The Annex to Chapter 2 of the Agreement relating to pharmaceuticals is covered in Chapter 6.
- 5.2 Under the Agreement, both Parties have agreed to eliminate customs duties on the import of each other's goods.¹ According to the DFAT Briefing No. 3 2003
- the end product of the market access negotiations on *goods* is a schedule for tariff elimination, listing any items for which there may be transition periods for tariff elimination.
- 5.3 The Committee understands that under the national treatment obligation each Party is required to
- treat service suppliers and investors of the other Party no less favourably than its own service suppliers and investors in like circumstances. The market access obligation prohibits a number of forms of limitation on market access – such as limitations on the

¹ Duties will be zero from day one of the Agreement, on 97 percent of Australia's exports to the US. All tariffs will be zero by 2015, according to the DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/04_manufactured_goods.html

number of service suppliers, or on the total value of services transactions or assets.²

- 5.4 Both countries have retained the right to regulate the import and export of certain items, in particular forest products as well as retain marketing arrangements for wheat, barley, rice, sugar and export arrangements for horticulture and livestock.³
- 5.5 According to DFAT, Australia's trade in non-agricultural goods or merchandise trade with the US was valued at approximately \$5.84 billion in 2003. Duty free entry will allow this to grow across all sectors, but in particular autos, metals, minerals, seafood, paper and chemicals.⁴ The Committee understands that Australia is already competitive in these areas but has been restricted in its market penetration because of high US tariffs in key products.

Anti-dumping measures

- 5.6 Both Parties retain their WTO rights to anti-dumping and countervailing action, in the event of unfair trade injury to particular industries.⁵

National treatment and market access for goods

- 5.7 Chapter 2 of the Agreement applies to trade in all goods between the Parties. Only those goods which qualify under Chapter 5 (Rules of Origin) are able to benefit from the non-discriminatory treatment to which Chapter 2 commits the Parties.⁶
- 5.8 As a result of liberalisation under the Chapter, over 97 per cent of Australia's non-agricultural exports to the US (excluding textiles and clothing) will be duty free immediately upon entry into force of the Agreement. Remaining tariffs will be phased out. All trade in goods will be duty free by 2015.⁷

2 DFAT Briefing No. 3, 2003.

3 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/04_manufactured_goods.html

4 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/04_manufactured_goods.html

5 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/04_manufactured_goods.html

6 DFAT, *Guide to the Agreement*, p. 7.

7 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/04_manufactured_goods.html

National treatment

- 5.9 Under Article 2.2, the Parties agree to accord national treatment to each other's goods.

Elimination of duties

- 5.10 Under Article 2.3, the Parties will progressively eliminate customs duties on goods from the other Party in accordance with their Annex 2-B schedules on tariff elimination.⁸ Parties can not increase an existing duty or introduce a new one unless provided for by the Agreement.⁹
- 5.11 The *Guide to the Agreement* states that

A large proportion of Australia's exports of non-agricultural goods to the US will be duty free from day one of the Agreement. Apart from agricultural goods, tariffs on a range of textiles and clothing, some footwear, and a small number of other items, will be phased out with all trade in goods free of duty by 2015.¹⁰

Customs value

- 5.12 Under Article 2.4, in determining the value of goods, valuation is based upon transaction value and not minimum import prices.¹¹

Specific categories of goods

Temporary admission

- 5.13 Under Article 2.5, the Parties agree to specific arrangements for goods entering the country temporarily, for the use of a resident of the other Party, such as professional equipment or goods intended for use as displays at an exhibition. Such goods are able to enter free of duty.¹² However, the goods must meet a number of criteria, including that they be exported on, or before, the departure of the person using them, or within a reasonable period of time related to the purpose of their admission.¹³

Goods re-entered after repair or alteration

- 5.14 Under Article 2.6, goods which are re-entered after repair or alteration are able to enter duty-free, as long as the repairs or alterations do not 'destroy

8 AUSFTA, Article 2.3.1.

9 DFAT, *Guide to the Agreement*, p. 7.

10 DFAT, *Guide to the Agreement*, p. 7.

11 DFAT, *Guide to the Agreement*, p. 8.

12 AUSFTA, Article 2.5.1

13 DFAT, *Guide to the Agreement*, p. 8.

the essential characteristics of the good, or change it into a different commercial item.’¹⁴

Commercial samples of negligible value and printed advertising material

5.15 Under Article 2.7, commercial samples of negligible value and printed advertising material are allowed to enter duty free.

Waiver of customs duties

5.16 Under Article 2.8, the Parties will not adopt any new waiver of customs duties, or expand any existing waiver program where the waiver is only available upon fulfilment of certain performance requirements. Prohibited performance requirements include export outcomes, import substitution, or domestic preferences (including local content thresholds).¹⁵

Import and export restrictions

5.17 Article 2.9 provides that except in accordance with WTO rights and obligations, Parties may not impose restrictions on the import and export of goods.¹⁶

Fees, taxes and formalities

5.18 Under Article 2.10, Parties must ensure that any administrative fees charged in connection with goods do not reflect a disguised tax or indirect protection of domestic products.¹⁷

5.19 Under Article 2.11, the Parties agree not to adopt or to maintain any duty, tax or other charge on the export of goods to the territory of the other Party unless the same charge is applied to goods for domestic consumption.¹⁸

5.20 Article 2.12 states that customs import and export fees must not be stipulated on an ‘ad-valorem’ basis, meaning that the fee must not be calculated on the value of the goods.¹⁹

Committee on Trade in Goods

5.21 Article 2.13 establishes a Committee on Trade in Goods, which will enable Parties to raise issues of concern in relation to tariffs, non-tariff measures, rules of origin and customs administration.²⁰

14 AUSFTA, Article 2.6.3; DFAT, *Guide to the Agreement*, p. 8.

15 DFAT, *Guide to the Agreement*, p. 8.

16 DFAT, *Guide to the Agreement*, p. 8.

17 DFAT, *Guide to the Agreement*, p. 9.

18 DFAT, *Guide to the Agreement*, p. 9.

19 DFAT, *Guide to the Agreement*, p. 9.

5.22 The Committee heard from the Australian Chamber of Commerce and Industry that

For the Committee to be effective, it is important that the private sectors from both countries be fully engaged in its work, especially in identifying outstanding problem areas that may be frustrating the fundamental objectives of the free trade agreement.²¹

Tariff reductions

5.23 The Committee heard a mixed response to the prospect of substantial tariff reduction on imports to Australia under the Agreement. The response to the prospect of lowering of US tariffs was positive.

5.24 The Committee notes evidence that Australia has a significant trade imbalance with the US in merchandise trade. Mr Doug Cameron, National Secretary of the Australian Manufacturing Workers Union (AMWU) stated that tariff reductions will only worsen the trade imbalance.²² Mr Cameron went on to explain his position

I think we will have great difficulty competing with the United States in a zero tariff situation, because of a number of the factors we have outlined in our submission: firstly, the economies of scale that the United States has; secondly, the dollar, and the deliberate devaluation of the American dollar; and, thirdly, the technological advantage that the United States has. These are the simple realities of world trade that we are having to face. We have taken a view that, if we simply open up and get rid of the tariffs, there will be significant job losses—and not only for us.²³

5.25 However, the Committee did hear much evidence supporting tariff reductions. Mr Alan Oxley of the Australian Business Group for a Free Trade Agreement with the United States stated

Australia has agreed to...reduce all tariffs on imports from the United States from an average of five per cent to zero. That puts Australia in a position where those goods will be cheaper. If they are cheaper, it makes the economy more competitive. That is not a very big cut. In fact, one of the points about this agreement is that the actual average height of trade barriers between Australia and

20 DFAT, *Guide to the Agreement*, p. 9.

21 Australian Chamber of Commerce and Industry, *Submission 133*, p. 1.

22 Mr Doug Cameron, *Transcript of Evidence*, 19 April 2004, p. 47.

23 Mr Doug Cameron, *Transcript of Evidence*, 19 April 2004, p. 53.

the US in traditional senses, apart from services, are not very high compared to other countries.²⁴

5.26 The Australian Chamber of Commerce and Industry submitted that

The Australia - USFTA is a big win for Australia's manufacturers, especially those already exporting, or looking to export, to the massive United States market. As noted earlier, virtually all of our manufactured exports to the United States will be duty free from the entry into force of the FTA, with the remaining small fraction subject to known phase-out arrangements over the next decade or so.²⁵

5.27 In reference to tariff outcomes for manufacturing, Mr Stephen Deady advised the Committee that

The manufacturing outcome is a very large part of the deal. I think 97 per cent of tariff lines will be zero on entry into force of the agreement. It is an area again where we are talking about two developed countries with quite open trade regimes really—the average tariff for the United States is 2.8 per cent and the average tariff for Australia is 3.8 per cent. So there are tariff cuts there. The openness of the market I think was there before we started. There are some significant differences, though, in the structure of the tariff regime in the United States compared to Australia's. The maximum tariff in Australia effectively now is five per cent, apart from passenger motor vehicles and textile, clothing and footwear. The United States, though, still has a number of tariff peaks well above that five per cent level and well above its average of 2.8 per cent. Some of them are certainly in significant areas of trade importance to Australia. We have flagged a few—and I think they are well known now: the 25 per cent tariff on light commercial vehicles that impacts on exports of Australian utes, the 35 per cent tariffs on canned tuna and the eight, 10 and 12 per cent tariffs on various metals and minerals.²⁶

Industry impacts

Automotive industry

5.28 DFAT has stated that, under Chapter 2, customs duties will be eliminated on almost all automotive products upon entry into force of the Agreement.

24 Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, p. 27.

25 Australian Chamber of Commerce and Industry, *Submission 133*, p. 1.

26 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 71.

Significantly, this includes the removal of the current prohibitive 25 per cent US customs duty on pick up trucks (utes). Australian duties on passenger vehicles will be phased out by 2010.²⁷

5.29 The Committee notes that this is expected to benefit Australian manufacturers, as the US represents the world's largest market for autos and auto parts.²⁸

5.30 Evidence received from the automotive industry was largely positive. The Committee notes the position of Holden Australia, which is in support of the Agreement

from 1 January 2005 the tariff will drop to 10 per cent and further tariff phase-downs are scheduled for five years after that. While the local manufacturers' share of the domestic market has been declining as tariffs have declined, the industry has actually restructured and become more competitive by creating opportunities for growth through export. Of course, market access to the large economies, whether they be developed or developing, is crucial to keep that growth going. The US is currently the largest automotive market in the world, and we believe the free trade agreement provides opportunities for the Australian automotive industry to grow by taking advantage of that.²⁹

5.31 In relation to the removal of the current 25 per cent tariff on the export of Australian 'utes' to the US, Holden Australia stated that

It certainly presents an opportunity, though there are perhaps a couple of caveats to that. But there has been a fair amount of publicity around Holden utes going into the United States. Obviously with the 25 per cent tariff that simply was not feasible prior to these negotiations. Whether such an export program goes ahead will depend on a whole range of factors. But removal of the tariff takes away an obvious first barrier.³⁰

5.32 The Committee also heard from the Ford Motor Company, which extended its support to the Agreement

Ford Australia acknowledges the reductions of tariffs on US vehicles and components imported into Australia under the free trade agreement is likely to result in some additional competitive

27 DFAT, Factsheet, viewed on 18 June 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/12_automotive.html

28 DFAT, Factsheet, viewed on 18 June 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/12_automotive.html

29 Ms Alison Terry, *Transcript of Evidence*, 20 April 2004, p. 106.

30 Ms Alison Terry, *Transcript of Evidence*, 20 April 2004, p. 107.

challenges. However, the company has a proven track record of developing award-winning vehicles within a flexible and cost-effective manufacturing environment. As such, the company believes it is well placed to meet these new challenges while also looking for opportunities that will come from the opening of the US market.³¹

And

We also believe that the proposed phasing arrangements for Australia's automotive industry are extremely fair, particularly recognising the fact that the US has agreed to there being no phasing arrangements for its automotive industry.³²

5.33 The Committee also notes the position of the Federal Chamber of Automotive Industries.

From the standpoint of the Australian automotive industry as a whole, we believe that this agreement offers significant opportunities to automotive exporters. The United States has offered to remove all tariffs on automotive products upon entry into force. Equally, we have acknowledged that the agreement will bring with it some additional competitive challenges. Under the terms of the agreement, imports of vehicles and parts will receive preferential access to the Australian market. It remains to be seen what impact this will have, although I should note that by 2010 the maximum margin of preference will be no more than five per cent.³³

5.34 Mr Peter Sturrock of the Federal Chamber of Automotive Industries conceded that, despite benefits, there may be some challenges for Japanese manufacturers Toyota and Mitsubishi as a result of the Agreement.

I think there is recognition that the US FTA, as it is described, does provide a number of challenges for the Japanese based companies or companies with Japanese sourced products. That is nothing we would necessarily believe to be unusual or a surprise, given the scope of such a potential agreement. The particular companies that you have identified have had discussions with DFAT directly and with the ministers generally about their concerns or anxieties. They relate to particular issues of long-term strategy for the corporations. I think it is useful to note that, broadly, the corporations at head office level, as brands in worldwide trading

31 Ford Motor Company of Australia, *Submission 121*, p. 2.

32 Mr Russell Scouler, *Transcript of Evidence*, 21 April 2004, p. 11.

33 Mr Peter Sturrock, *Transcript of Evidence*, 4 May 2004, p. 34.

circumstances, are supportive of overall WTO type free trade arrangements. The individual circumstances, region to region and country to country, become another matter and, as I said, are wedded to the particular business plans of those organisations and those subsidiary companies.³⁴

5.35 Mr Sturrock also commented on trade diversion generally as a result of the Agreement

There are some companies that import more from the US versus other sources and there are others that gain more from elsewhere. There may be some opportunities among some of those manufacturers that currently source elsewhere in the region to look at the US as a source. There will be a preferential tariff advantage from doing so but we would be cautious about adopting the interpretation that it is going to result in significant volumes of diversion of trade. It is probably unlikely in the short term, remembering that as we move towards 2010 the actual preferential margin, whether it is on components or vehicles, under this agreement for automotive products will diminish back to a maximum of five per cent.³⁵

5.36 In regard to the general impact of the Agreement on the sector, the Committee heard evidence from DFAT that

if you look at the work that Dr Stoeckel has done in the manufacturing sector broadly but in the auto sector in particular, it shows very strong gains for the Australian industry as a result of the free trade agreement. In fact, it shows increased two-way trade with the United States, certainly showing increased imports from the United States in autos but also in auto parts. They go on to explain that they think most of those increases would be in components, trucks and vehicles other than passenger motor vehicles—where they do not really see competitive pressure from the United States—but also significant growth in Australia's exports and output of autos. That seems to be an area where the FTA delivers significant gains to the manufacturing sector, and the auto sector in particular.³⁶

5.37 The Committee notes analysis by the CIE which suggests that the impact of the Agreement on the automotive industry will be generally positive,

34 Mr Peter Sturrock, *Transcript of Evidence*, 4 May 2004, p. 37.

35 Mr Peter Sturrock, *Transcript of Evidence*, 4 May 2004, pp. 38-39.

36 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 90.

with a slight increase in outputs (0.2 per cent increase) and a greater increase in exports (7.8 per cent) than the increase in imports (2.5 per cent).³⁷

- 5.38 In response to questions about whether Monaro could be produced offshore, the Committee notes the exchange between Senator Marshall and Ms Alison Terrey from Holden Australia.

Senator MARSHALL—Following on from that, the committee has been told that the head of General Motors North American operations, Mr Bob Lutz, pointed out to the Detroit press that, if the Australian manufactured Monaro achieved sufficient volumes and market acceptability, production would be shifted from Australia back to the US. Is that the case?

Ms Terry—Those comments were made at the New York show, I believe, very recently. It is certainly the case that General Motors operates as a global organisation. The domestic Monaro has always been what we call a niche, brand leader type vehicle. We will sell only between 2,000 and 3,000 domestically this year, obviously with 18,000 going to the United States and small volumes to other markets.

Senator MARSHALL—Would that be considered a sufficient volume in the States to move production? I am just trying to work out what level of exports to the States we need to achieve before we lose the whole export market.

Ms Terry—That is the way things work when you are working as a global operation. General Motors in the United States have a number of brands under which they sell vehicles. Obviously with a 17 million, 19 million, or whatever it is, domestic market, their domestic production would always be far in excess of ours if that decision were made. The view that we have taken is that, when you go into an export program or, indeed, a domestic program, it is only ever for the life of that model, which might be seven years these days for an all-new Commodore, for example. Nothing is forever. We have a manufacturing facility that has a certain capacity. Our business view would be that, if Monaro were to shift production to the United States or wherever, that would then free up capacity for us to manufacture another vehicle which the US or China were not making.

37 CIE Report, Table 7.2, p. 85.

Minerals

- 5.39 The Committee understands that all metals and minerals will be duty free from day one of the Agreement, and notes that Australian aluminium manufacturers currently export \$134 million to the US.³⁸
- 5.40 The Minerals Council of Australia considers that there are five key benefits to the minerals industry
- The agreement will enhance Australia's attractiveness as a favourable destination for US investment, increasing the opportunity for new resource projects
 - There will be flow on effects to other major trading partners which will enhance trade and investment opportunities for those countries
 - Tariffs will be eliminated
 - There is an enhanced potential for Australian mining technology and service industries to build partnerships with US technology firms in servicing the global industry
 - The Agreement does not introduce trade related measures to restrict trade for environmental, labour or other non-trade objectives.³⁹

Canned tuna

- 5.41 The Committee notes the position of the Tuna Boat Owners Association of Australia, which is strongly in support of tariff reductions under the Agreement. The Committee heard that the previous tariff imposed by the US on canned tuna of 35 per cent was prohibitive to any export of Australian canned tuna product to that market. The immediate elimination of a tariff on canned tuna product upon the Agreements entry into force is strongly welcomed by the Tuna Boat Owners Association.⁴⁰ Mention of the impact of the US tariff on Australian canned tuna is also made in Chapter 7 of this Report.

Spirits

- 5.42 The Distilled Spirits Industry Council of Australia advised the Committee that it welcomes the immediate removal of the 5 per cent ad valorem tariff imposed on the import of US spirits and ready-to-drink products to Australia.⁴¹

38 www.dfat.gov.au/trade/negotiations/us_fta/outcomes/01_overview.html, viewed on 20 June 2004.

39 Minerals Council of Australia, *Submission 134*.

40 Mr Brian Jeffriess, *Transcript of Evidence*, 6 May 2004, p. 10.

41 Distilled Spirits Industry Council of Australia, *Submission 209*, p. 1.

Effect on employment

- 5.43 The Committee received evidence suggesting that there would be some negative effects on the automotive industry as a result of the Agreement. Based on economic analysis, the AMWU forecast that there would be large job losses in the auto and component industry as a result of fast tariff reductions.⁴²

What then will happen when Australia surrenders its tariff advantage over the United States virtually overnight? The AMWU submits that it is clear that to the extent employers are unable to pass losses directly on to their workers through insecure forms of employment and downward pressure on wages and conditions, increasing numbers of Australian manufacturers will either cease production or move offshore.⁴³

And

In terms of what benefits are there, we agree with the general economic analysis that has taken place: that there will be job losses in manufacturing. That has been said in a clear and consistent voice by independent economic analyses into the US free trade agreement. Even the Productivity Commission in an internal working document indicated job losses in manufacturing as a result of the US free trade agreement. That is why the government will not go to the Productivity Commission. I am not a fan of the Productivity Commission but I certainly think they would give a far more independent position than the manufactured outcome that is being promoted as part of the so-called independent analysis from government.⁴⁴

- 5.44 Mr Cameron argued that

If there was a loss of a significant part of the industry, the multiplier effect would move down into the components sector and the industries that supply the components sector. We believe that the basic skills, the fundamental transportable skills, for manufacturing will be lost, and that is a problem not only for the economy but also for the defence of this country. If we cannot maintain our defence capacity through having skilled trades people in this country, because we are not training them up and because we have lost our economic independence as a

42 Mr Doug Cameron, *Transcript of Evidence*, 19 April 2004, p. 49.

43 Australian Manufacturing Workers Union, *Submission 125*, p. 6.

44 Mr Doug Cameron, *Transcript of Evidence*, 19 April 2004, p. 50.

manufacturing country, then that has not only economic but defence implications for this country.⁴⁵

- 5.45 However, the Committee notes additional comments in the CIE Report which are attributed to the AMWU.

However, although the AUSFTA has been well received by the major motor vehicle manufacturers and FAPM, the ... AMWU believes that, although some product substitution may take place, AUSFTA will have no major (additional) impact on employment or production. This is because Australian tariffs were already scheduled to be reduced, and Australian manufacturers will still be faced with non-tariff barriers in the US market.⁴⁶

- 5.46 The Committee also notes comments from DFAT in relation to claims that the Agreement would result in increased employment in the US, and therefore would impact negatively upon employment in Australia

The first point I would make is that it does not follow that, because there is an increase in jobs in the United States from increased exports of manufactured products to Australia, there is a corresponding loss of jobs in this country. We look at the vast range of factors that I think you have to take into account here. The first is that we do have low levels of protection in this country already. The Americans have that trade surplus with Australia largely because we want to import those products. They are competitive suppliers in the market, and many of them do not compete with existing Australian production. To the extent that there are any tariffs on those, they will actually be a benefit to Australian manufacturers and lower the costs of Australian industry.⁴⁷

Rules of Origin (ROOs)

- 5.47 Chapter 5 provides for the determination of which goods are originating, and therefore eligible for preferential tariff treatment under the Agreement.⁴⁸ The Chapter consists of 17 Articles and Annex 5-A.

45 Mr Doug Cameron, *Transcript of Evidence*, 19 April 2004, p. 51.

46 CIE Report, p. 125, citation to 'Jones, I., AMWU, personal communication, 5 April 2004.'

47 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 87.

48 DFAT, *Guide to the Agreement*, p. 29.

5.48 Under Chapter 5, any manufactured product that includes imported inputs must be ‘substantially transformed’ in either Australia or the US before it can benefit from the Agreement. Where it is difficult to demonstrate that a product has undergone substantial transformation, an additional or alternative local content threshold test will be applied, under which domestic materials and processes will need to form a set proportion of the final value of the product.⁴⁹

5.49 Mr Deady explained to the Committee that the rules of origin under this agreement are different for those used in a preferential agreement and certainly different to those in ANZCERTA and the Singapore FTA where there is ‘essentially a 50 per cent final stage of processing value added concept’.

The objectives of the rules are much the same, though: to ensure sufficient substantial transformation of the product in either Australia or the United States to qualify for the preference. The US does it a different way. The basic way is a change of tariff classification. If an imported product in one tariff classification gets exported in a different classification, then it passes the rules of origin. We spent a lot of time explaining that to Australian industry throughout last year, and I think there is strong support and acknowledgement within Australian industry that that is in fact an easier way to monitor the rules of origin and ensure that they are met. The complication there is that the US system is a bit of a hybrid. They still have some value added elements, some product lines which are still subject to value added elements and where bookkeeping is still required—but that bookkeeping is familiar to Australian industry through the processes of New Zealand and Singapore. This is broadly the picture. It is a very big deal on manufactured exports in both directions.⁵⁰

5.50 The Committee notes concerns from the NSW Cabinet that

The Rules of Origin provisions contained in the proposed AUSFTA could potentially impose significant market barriers and administrative costs on NSW manufacturing firms wanting to export to US markets.

The purpose of the Rules of Origin provision is to confine access to tariff concessions to goods originating in Australia and the US, respectively. The proposed AUSFTA, however, appears to adopt the current US regime for Rules of Origin, which is highly

49 DFAT, Factsheet, viewed on 18 June 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/16_rules_of_origin.html

50 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 71.

prescriptive and very complex. This approach could potentially restrict the ability of NSW-based firms to gain access to the AUSFTA's tariff concessions for manufactured goods, particularly in relation to textiles, clothing and footwear, as well as the automotive components sector.

The differences between Rules of Origin requirements for Australia's free trade agreements with the US, Thailand and Singapore could potentially increase compliance costs and create confusion and uncertainty among Australian exporters of manufactured goods.⁵¹

5.51 The AMWU stated that

While the AMWU is still analysing the relevant clauses, the AMWU's preliminary view is that in many cases the rules of origin clauses in the agreement appear insufficient to ensure that only products which are substantially produced in Australia or the United States obtain concessional entry under the Agreement. The AMWU is particularly concerned that not only will the rules of origin in the proposed AUSFTA grant concessional access to products for which a significant proportion of their manufacture took place in a country that has not granted reciprocal access to Australian producers but that it will also grant concessional access to products for which a significant proportion of their manufacture has taken place in a country or countries with a very low commitment to environmental or labour standards.⁵²

And

The AMWU also notes that the rules of origin appear to largely operate on a self-assessment basis. Although there is some capacity for requiring the production of records after the event, the AMWU is concerned that the agreement will in practice be difficult to monitor and enforce.⁵³

5.52 However, the Committee notes evidence from Holden Australia that

From Holden's perspective, our first preference was to ensure that, in developing a free trade agreement with the United States, consistency was maintained with other arrangements and while this has not been achieved, the rules for determining origin

51 NSW Cabinet, *Submission 66*, p. 6.

52 Australian Manufacturing Workers Union, *Submission 125*, p. 21.

53 Australian Manufacturing Workers Union, *Submission 125*, p. 22.

provide an adequate test to ensure that preference is only being given to the parties to the agreement.

Holden was particularly supportive of the requirement to have both a change of tariff classification **and** a 50% minimum regional value content requirement based on the net-cost methodology, to ensure that the Australian market is protected from a possible influx of cars, particularly used cars, originally manufactured outside the US.⁵⁴

Originating goods

- 5.53 For the purposes of the Agreement, originating goods are those that
- are wholly obtained or produced entirely in the country, such as minerals extracted there, vegetable goods harvested there, and live animals born and raised there
 - are produced in the country wholly from originating materials, or
 - are produced in the country partly from non-originating materials. In this case, the non-originating materials must meet the requirements of the origin rules in the Annex 4-A (Textiles - see Chapter 4 of the Agreement) and Annex 5-A (Goods other than Textiles). These Annexes contain the product-specific changes in tariff classification that non-originating materials must undergo for the finished goods to qualify as originating. The goods must also satisfy all other applicable requirements.⁵⁵

Change in tariff classification approach to ROOs

- 5.54 In regard to change of classification under the AUSFTA, the *Guide to the Agreement* states that

The concept of change in tariff classification used in the Annexes means that inputs sourced outside the territories of the FTA may not come from the same tariff item as the good in question nor from a defined set of related tariff items. This approach ensures that sufficient transformation has occurred within the US or Australia to justify a claim that the good is a legitimate product of the US or of Australia. The exact nature of the change of tariff classification required for a specific good can be found by referring to the rule in the Annexes covering that good.⁵⁶

54 Holden Australia, *Submission 148*, p. 13.

55 DFAT, *Guide to the Agreement*, p. 29.

56 DFAT, *Guide to the Agreement*, p. 29.

Accumulation

5.55 Under Article 5.3, materials originating in the territory of one Party that are then used in the production of a good in the other Party are considered to originate in the territory of that other Party.⁵⁷ A good is considered an originating good when it has been produced in the territory of one or both Parties, by one or more producers, provided that the good satisfies requirements under Chapters 4 and 5 of the Agreement.⁵⁸

Regional value content

5.56 For some products, the change of tariff classification rule is supported by a local content threshold, or regional value content (RVC) requirement. This means that domestically sourced materials and processes must represent a certain proportion of the final value of the product.⁵⁹

5.57 The Agreement provides for 3 formulas to determine the RVCs

- the Build-Down method, where the RVC threshold is determined by calculating the value of the final product after subtracting the cost of non-originating materials and comparing this to the value of the exported product.⁶⁰ [45 per cent]
- the Build-Up method, under which the RVC threshold is based on the proportion of the value of the final product represented by locally sourced materials.⁶¹ [35 per cent]
- a Net Cost method that is applied only to certain automotive products.⁶²[50 per cent]⁶³

5.58 The Committee notes comments by Mr Andrew McKellar of the Federal Chamber of Automotive Industries in relation to this provision

For some items the agreement also provides that origin may be conferred if a minimum level of regional value content is achieved. In most instances regional content is measured on the basis of so-called transaction value of the product calculated using one of two methods—either a build-down approach in which the value of non-originating materials is subtracted from the final value or a

57 AUSFTA, Article 5.3.1.

58 AUSFTA, Article 5.3.2.

59 DFAT, *Guide to the Agreement*, p. 30.

60 AUSFTA, Article 5.4.1(a).

61 AUSFTA, Article 5.4.1(b).

62 AUSFTA, Article 5.4.2.

63 DFAT, *Guide to the Agreement*, p. 30.

build-up method in which the value of originating inputs is added up and calculated as a proportion of the final value of the goods.⁶⁴

De Minimis

5.59 Under Article 5.2, if all inputs which fail the ROOs test for a particular product account for a total of less than 10 per cent of the total product value, the final product is still considered to be an originating product.⁶⁵ This is known as the ‘de minimis’ principle.

5.60 This provision does not apply to certain products, including dairy, citrus fruit, certain animal or vegetable fats or sugars, and some alcohol products where used in the production of specified other alcohol products.⁶⁶

Specific products

Essential tools and spare parts

5.61 Under Article 5.6, a product that otherwise qualifies for preferential treatment will not be disqualified purely because any essential tools, accessories or reasonable quantities of spare parts shipped with the product do not pass the test of origin for those products.⁶⁷

Fungible goods and materials

5.62 Article 5.7 states that in determining whether fungible goods or materials are originating, they can be tracked either by means of physical segregation or by inventory management.⁶⁸ Under Article 5.18.3, fungible goods or materials are defined as those that ‘are interchangeable for commercial purposes and whose properties are essentially identical’, such as fasteners used in metal manufacture.⁶⁹

Packaging materials and containers

Retail sale

5.63 Under Article 5.8, in terms of their origin, packaging materials and containers for retail sale are disregarded, and so do not affect the treatment of goods concerned in terms of change of classification rules.⁷⁰

64 Mr Andrew McKellar, *Transcript of Evidence*, 4 May 2004, p. 36.

65 DFAT, *Guide to the Agreement*, p. 31.

66 DFAT, *Guide to the Agreement*, p. 31.

67 DFAT, *Guide to the Agreement*, p. 31.

68 DFAT, *Guide to the Agreement*, p. 31.

69 DFAT, *Guide to the Agreement*, p. 31.

70 DFAT, *Guide to the Agreement*, p. 31.

- 5.64 If the good is subject to an RVC, the value of the packaging materials is considered in calculating that RVC.⁷¹

Shipment

- 5.65 Under Article 5.9, packaging materials and containers for shipment are disregarded in determining both their origins and for RVC calculations.⁷²

Third country transportation

- 5.66 Under Article 5.11, a good will not be considered to be an originating good

where it undergoes subsequent production or any other operation outside the territories of the Parties, other than unloading, reloading or any other operation necessary to preserve it in good condition or to transport the good to the territory of a Party.⁷³

Claims for preferential treatment

- 5.67 Under Article 5.12, the importer bears the onus for making a claim for preferential treatment for a product. The Committee notes that this differs from current practice under SAFTA and ANZCERTA, which both place this onus on the exporter.⁷⁴

- 5.68 In relation to making such a claim, the *Guide to the Agreement* states that

This Agreement does not require that the importer provide a certificate of origin in support of a claim preference. However, importers claiming a preference for a good must be prepared to submit, upon request by Customs authorities, a statement setting out the reasons that the good qualifies, including pertinent cost and manufacturing information. No particular format for such a statement is specified in the Agreement.

Customs officials can require importers to maintain documents relating to purchases and costs for up to five years after importation should investigation and verification of claims be required. Customs officials can also seek information from exporters in verifying claims.⁷⁵

71 DFAT, *Guide to the Agreement*, p. 31.

72 DFAT, *Guide to the Agreement*, p. 31.

73 AUSFTA, Article 5.11.

74 DFAT, *Guide to the Agreement*, p. 32.

75 DFAT, *Guide to the Agreement*, p. 32.

Textiles and Apparel

- 5.69 The Regulatory Impact Statement states that ‘around 30 per cent of tariff lines for textiles and apparel will be duty free on entry into force with the remaining lines in this sector to be phased out by 2015’.⁷⁶ The Committee notes statements from DFAT that the outcome on textiles and apparel was due to US insistence on maintaining the ‘yarn forward’ rule, which operates in a more restrictive manner than other rules of origin.⁷⁷
- 5.70 The Committee heard evidence concerning the disparity between the Australian and US textiles and apparel industries

Our industry is tiny compared to the US. We employ 58 000 workers in the regulated sector, whilst the US employs 520 000 clothing workers and 432 000 textile workers.

Capital investment in the US textile sector in 2001 (excluding clothing) was \$2.2 billion US dollars. The equivalent period in Australia saw \$202 million (AUD) invested in the entire Australian TCF industry.

Our industry is tiny, it is a minor player in the US domestic market and yet the US FTA is treating us as though we represent the same level of threat that China represents to the US TCF market.

In 2002 the US represented 7% of all Australian TCF imports of textiles and 1.6% of clothing. The US FTA is likely to see an increase of textile imports, especially over time with the continued winding down of tariff rates. At the same time Australia’s share of the US domestic market is unlikely to change as a result of the FTA.⁷⁸

Safeguard Mechanisms

- 5.71 Article 4.1 provides for a safeguard mechanism to protect domestic industry adversely affected by a ‘sudden growth in imports flowing from a tariff reduction’. If an increase in imports threatens or results in serious damage, then the importing country is permitted to raise tariffs back to the most favoured nation rate applying at the time of action.⁷⁹
- 5.72 Under Article 4.1.6, in the first ten years after a tariff has been eliminated, emergency action can be taken for a maximum of two years, followed by one-off extension (a further two years). After this time, no emergency

76 Regulation Impact Statement, p. 5.

77 Regulation Impact Statement, p. 5.

78 Textile, Clothing and Footwear Union of Australia, *Submission 8*, p. 2.

79 DFAT, *Guide to the Agreement*, p. 25.

action is permitted. The Committee notes that emergency action over a particular product can only be used once. On conclusion of action, the rate of duty will return to pre-action levels.⁸⁰

5.73 According to Article 4.1.7, a Party imposing emergency action is required to provide liberalising compensation, preferably to a level on other textile products equivalent to the negative effects caused by the action. If mutually acceptable compensation cannot be found then the exporting Party is permitted to impose tariff penalties on product equivalents.⁸¹

5.74 In regard to the effectiveness of the safeguard mechanism to protect the Australian industry, the Committee notes evidence from the Textile, Clothing and Footwear Union of Australia (TCFU) that

what has been agreed to is not only insufficient but potentially damaging to other TCF exporters. The safeguard mechanism, which can be put in place for two years, can only be used once for any particular product. Thereafter, regardless of any surge in imports, this product cannot be protected.

Another aspect of the safeguard mechanism which will cause major problems for the industry is the requirement that the country imposing an emergency action will [be required to offer compensation].

In other words, if the safeguard mechanism is used by an Australian firm, (and given the restrictive basis of the rules of origin the only likely user of this mechanism is Australia because so few Australian TCF exports will ever reach the US market), another Australian firm will suffer. This will be either a TCF firm, or if there is no TCF firm, then another Australian company in another industry.

The most likely implication of this 'safeguard' mechanism is that it will never be used by Australia because there will be immediate retaliation by the US with our TCF or other exports.⁸²

5.75 However, Council of Textiles and Fashion Industries of Australia (TFIA) offered some support for the mechanism

While unlikely to be used given the marginal tariff preference the TFIA and its members support the inclusion of safeguards in the agreement. As provided for in the draft text they will offer a valid

80 DFAT, *Guide to the Agreement*, p. 25.

81 DFAT, *Guide to the Agreement*, p. 25.

82 Textile, Clothing and Footwear Union of Australia, *Submission 8*, p. 3.

and reasonable means for companies in one party to redress exploitative behaviour by companies from the other party.⁸³

Rules of Origin – the ‘yarn forward’ rule

5.76 Article 4.2.1 states that the ROOs applying to textiles and apparel are based on a change in tariff classification (CTC) approach and are set out in Annex 4-A.

5.77 The ROOs apply a ‘yarn forward’ test, under which

- fabrics produced for export be made up of yarns wholly formed in one or other of the Parties to the Agreement
- apparel for export be produced from fabrics entirely formed in one or other of the Parties using yarns wholly formed in one or other of the Parties. The apparel must also be cut or knit to shape or otherwise assembled in one or other of the Parties.⁸⁴

5.78 The Committee notes evidence from the textiles and apparel industry which claims that

These rules negate the bulk of Australian TCF products from preferential access under the agreement by virtue of the fact that the fibre or yarn for much of these products is not produced or wholly formed in Australia being generally imported from third countries outside of the agreement. While it would be possible to source US fibres and yarn or commence production in Australia this would place the price of the finished Australian products well above those of equivalent US products and third country imports in the marketplace.⁸⁵

5.79 The *Guide to the Agreement* states that there are exceptions for certain products, for example, that cotton and man-made fibre spun yarns and knitted fabrics must be produced from fibres grown or formed in one or other of the Parties.⁸⁶

5.80 Textile and apparel ROOs are product-specific and vary depending on the particular good. Specification of which test to apply is contained in Annex 4-A.⁸⁷

5.81 Under Article 4.2.3 there is a mechanism for consultation between the Parties to reconsider the ROOs applying to individual products and to amend these ROOs as appropriate.⁸⁸

83 Council of Textile and Fashion Industries, *Submission 111*, p. 2.

84 DFAT, *Guide to the Agreement*, p. 26.

85 Council of Textile and Fashion Industries, *Submission 111*, p. 2.

86 DFAT, *Guide to the Agreement*, p. 26.

87 DFAT, *Guide to the Agreement*, p. 26.

- 5.82 Article 4.2.6, which is a *de minimis* provision, provides that a product will not forfeit its originating status if any non-originating fibres or yarns used in the production account for less than seven per cent by weight of the textile or apparel good. This provision does not apply to elastomeric yarns for which there is zero tolerance for non-originating yarn.⁸⁹
- 5.83 Article 4.2.8 provides that where a product for export consists of a set of products, e.g. clothing and accessories, any non-originating goods in the set must be no more than 10 per cent if the set is to preserve its originating status.⁹⁰
- 5.84 The Committee notes evidence from the textiles, clothing and footwear union on the maintenance of the yarn forward rule and its effect on the Australian industry
- Whilst there was potential for considerable benefits to the Australian TCF industry from this agreement, the US insistence on maintaining 'yarn forward' rules of origin has significantly reduced, if not eliminated, any potential up-side for industry and created a considerable down-side.⁹¹
- 5.85 The TCFU submitted to the Committee
- The bulk of Australian TCF industry (up to 80%) cannot meet US yarn-forward rules because much of our yarn is sourced from Asia. Most US companies meet this rule which means that by 2015 the benefits of the FTA will only flow to US companies.
- These 'rules of origin' issues are in addition to concerns that large US companies with volume production will be able to flood the Australian market with cheaply made goods in some TCF areas where Australia has traditionally maintained a strong domestic base.⁹²
- 5.86 Similarly, the TFIA stated that
- These rules negate the bulk of Australian TCF products from preferential access under the agreement by virtue of the fact that the fibre or yarn for much of these products is not produced or wholly formed in Australia being generally imported from third countries outside of the agreement. While it would be possible to source US fibres and yarn or commence production in Australia

88 DFAT, *Guide to the Agreement*, p. 26.

89 DFAT, *Guide to the Agreement*, p. 26.

90 DFAT, *Guide to the Agreement*, p. 26.

91 Textile, Clothing and Footwear Union of Australia, *Submission 8*, p. 1.

92 Textile, Clothing and Footwear Union of Australia, *Submission 8*, p. 1.

this would place the price of the finished Australian products well above those of equivalent US products and third country imports in the marketplace.⁹³

5.87 In reference to the impact of the rule on the industry, Mr Deady advised the Committee that

The structure of our industry is different. We do not produce the yarn ourselves, or we import it from countries in the region, so we would never meet the rule of origin; therefore, we would never meet the standard to qualify for the preference. As a result of that, despite many attempts to modify the rule of origin—to identify particular products and sectors where we could, even within a limited range of products, have that rule of origin adjusted—that was something the Americans could not agree to. At the end of the day, as a result of that, we phased out our tariffs over a 10-year period. So the impact on the industry will be very minimal either way as a result of the deal. Some Australian products certainly will benefit from the preferences, but it is a limited range of products.⁹⁴

Customs Cooperation (Article 4.3)

5.88 The Agreement allows for Customs authorities in both countries to cooperate to ensure compliance with the rules. Customs of importing countries may request the authorities of exporting countries to verify a claim. Imports of suspicious goods may be suspended by the importing country while a matter is being investigated.

5.89 There will be a special transitional safeguard measure for textiles and clothing to address any undue interruption to the industry in either country.⁹⁵

Concluding observations

5.90 The Committee received little evidence with regard to the general principles of market access. Much of the evidence was focussed on specific tariff lines such as passenger motor vehicles (PMV), Textiles, Clothing and Footwear (TCF) and canned tuna.

93 Council of Textile and Fashion Industries, *Submission 111*, p. 2.

94 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, pp. 72-73.

95 DFAT, Factsheet, viewed at 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/04_manufactured_goods.html

- 5.91 Both Australia and the US have relatively low average tariffs with a maximum tariff of 5 per cent except for PMVs and TCF. As proposed under the Agreement, both items will have phase-ins of five years for PMVs and ten years for TCF. The Committee has carefully examined evidence received from these two industries.

Annex on Pharmaceuticals

6.1 Considerable evidence was received on the potential impacts to the PBS as a result of the Pharmaceutical Annex (Annex 2-C) and it will therefore be the focus of this Chapter. The Annex reflects some joint obligations and common principles, and the exchange of letters (side letters) on pharmaceuticals sets out some specific commitments that Australia has made in relation to the processes by which new products are added to the list of medicines subsidised under the PBS.¹ These include issues of transparency and timeliness. According to the DFAT Factsheet, the Annex will 'provide more opportunities for companies seeking listing of new medicines on the PBS to have input into the process.'² It is this statement which has been the subject of much debate within the Australian community.

Agreed Principles of the PBS

Australians' access to health services in general, and pharmaceuticals in particular, is enviable. Our system provides a clear pathway for all Australians to access medications they need for preventative care, disease treatment and modification, palliative care and maintenance of a lifestyle which would otherwise be curtailed or indeed ended in the absence of such medication.³

- Dr Mukesh Haikerwal, Vice President, Australian Medical Association

1 DFAT, *Guide to the Agreement*, p. 10.

2 DFAT Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/10_health.html.

3 Dr Mukesh Haikerwal, *Transcript of Evidence*, 3 May 2004, p. 13.

- 6.2 The Committee considers that it is of utmost importance to recognise that the existing structure of the PBS will be largely maintained. As Mr Deady stated

The fundamentals of the PBS – the pricing and listing arrangements – were something that we were not prepared to negotiate on, but there were aspects of transparency and process that we were prepared to talk about.⁴

- 6.3 The Committee recognises the general agreement amongst many who presented evidence that the Agreement would not alter the PBS' operations, as demonstrated by Medicines Australia in their submission.

There is nothing in the FTA which would lead to the dismantling of the PBS. The fundamental principles that underpin the PBS remain. The Agreement does not impair Australia's ability to deliver fundamental policy objectives in healthcare and does not change the fundamental architecture of the PBS.⁵

- 6.4 Views expressed by Medicines Australia were reiterated by the Australian Medical Association, who stated that they were satisfied at this stage with

assurances we have been given by Australian Government negotiators that the draft Australia-US Free Trade Agreement (AUSFTA) of itself protects the essential framework of the Australian health system.⁶

- 6.5 The Committee is aware nonetheless of the extent of debate and concern that the Agreement has caused in the wider community. The Committee received evidence from many parties who are concerned that the implementation of a review mechanism will place additional pressures on the PBS and the PBAC. Dr Ken Harvey's view that 'the provisions under the free trade agreement will substantially weaken the Pharmaceutical Benefits Scheme' was echoed in similar terms by the Australia Institute, the Doctors Reform Society and Healthy Skepticism Inc in their submissions.⁷

- 6.6 In evidence to the Committee, Dr Ruth Lopert from the Department of Health and Ageing has said that the review mechanism will only formalise what already occurs in an informal context.

4 Mr Stephen Deady, *Private Briefing*, 2 April 2004, p. 46.

5 Medicines Australia, *Submission 28*, p. 23.

6 Australian Medical Association, *Submission 146*, p. 1.

7 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 2., and the organisations' submissions 70, 87 and 179 respectively.

When a drug is rejected for listing on the PBS, there is often intense lobbying that is applied to that situation. What this process does is formalise and institutionalise a channel for that. It is important to recognise that there is an opportunity for a review mechanism to enhance the transparency and accountability of the process.⁸

- 6.7 Dr Lopert's views were confirmed by Medicines Australia in their submission, which stated in part

There is no new process whereby companies can ask for higher prices for medicines. The FTA text formalises an existing process whereby companies can ask the Government to consider the value of their medicines.⁹

- 6.8 Further to concerns that the structure of the PBS would be weakened were claims that the costs would increase under the Agreement, whether because of increased pressure by pharmaceutical companies under the review process, or because of the extra administrative costs to the scheme resulting from the proposed changes.¹⁰

- 6.9 Concerns about costs were also raised by State and Territory Governments.¹¹ Despite claims by the Australia Institute that the Agreement will result in higher costs for the Commonwealth Government for the provision of the existing quantity of medicines through the PBS, and that

while prices will not raise by as much as the US drug companies would have liked, the changes are likely to result in both higher prices in the short term and a faster rate of growth for drug prices in the medium to long term.¹²

the Committee heard no compelling evidence that would convince it of the linkage between the Agreement and any price rise.

- 6.10 The Committee does however have some concerns about the balance of principles in the Agreement. These views were expressed by, among others, Dr Faunce and Professor Drahos.

Article 1 of the FTA's Pharmaceutical Annex outlines 'agreed principles' utilized by the dispute panel in interpreting the text.

8 Dr Ruth Lopert, *Transcript of Evidence*, 14 May 2004, p. 60

9 Medicines Australia, *Submission 28*, p. 21.

10 These views were expressed by some submissions, including from The Grail Centre, *Submission 97*, p. 6, and Uniting Care (NSW/ACT), *Submission 169*, p. 8

11 Concerns about costs were specifically raised by the ACT Legislative Assembly, *Submission 180*, p. 1, The NSW Government, *Submission 66*, p. 2., and the Queensland Government, *Submission 206*, p. 8.

12 Australia Institute, *Submission 70*, p. 2.

These emphasize ‘innovation’, the importance of R&D and ‘competitive markets.’ Missing, however, is an unambiguous and unqualified statement of Australia’s right to make a priority of ‘protecting public health’ and, in particular, facilitating ‘access to medicines for all.’ These are the words that public health groups fought for and won in the WTO’s *Doha Declaration* under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), but which the US is now circumventing through more restrictive bilateral FTAs.¹³

- 6.11 The views of Drs Faunce, Drahos and Harvey on these issues are echoed by the Australian Nursing Federation, who state

The ANF considers that the proposed FTA in regard to the PBS is unbalanced and almost exclusively focuses on the rights of manufacturers at a potential cost to consumers.¹⁴

- 6.12 Dr Schrader referred at a public hearing to the principles’ lack of reference to public health policy or equity.

If you read the principles in annex 2-C, Pharmaceuticals, you can see that they are basically to reward innovation and research and development by pharmaceutical companies. It is not under public health principles or equity. Universal access is not even mentioned.¹⁵

- 6.13 The Committee believes that innovation and R&D are important matters for the pharmaceutical industry but should continue to be recognised as part of industry policy not health policy.

Patents and marketing of generic drugs

- 6.14 Issues of patents and marketing of generic drugs are discussed in Chapter 20 of this report, which considers the Intellectual Property Rights Chapter of the Agreement (Chapter 17).

13 Dr Tom Faunce and Professor Peter Drahos, *Submission 72*, p. 2. This reference to the TRIPS agreement in public health was also stated by Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 3 and the Australasian Society for HIV Medicine, *Submission 75*, p. 3.

14 Australian Nursing Federation, *Submission 120*, p. 2.

15 Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 24.

Medicines Working Group

- 6.15 According to the *Guide to the Agreement*, the establishment of a Medicines Working Group will enable further discussion of the issues covered by the Annex. It will be similar to other Working Groups that are proposed, and will discuss aspects of the Agreement.
- 6.16 Dr Harvey's statement that
- All we know [about the medicines working group] at the moment is that it is meant to be made up of officials from the US health department and the Australian health department and it is meant to review future dealings of the free trade agreement in light of the principles¹⁶
- reflects the negative effects foreshadowed by several groups, including the Doctors Reform Society, and the Australian Fair Trade and Investment Network (AFTINET).
- 6.17 The AMA states that it would be very concerned if the Medicines Working Group
- were to assume any role in setting rules or making decisions related to the PBS as this would undermine Australian sovereignty. We note and endorse assurances that this group of federal health officials from the US and Australia will be strictly a consultative forum.¹⁷
- 6.18 The Committee is notes concerns raised by the Association of People Living with HIV/AIDS in its submission as to the authority held by the Medicines Working Group. The Committee is not in a position to make a judgement as to the eventual operation of the Working Group but would support the continued involvement of health professionals in Australia and America in debates on the ongoing roles and operations of the Group.

Review mechanism for PBAC decisions

- 6.19 A particularly contentious issue in the Agreement is the review mechanism proposed under the Pharmaceuticals Annex and that it will act as a possible threat to the PBAC.¹⁸ The *Guide to the Agreement* states that

16 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 9.

17 Dr Mukesh Haikerwal, *Transcript of Evidence*, 3 May 2004, pp. 14-15.

18 See for example Ms Nicola Ballenden, *Transcript of Evidence*, 6 May 2004, p. 77.

In the interests of greater transparency and accountability, Australia has agreed to establish a review mechanism that will be made available to companies when an application to have a drug added to the PBS has been rejected by the PBAC.

The details of how the review process will operate will be worked out in the context of Australia's legal and administrative framework.¹⁹

- 6.20 Evidence received by the Committee demonstrated widespread concerns in the Australian community about pressure on the PBAC, and the impact of these changes to
- open the door for major US pharmaceutical companies, possessing very extensive legal, financial and technical resources, to lobby the PBAC, pursue appeals against negative decisions, and generally secure much greater leverage in price negotiations.²⁰
- 6.21 These views were generally reiterated by several groups including the Australian Consumers Association and Healthy Skepticism Inc.²¹
- 6.22 The Committee received information on several related issues: the establishment of the review mechanism: its rules and operation, and the possible ways in which it may be used by US drug companies to exert pressure on the PBAC and the PBS. Dr Ruth Lopert, from the Department of Health and Ageing advised that
- a number of stakeholders have already been consulted ... We have held stakeholder briefings in which representatives of other organisations have put forward very strong and carefully thought through views on how they see the review mechanism should be implemented and we are continuing to canvass those opinions with a view to arriving at an implementation of the review mechanism which reflects the interest of the key stakeholders.²²
- 6.23 Dr Lopert later confirmed that 'after some degree of consultation with key stakeholders a paper will be developed and circulated for further comment from a broader range of interests'.²³ The Committee accepts that, as the consultation process has recently commenced, procedural rules have not yet

19 DFAT, *Guide to the Agreement*, p. 12.

20 ACT Government, *Submission 180*, p. 2.

21 Australian Consumers Association, *Submission 195*, p. 5 and Healthy Skepticism Inc., *Submission 179*, p. 2.

22 Dr Ruth Lopert, *Private Briefing*, 2 April 2004, p. 51.

23 Dr Ruth Lopert, *Transcript of Evidence*, 14 May 2004, p. 59.

been developed and that it is difficult to be precise about what procedural rules will apply.²⁴

- 6.24 The Committee understands that essentially, it is expected that the review process will have the capacity for an application to be reviewed where the PBAC has rejected a listing.

It is anticipated that the outcome of that review would be a referral back to the PBAC to review certain aspects of the application or to take into consideration some perspectives that the reviewers felt had not been adequately considered or given due weight in the original assessment of the application.²⁵

- 6.25 The Committee heard from several groups about the ability of powerful pharmaceutical groups to lobby to have their products listed. As Dr Ken Harvey states

it seems to me inevitable that they will use their public relations power, their marketing power, their money and their lawyers – all the opportunities they have – to create pressure on PBAC to modify and soften their decision. That is likely to lead, therefore, to less stringent concern about pharmacoeconomics or broader indications than the evidence might otherwise have portrayed.²⁶

- 6.26 Similar concerns were raised by Dr Patricia Ranald of AFTINET, the Australian Nurses Federation and the Australian Society for HIV Medicine.

... it is naïve to think that, because this review process is in a trade agreement, the US companies will not pursue it very vigorously.²⁷

The ANF is concerned that this new step will lead to greater opportunities for the pharmaceutical manufacturers to utilise an army of publicists, lawyers and lobbyists to change the outcomes of a robust and respected system that is the PBAC.²⁸

This allows more opportunity for US pharmaceutical companies to exert pressure to have their products listed – through lobbying and their massive legal and PR machines.²⁹

- 6.27 The Committee acknowledges the concerns raised by Dr Harvey, AFTINET and the Australasian Society for HIV Medicine with regard to the situation

24 Dr Ruth Lopert, *Private Briefing*, 2 April 2004, p. 52.

25 Dr Ruth Lopert, *Private Briefing*, 2 April 2004, p. 51.

26 Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 6.

27 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 42.

28 Australian Nursing Federation, *Submission 120*, p. 2.

29 Australasian Society for HIV Medicine, *Submission 75*, p. 1.

that might arise where a pharmaceutical company might use a positive review result to launch a political campaign designed to influence a subsequent PBAC outcome, even where the PBAC might not wish to support it. The Committee also acknowledges the concerns of the AMA that the review process may not be transparent and may actually be able to circumvent the decisions of the PBAC and the PBAC process.³⁰

6.28 The Committee also received evidence on how the structure of the mechanism might be acceptable to stakeholders as well as the Australian public. The AMA suggests that the review process

needs to be undertaken by a specialised subcommittee comprising experts relevant to the subject under review. It should consider only information originally provided to the PBAC and relevant to the requested review, and reporting back must be to the PBAC and not directly to the government.³¹

Further

To ensure that the independent review process delivers true accountability to the public, the industry will support a process that:

- a. Is conducted at arms length from the process which provides the original recommendation to Government
- b. Involves an independent objective appraisal of the matters dealt with in the initial process of arriving at a determination — the facts, all aspects of the recommendation. For PBAC submissions, this includes the scientific analysis/findings and economic analysis/findings
- c. Enables determinations to undergo review, where the original advice to Government is confirmed or can vary from the original determination
- d. Is conducted in such a way as to make public outcomes from the review process at the first opportunity
- e. Is consistent with the currently agreed processes for the publication of negative decisions of the PBAC.³²

6.29 The Committee considers that it is of utmost important that the review mechanism ‘does not in any way undermine the PBAC’s role as the only

30 Dr Mukesh Haikerwal, *Transcript of Evidence*, 3 May 2004, p. 17.

31 Dr Mukesh Haikerwal, *Transcript of Evidence*, 3 May 2004, p. 14.

32 Medicines Australia, *Submission 28*, p. 16.

body that can recommend to the Minister for Health and Ageing whether a drug can be listed on the PBS'.³³

The independent review system will not be able to force PBS listing. The final say and decision making on whether a medicine achieves PBS listing remains in the hands of the Executive Government and Health Minister. Whatever the PBAC or an independent review system may conclude the ultimate authority remains with the Government. The Minister retains the power to list or not list a medicine and to decide on the conditions that are placed for such listing.³⁴

- 6.30 The Committee trusts that the concerns of the Australian Consumers' Association, among others, about the basis of the criteria under which decisions are taken according to the independent review mechanism will be allayed by evidence received from Dr Lopert of the Department of Health and Ageing

While not wishing to pre-empt the outcome, my understanding is that it would not be appropriate for a review to consider any facts other than those which had also been put before the PBAC in its original consideration of the matter. The PBAC is not empowered, for want of a better word, to consider the cost of R&D as one of the facts that it considers.³⁵

- 6.31 The Committee notes the views of Medicines Australia and the Department of Health and Ageing that a system of independent review for decisions made by the PBAC is 'a safeguard for Australians to make sure that the right decision has been made for the community's needs'³⁶ and that

The purpose of the review mechanism is, if you like, to create a second look – to take another view where PBAC has made a decision not to recommend the listing of a drug on the PBS. It will not look specifically at prices, so it will not have the capacity to recommend an increase in price.³⁷

- 6.32 The Committee also acknowledges the point made by Medicines Australia, rarely made elsewhere within the recent debate about the review process, that the ability to demonstrate procedural fairness is important, 'considering the high level of investment industry makes in developing a

33 Dr Ruth Lopert, *Transcript of Evidence*, 14 May 2004, p. 60.

34 Medicines Australia, *Submission 28*, p. 8.

35 Dr Ruth Lopert, *Transcript of Evidence*, 14 May 2004, p. 61.

36 Medicines Australia, *Submission 28*, p. 6.

37 Dr Ruth Lopert, *Private Briefing*, 2 April 2004, pp. 50-51.

new medicine and the need for timely access to critical medicines by the community'.³⁸

- 6.33 The Committee understands that Australia will shape the review process subject to the commitments outlined in this Chapter. Many of the concerns raised should be incorporated in the Department's consultations. There were several specific questions raised during the course of the inquiry about the shape of the review mechanism which should be the subject of departmental consultation.

Recommendation 5

In establishing the independent review of PBAC processes (for PBS listing under Annex 2-C of the Agreement), the Committee recommends that, in order to ensure that the fundamental integrity of the PBS is retained, the following principles be taken into account:

- **the review should focus on the issues of concern rather than re-opening the whole application**
- **the review should be undertaken by a specialised subcommittee comprising experts relevant to the subject of the requested review**
- **the subcommittee should consider only that information provided to the PBAC, and relevant to the requested review**
- **the subcommittee should report back to PBAC, and not directly to government**
- **the review process should be pragmatic, and facilitate, not delay, the PBAC approval processes for PBS listing of pharmaceuticals**
- **the review process be transparent and the findings and reasons for decisions made publicly available.**

38 Medicines Australia, *Submission 28*, p. 6.

Transparency

- 6.34 The Committee was pleased to receive many differing opinions with regard to issues of transparency in the Agreement. With regard to the PBS, the Committee believes that the increasingly apparent insistence on transparency in international relations and trade dealings is to be supported.
- 6.35 The Committee agrees with the view of the AMA that commercial-in-confidence secrecy surrounding research data is a major restraint on the quality use of medicines and that information given to the PBAC should be available to clinicians to ensure best practice management. The Committee was advised that 'such transparency across the whole PBS approval process is fundamental to AMA support for the FTA'.³⁹ This would involve the application of transparency principles to include pharmaceutical companies as well as the PBAC and the Pharmaceutical Benefits Pricing Authority (PBPA).⁴⁰

Direct-to-consumer advertising

- 6.36 A further area where concerns were raised with regard to Annex 2-C was with the dissemination of pharmaceutical information via the internet. The concern is that this may allow direct-to-consumer advertising in Australia.⁴¹ The Committee would be extremely concerned if this were the case, as it notes Dr Harvey's concerns that the practice of direct-to-consumer advertising has been clearly associated with the increased use of products often not in accordance with best practice principles.⁴²
- 6.37 The Committee accepts however that there is no provision in the Agreement which suggests that the practice of advertising direct to consumers will take place.

The FTA text articulates that any marketing and advertising to consumers must comply with existing laws. Current Australian law states that advertising direct to consumers by industry is prohibited.⁴³

39 Dr Mukesh Haikerwal, *Transcript of Evidence*, 3 May 2004, p. 14.

40 Australian Medical Association, *Submission 146*, p. 2.

41 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 4.

42 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 4.

43 Medicines Australia, *Submission 28*, p. 17.

Plasma Fractionation Arrangements

- 6.38 According to the Side Letter on Blood Plasma, Australia is obliged to review Australian blood plasma fractionation arrangements by 1 January 2007. The Committee understands that the review will be undertaken by Commonwealth, State and Territory Governments and will include examining whether, in the future, suppliers of fractionation services should be selected through competitive tender processes.⁴⁴
- 6.39 According to the DFAT Factsheet on Health Outcomes, Australia's policy on self-sufficiency in blood products will not be affected and blood plasma products for use in Australia will continue to be derived from plasma collected from Australian blood donors.
- 6.40 The Committee received evidence on this issue from the Australian Red Cross Blood Service, and Baxter Healthcare Corporation.⁴⁵ Both are in support of the Agreement.

Recommendation 6

The Committee recommends that Australia's policy of self-sufficiency in blood products continue to be maintained.

Concluding remarks

- 6.41 The Committee notes that, while much of the evidence it received in relation to Annex 2-C was based on strong concerns and admirable motivations of the community groups, organisations and individuals who have been involved in this inquiry, the Committee assessed whether the AUSFTA as a *whole* is in the national interest.
- 6.42 The Committee recognises and appreciates evidence from several sources in defence of the Australian health care system, and notes the lobbying currently taking place in several countries, including the US, for the establishment of a similar system where citizens have access to a PBS-style

44 DFAT Factsheet, viewed on 14 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/10_health.html

45 Baxter Corporation, *Submission 114* and Australian Red Cross Blood Service, *Submission 187*. Representatives from each organisation also appeared at public hearings to present evidence on this issue (19 April 2004 and 6 May 2004 respectively).

system for the provision of medicines. The Committee would be extremely concerned should the PBS be undermined or threatened with regard to this, or any, international trade agreement.

- 6.43 With regard to some of the measures under the Pharmaceuticals Annex in the Agreement, such as the Medicines Working Group and the independent review mechanism, the Committee hopes that these bodies may serve to set an example of transparency and consultation, rather than threaten or undermine the PBS and the PBAC in Australia. The Committee concurs with Dr Lopert's views that, while there has been some criticism of the text of the Agreement in relation to the nature of the review mechanism is ambiguous,

I would characterise it as indicating a degree of flexibility in that, in developing the way in which we will implement this obligation, it would not be appropriate to define within a treaty level obligation in the document the precise nature of the implementation of that obligation. It is a matter for Australia to develop in consultation with key stakeholders as a domestic issue, as long as we meet the letter of the obligation contained in the text.⁴⁶

- 6.44 The Committee thanks the health professionals, organisations and individuals who provided evidence to the Committee on the Pharmaceuticals Annex. The Committee is certain that their ongoing involvement and vigilance will ensure that any mooted changes, either domestically or internationally, which may be seen to threaten or undermine the Australian health system, will be the subject of spirited debate and public involvement in the future. The Committee considers this the most healthy sign of a functioning democracy.

46 Dr Ruth Lopert, *Transcript of Evidence*, 14 May 2004, pp. 58-59.

Agriculture

Introduction

- 7.1 The Agreement contains obligations in respect of market access for agriculture which are covered by the following chapters, schedules and annexes of the Agreement
- Chapter 2 (National Treatment and Market Access for Goods)
 - the Tariff Schedule of the United States and the Tariff Schedule of Australia (both of which form part of Annex 2-B) – together with the provisions of Annex 2-B and the General Notes and Annex I of the tariff schedules
 - Chapter 3 (Agriculture) and Annex 3-A.¹
- 7.2 In part the obligations determine the rate of tariff reduction on Australian agriculture products entering the United States through staging categories ranging from confirmation of zero tariff up to elimination of tariffs in equal annual instalments over 18 years.² As well as tariff reductions, there are also obligations in respect of tariff rate quotas to beef, dairy, tobacco, cotton, peanuts and avocados.³
- 7.3 There are three types of agriculture safeguard measures that may apply to Australian exports to the United States. These are

1 DFAT, *Guide to the Agreement*, p. 15.

2 DFAT, *Guide to the Agreement*, p. 16.

3 DFAT, *Guide to the Agreement*, p. 17.

- a horticulture price-based safeguard (Section A, Annex 3-A)
 - a quantity based beef safeguard, (Section B, Annex 3-A)
 - a price-based beef safeguard (Section C, Annex 3-A).⁴
- 7.4 Also included in the Chapter are some obligations in respect of multilateral cooperation, establishing a Committee on Agriculture, an agreement not to use export subsidies on agriculture goods traded into each other's market and a side letter on BSE (Bovine Spongiform Encephalopathy – mad cow disease) committing both Parties to continue working in international forums for standard setting and guideline establishment.⁵
- 7.5 While there have been changes in various agricultural products, the Committee notes that
- Australia's single-desk arrangements for marketing Australian commodities to the world, such as for sugar, rice, wheat and barley, have been preserved.⁶

Background

- 7.6 Agriculture has long been important to the Australian economy. Currently 80 percent of total production is exported, and over the last ten years, exports in agriculture goods, including processed foods and beverages grew to nearly \$32 billion in 2002.⁷
- 7.7 Agriculture is an important part of international trade, and thus receives a considerable amount of attention in any trade talks, whether that is at the bilateral, regional or multilateral level. The debate on agriculture in trade talks is about market access and trade distorting subsidies.

In no other area does domestic support distort international markets to the extent that it does in agriculture, with

4 DFAT, *Guide to the Agreement*, p. 21.

5 DFAT, *Guide to the Agreement*, pp. 22-23.

6 http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/03_agriculture.html, viewed on 7 June 2004.

7 http://www.dfat.gov.au/trade/negotiations/trade_in_agriculture.html, viewed on 7 June 2004.

US\$318 billion in 2002 in support and protection for agriculture by rich developed countries worldwide.⁸

- 7.8 Australia has led the world in pressing for reductions in subsidies and has established several methods to achieve this outcome. Australia established the Cairns Group⁹ and has since then pushed for agriculture trade reform in the Uruguay Round of trade negotiations completed in the mid 1990s. The Committee understands that Australia is now committed to a substantial outcome in the current Doha round of negotiations.

Beef

Industry views on goals

- 7.9 The Committee heard from organisations and individuals about the beef market access and the safeguards that apply to beef. The US beef market is important to Australian exporters and this was supported by evidence to the Committee

Beef exports were Australia's largest individual merchandise export item to the US in 2002, valued at A\$1.6 billion.

However, the volume of beef and other commodity exports such as dairy and sugar is severely constrained by a series of tariffs and quotas¹⁰

and

as a globally focussed industry and a staunch supporter of free trade, the prospects of an FTA delivering ongoing trade improvements presented a unique opportunity to advance the interests of the red meat industries in both Australia and the US.¹¹

- 7.10 The Committee heard from beef exporting organisations that key negotiating objectives were increased market access through either

8 http://www.dfat.gov.au/trade/negotiations/trade_in_agriculture.html, viewed on 7 June 2004.

9 The Cairns Group, established in 1986, consists of 17 countries from Latin America, Africa and the Asia-Pacific region dedicated to agriculture trade reform.

10 National Farmers Federation, *Submission 153*, p. 4.

11 Australian Red Meat Industry, *Submission 61*, p. 2.

the removal of the current tariff rate constraints or, if not, substantial liberalisation through increased tonnage.¹²

Outcomes – Access and Safeguards

- 7.11 Under the terms of the AUSFTA, Australia will maintain its WTO agreement quota of 378 214 tonnes of beef, but will receive an increasing volume of beef, growing from 20 000 (at the latest) tonnes in year 3 of the Agreement to 70 000 tonnes in year 18. The in-quota tariff of US\$4.4c per kg will be eliminated on date of entry into force. In years 9-18 the 26.4 percent tariff on over-quota exports will be reduced to zero. At the beginning of year 18, Australia will be able to export unlimited quantities into the United States, subject to the beef safeguards.¹³
- 7.12 There are two types of beef safeguards that will apply at different times to Australian beef. The first safeguard applies during the 18 year tariff elimination which applies to exports of beef which exceed 110 percent of the total preferential quota volume in that year. If the safeguard is triggered then
- any additional over-quota exports [will] have to pay a tariff equal to the FTA preferential tariff plus 75 per cent of the difference between the original tariff and the FTA preferential tariff.¹⁴
- 7.13 The second safeguard is price-based and applies to beef exports starting in year 19 of the Agreement. The safeguard applies to beef exports in excess of 448 634 tonnes (the existing quota of 378 214 tonne quota plus the additional 70 000 tonne quota in year 18 plus 420 tonnes). An additional 420 tonnes will be added each year after this, and this total amount will always receive duty free access into the US and is not subject to the price-based beef safeguard. The ‘safeguard will be triggered if the price of beef in the United States falls 6.5 percent below the average price in two months of a quarter’.¹⁵ If this point is triggered, then exports in excess of the quota will be subject to a tariff equal to 65 percent of the prevailing tariff. Once

12 Mr Stephen Martyn, *Transcript of Evidence*, 19 April 2004, p. 13.

13 DFAT, *Guide to the Agreement*, p. 18.

14 DFAT, *Guide to the Agreement*, p. 19.

15 DFAT, *Guide to the Agreement*, p. 19.

triggered the safeguard operates for three months or until the end of the calendar year, whichever is the shorter.¹⁶

Why weren't the goals met?

- 7.14 From the evidence and submissions received, the Committee understands there were several reasons for not achieving substantial liberalisation. These included the strong US beef lobby and the unfortunate timing of the identification of a BSE infected cow in Washington State.
- 7.15 Industry representatives noted that 'the FTA did not deliver industry expectations of an immediate increase in Australia's beef quota to the US,'¹⁷ despite Australia's offer which was 'modest' and 'developed by industry in consultation with Australian negotiators to be deliberately conservative'.¹⁸
- 7.16 Evidence to the Committee from both the peak farming body and the red meat industry in respect of the beef safeguards noted
- that the existence of a permanent safeguard on beef sets a bad precedent in other bilateral negotiations. It is important to note that the US lobbied with Australia against the use of a safeguard on beef by Japan, which was imposed last year¹⁹
- and
- the arbitrary price-based safeguards to be imposed at the end of the transition period provide a 'safety-net' to the US beef industry and are an unwarranted obstacle in achieving free trade.²⁰
- 7.17 The Committee heard that the beef safeguards would have minimal impact on Western Australia, a representative of which asserted that the new US bioterrorism regulations may have more impact on that State.²¹
- 7.18 The Committee understands that the final outcome on beef was probably also affected by the identification of a BSE infected cow in the US during the final negotiations.

16 DFAT, *Guide to the Agreement*, p. 20.

17 Australia Red Meat Industry, *Submission 61*, p. 1.

18 Cattle Council of Australia, *Submission 173*, p. 19.

19 National Farmers Federation, *Submission 153*, p. 6.

20 Australian Red Meat Industry, *Submission 61*, p. 1.

21 Mr Henry Steingeisser, *Transcript of Evidence*, 23 April 2004, p. 11.

Despite sound economic rationale, the level of liberalisation ambition was tempered by a case of BSE in the US announced in December 2003 and opposition to any increased access for Australian product under an FTA as voiced by the US beef lobby.²²

- 7.19 Despite the safeguards and BSE issue, it was clear to the Committee that the final outcome on beef was not as expected and to some extent disappointing considering that the impact on the US market would have been negligible.

For some Australian exports, such as beef for example, Australian product is complementary and not competitive in nature. As a result, NFF believes the US has no justification for not providing Australian farmers with unimpeded access to their market²³

and

It would be impossible for the Australian beef industry to increase production to an extent which could cause any perceptible harm to the US beef industry.²⁴

- 7.20 The Committee notes with interest that industry made positive submissions suggesting that the outcomes in the AUSFTA could not have been negotiated in any other forum at the current time.²⁵
- 7.21 The Committee notes that there was a general level of concern amongst organisations, individuals and community groups outside of the industry, which for the most part mentioned the inclusion of beef safeguards and/or the long phase in periods.²⁶ These issues are also discussed at Chapter 5.

22 Australian Red Meat Industry, *Submission No. 61*, p. 1 and reflected in Australian Meat Holdings Pty. Ltd., *Submission No. 149*.

23 National Farmers Federation, *Submission 153*, p. 5; and supported by the Australian Red Meat Industry, *Submission 61*.

24 Cattle Council of Australia, *Submission 173*, p. 3.

25 Australian Red Meat Industry, *Submission 61*; National Farmers Federation, *Submission 153*, and Cattle Council of Australia, *Submission 173*.

26 Australian Pensioners & Superannuants League Qld, *Submission 30*; Mr Jonathon Shultz, *Submission 51*; NSW Government, *Submission 66*; WTO Watch, QLD, *Submission 112*; Western Australian Government, *Submission 128*.

Comment on conduct of the negotiations

7.22 The Committee was reassured that the conduct of the negotiations by Australian Government officials was of the highest standard, reflected in this comment by the Cattle Council of Australia, that

the Australian Trade Minister and the Australian negotiating team worked tirelessly to achieve the best outcome they could for Australian beef producers. CCA takes exception to anyone who would criticise their efforts during the FTA. There has been comment by some groups within Australia questioning the professionalism of the Australian negotiators.²⁷

7.23 It is clear from peak bodies and the industry that the original negotiating objectives were not achieved in its entirety through no fault of the Australian negotiating team, but 'with the US and its inability to remove itself from the political shackles of certain groups within the US farm lobby'.²⁸

Dairy

7.24 The outcome on dairy provides an increase in the duty free quotas, and the reduction of in-quota tariffs on existing dairy quotas reduced to zero from the date of the Agreement's entry into force. Over quota tariffs, except for goya cheese will remain the same.²⁹

7.25 From the date of entry into force, the dairy industry recognises that the Agreement will provide a 'threefold increase in Australia's quota access for dairy products to the US and new access will grow at five per cent a year, year on year.'³⁰

7.26 The Committee heard that

the new access offers Australian manufacturers a unique opportunity to grow demand for dairy in the United States, with innovative customer-tailored products, before our competitors can secure increased access either via regional agreements or multilaterally through the WTO.³¹

27 Cattle Council of Australia, *Submission 173*, p. 2.

28 Cattle Council of Australia, *Submission 173*, p. 6.

29 DFAT, *Guide to the Agreement*, p. 20.

30 Mr Allan Burgess, *Transcript of Evidence*, 20 April 2004, p. 55.

31 Mr Paul Kerr, *Transcript of Evidence*, 20 April 2004, p. 56.

7.27 While the industry is disappointed that negotiators were unable to secure free trade in dairy,³² they note that this Agreement is a stepping stone

to the industry's most important trade objective: fundamental reform of the world's dairy products trading arrangements through the Doha development round negotiations.³³

7.28 Overall, the Committee notes that despite the fact that the industry did not get immediate access on all categories without limit³⁴, they support the AUSFTA.³⁵

Sugar

7.29 Australia currently has a tariff rate quota access of approximately 87 000 tonnes per calendar year and sought substantial improvement to this access in the process of negotiations towards this Agreement. The Committee understands that sugar access has been an ongoing issue between Australia and the United States, with the Australian lead negotiator noting that

It is something that Australia has been pursuing, including through GATT cases, for the last 40 or 50 years.³⁶

7.30 The Committee notes that the global sugar market is perhaps the most corrupt and

sugar farmers in European countries, the US, Japan and a few other countries appear to be heavily protected, and there does not seem to be very much movement at all to the levels of protection or regimes in those countries.³⁷

7.31 In this respect, the Committee notes with interest that the Australian Government is currently in dispute settlement proceedings in the WTO on the European Communities export subsidies on sugar.³⁸

32 Australian Dairy Industry Council, *Submission 19*, p. 1.

33 Mr Paul Kerr, *Transcript of Evidence*, 20 April 2004, p. 56.

34 Ms Virginia Greville, *Transcript of Evidence*, 2 April 2004, p. 34.

35 Mr Allan Burgess, *Transcript of Evidence*, 20 April 2004, p. 55; Mr Paul Kerr, *Transcript of Evidence*, 20 April 2004, p. 56; Australian Dairy Industry Council, *Submission 19*.

36 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 93.

37 Mr Ian White, *Transcript of Evidence*, 5 May 2004, p. 3.

38 http://www.dfat.gov.au/trade/negotiations/wto_disputes.html#ozcomp, viewed on 16 June 2004.

- 7.32 The exclusion of sugar from the AUSFTA is disappointing. The Committee notes that the disappointment is not confined to just industry groups, but is felt in the Australian negotiating team. The Australian lead negotiator noted
- I think ... the whole team – and, I am sure, the government – feel disappointed that we were unable to achieve anything on sugar as part of the agreement.³⁹
- 7.33 The Committee heard from both government and industry on the reasons why the negotiating team was unable to secure an outcome on sugar. Both government and industry believed that it is because the US sugar lobby's political strength was able to convince the US Government that they were unable to stand additional access from countries such as Australia, and that as Australia was not a developing country, it did not need sugar in the Agreement.⁴⁰ Mr Ian Ballantyne, from the Australian Canegrowers Council, stated that
- The exclusion ... has certainly been disappointing – there is no question about that – but, to some extent, not totally unexpected, as we have dealt with the US sugar lobby for some time.⁴¹
- 7.34 The Committee also notes the concern of the industry in the multilateral environment and understands that a continued partnership with government in the WTO negotiations is the best way forward.⁴²
- 7.35 The Committee, with many others, believes that the exclusion of sugar is disappointing. The Committee accepts that a major factor in this outcome is the role of organisations within the US which have their own political agendas. It is clearly an extremely sensitive issue domestically for the US, and the Committee notes the statement by the lead negotiator: 'I did not and the minister did not give up'.⁴³
- 7.36 The Committee notes the views of the sugar industry representatives that despite their exclusion from the Agreement, they support the AUSFTA going ahead.

39 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 93.

40 Mr Ian White, *Transcript of Evidence*, 5 May 2004, p. 2.

41 Mr Ian Ballantyne, *Transcript of Evidence*, 5 May 2004, p. 3.

42 Mr Ian White, *Transcript of Evidence*, 5 May 2004, p. 3.

43 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 32.

Our access to the United States is less than one per cent of the United States' consumption of sugar. A 25 per cent increase in that...would have been no outcome. It would have been worse than no outcome, because at least with no outcome you have the opportunity to open discussions at a later date, if you do not have an agreement⁴⁴

and

I have made the comment directly to the Prime Minister and made a public statement that the exclusion of sugar should not prevent Australia from making its decision to enter the agreement ... from a sugar perspective, if it is a positive outcome it should go ahead, albeit without sugar. We would not like to see a positive outcome for the country overturned because of lack of sugar.⁴⁵

A way forward on sugar?

- 7.37 The Committee understands from recent press reporting⁴⁶ that the Chairman of the US Ways and Means Committee has said that the exclusion of sugar from the Australia – United States Free Trade Agreement was a mistake and that it 'ought not be repeated'.⁴⁷ The Committee notes that in that same report several other countries commencing free trade negotiations with the United States would discuss market access for sugar, including Thailand, Columbia and Panama. Based on this advice and respecting the authority commanded by the Ways and Means Committee, the Committee believes that similar opportunities should be pursued in future.

44 Mr Ian Ballantyne, *Transcript of Evidence*, 5 May 2004, p. 8.

45 Mr Ian Ballantyne, *Transcript of Evidence*, 5 May 2004, p. 19. Mr Ian White confirmed that Queensland Sugar Ltd shared this position.

46 *The Courier-Mail*, 18 June 2004, p. 1.

47 Opening Statement of The Honorable Bill Thomas, Chairman, and a Representative in Congress from the State of California, 16 June 2004, viewed at 18 June 2004 <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=1680>.

Recommendation 7

The Committee notes with interest the opening statement of the Honorable Bill Thomas, Chairman of the US Ways and Means Committee, that the exclusion of sugar from the AUSFTA was a mistake. Noting this, the Committee recommends that the Australian Government actively pursue after ratification through all available channels and in all available fora including the Doha Round, increased market access for Australian sugar into the United States.

Other agriculture products

Sheepmeat and goatmeat

- 7.38 The outcome of the negotiations in respect of sheepmeat is that 'import duties on all tariff lines, other than bone-in mutton carcasses' will go to zero on date of entry into force.⁴⁸ In respect of goatmeat, there will be free access.⁴⁹ The Committee also notes that the North American market is the largest export market for our goat meat industry.⁵⁰
- 7.39 The Committee notes that overall the outcome in sheepmeat and goatmeat is positive and is supported by the industry.⁵¹

Chicken meat

- 7.40 The Committee received a submission from the Australian Chicken Meat Federation which discusses the implications to the industry of the Chapter on Sanitary and Phytosanitary measures.⁵² For further information on quarantine, please refer to Chapter 8, which deals with SPS matters.

48 Mr Stephen Martyn, *Transcript of Evidence*, 19 April 2004, p. 13.

49 Mr Stephen Martyn, *Transcript of Evidence*, 19 April, p. 14.

50 Mr Stephen Martyn, *Transcript of Evidence*, 19 April, p. 14.

51 Australian Red Meat Industry, *Submission 61*; Australian Meat Holdings, Pty.Ltd, *Submission 149*, and the National Farmers Federation, *Submission 153*.

52 Australian Chicken Meat Federation, *Submission 26*.

Pork

- 7.41 The Committee heard evidence and received a submission from the Pork Industry. Both the submission and evidence focussed on the implications of the SPS Chapter to the Australian pork industry, and therefore the input of Australian Pork Limited has been dealt with more comprehensively in that Chapter.⁵³

Horticulture

- 7.42 The Committee understands that the outcomes on horticulture are immediate free trade is achieved for current fresh produce horticultural exports to the US. On the other hand free trade is not immediately achievable across the board, particularly for non-fresh items.⁵⁴
- 7.43 For the non-fresh items, the remaining tariffs will be eliminated via a phase in period, of up to 18 years in some cases.⁵⁵
- 7.44 The avocado industry will receive two new seasonal duty free tariff rate quotas beginning in Year Two of the Agreement. The extra amounts totalling 4000 tonnes per year are split into the season from 1 February to 15 September for an amount of 1500 tonnes and between 16 September and 31 January where the amount is 2500 tonnes.⁵⁶
- 7.45 The Committee also notes that
- The immediate zero tariff outcomes for a range of mostly tropical fruit which are currently seeking quarantine access to the States, while neither relating to quarantine access nor guaranteeing that trade will develop upon achievement of quarantine access, are nevertheless positive.⁵⁷
- 7.46 The Committee understands that there will be no change to US quarantine restrictions as a result of the AUSFTA, and that determinations will continue to be made on the basis of science.⁵⁸

53 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 23; Australian Pork Ltd., *Submission 108*.

54 Horticulture Australia, *Submission 159*, p. 1.

55 Horticulture Australia, *Submission 159*, p. 2.

56 DFAT, *Guide to the Agreement*, p. 21.

57 Horticulture Australia, *Submission 159*, p. 2.

58 Horticulture Australia, *Submission 159*, p. 2.

7.47 The Committee received a submission that notes that despite the additional access 14 of the 24 current items of prepared/processed items will need to wait either 10 or 18 years for total tariff elimination. It would also appear that the phasing periods for the FTA negotiated between Chile and the US are more favourable than our own.⁵⁹

7.48 The Committee notes that

A number of Australian product codes are faced with immediate elimination of a 5 percent tariff on the agreement coming into effect. This will impact variously, depending on a range of different factors.⁶⁰

7.49 The Horticulture industry provided to the Committee the following summary of US FTA outcomes for particular products.

Table Summary of AUSFTA Outcomes for the particular horticultural industries as provided to Committee

Industry	Outcome
1. Citrus	Elimination of current fresh fruit tariffs with an associated cost reduction Continuing support for the export efficiency licensing arrangements Expanded exports from additional areas will need await quarantine access approvals Elimination of the tariff on imported citrus juice from the US but Brazil is the major supplier
2. Macadamias	Elimination of the current tariff on raw macadamia kernel Reduction of the current tariff on processed (value added kernel) over 4 years to zero Liberal quota access with zero in quota tariff for chocolate coated macadamias of more than 5.5% butter fat Progressive elimination of the current competitive advantage that sub Saharan countries enjoy for raw and further process kernel Increase in the incentive to further process kernel in Australia and add scale to current value adding operations A further marketing advantage for chocolate coated macadamias at the indicted butterfat level
3. Avocados	A tariff free quota (two period quotas covering the year) with appreciable tonnages, increasing over the period of 18 years and with free trade at the end of the period Substantial growth in production is forecast and new markets are vital to support this growth Exports to the US will need to await quarantine access approval
4. Mangoes	Elimination of current US tariff on the agreement coming into force assisting ability to compete with current competitors in the market Exports to the US will need to await quarantine access approval

59 Horticulture Australia, *Submission 159*, p. 2.

60 Horticulture Australia, *Submission 159*, p. 2.

5. Nursery	Elimination of current tariffs on virtually all nursery and garden lines in to the US, including the two current major export items, artificially propagated cut wax flowers and Australian natives
6. Olives	Elimination of virtually all current tariffs on green and black olives and olive oil exported to the States Support to current strategic targeting of the US in the above lines
7. Potatoes	Subject to quarantine access, there could be potential to export fresh potatoes to the US during their winter. Reduction in tariffs of frozen potato products into Australia could negatively impact the Australian processing potato industry
8. Pistachios	Removal of current 5% import tariff will strongly affect margins
9. Almonds	Loss of any differential between import parity and domestic prices, resulting in reduced margins and significant increase in Californian competition on the domestic market

Source *Horticulture Australia, Submission 159, p. 8.*

Horticulture Safeguard

7.50 As part of the AUSFTA, there is a horticulture safeguard that applies to a limited range of horticulture products. Each product has a trigger price that is based on the Customs Import Value of the good (similar to the \$US Free On Board (FOB) price). The safeguard applies if the FOB import price of the Australian product is lower than the trigger point at which time an additional duty will apply depending on the amount by which the FOB import price of the product falls below the trigger price. The safeguard applies on a shipment by shipment basis and only applies during the 18 year tariff elimination period.⁶¹

7.51 The Committee notes that

There were no Australian exports to the US in the last 5 years (to 2002) in the case of 17 of the 33 items identified as subject to these safeguards.⁶²

7.52 The Committee notes the historical analysis done by Horticulture Australia in the 5 years to 2002 shows that the horticulture safeguard would have little impact on the industry.⁶³

Peanuts

7.53 The peanut industry actively pursued with Government a conservative outcome in the AUSFTA. With 1.7 million tonnes of peanuts consumed each year by the US, the industry's original

61 DFAT, *Guide to the Agreement*, p. 22.

62 Horticulture Australia, *Submission 159*, p. 6.

63 Horticulture Australia, *Submission 159*, p. 7.

submission seeking an increasing duty free tariff quota over five years to 12,500 tonnes and free trade after eight appears conservative.⁶⁴

- 7.54 Australia has secured a new duty free tariff rate quota of 500 tonnes at date of entry into force, increasing by three per cent cumulatively and free trade after 18 years.⁶⁵ This was much lower than their original demands. Overall, the peanut industry is supportive of the outcome, despite ongoing concerns about practical access to the market.⁶⁶ Mr Hansen, Managing Director of the Peanut Company of Australia advised the Committee that

on balance we are supportive of the agreement, because if we do not support it we will have nothing, whereas if we do support it we have something. In 18 years at least some of my children or somebody else may benefit from the arrangements.⁶⁷

Apples and Pears

- 7.55 The Committee heard evidence from the Tasmanian Apple and Pear Growers Association which focussed mainly on the outcome of the negotiations in the SPS Chapter.⁶⁸ Further information on quarantine aspects are discussed in Chapter 8 which deals with SPS measures.

A positive outcome for horticulture

- 7.56 The Committee understands that the outcome on horticulture products is viewed as positive and the industry is supportive of the AUSFTA.⁶⁹

Tuna

- 7.57 The Committee notes the canned tuna industry is perhaps the only industry in the AUSFTA that got something they were not expecting,

64 Mr Robert Hansen, *Transcript of Evidence*, 5 May 2004, p. 49.

65 DFAT, *Guide to the Agreement*, p. 21 and Mr Robert Hansen, *Transcript of Evidence*, 5 May 2004, p. 48.

66 Mr Robert Hansen, *Transcript of Evidence*, 5 May 2004, p. 48 and 49 and Peanut Company of Australia, *Submission 76*.

67 Mr Robert Hansen, *Transcript of Evidence*, 5 May 2004, p. 49.

68 Mr Mark Salter, *Transcript of Evidence*, 21 April 2004, p. 5.

69 Horticulture Australia, *Submission 159*; Mr Peter Corish, *Transcript of Evidence*, 4 May 2004, p. 79.

a significant outcome after more than two decades of bilateral and multilateral approaches.

- 7.58 The current tariff of 35 per cent has effectively priced Australian canned tuna out of the US market but under the terms of AUSFTA, the tariff will drop to zero on date of entry into force of the Agreement. The main competition is from Uruguay and Mexico.⁷⁰ This represents a significant opportunity for the Australian tuna industry.

The US premium market is expanding - and the FTA duty free access, from the start of the FTA, would give Australia the first opportunity in its history to achieve export volume.⁷¹

- 7.59 The Committee notes that the industry has consistently made approaches in the WTO through the Uruguay and Doha rounds of trade talks, but to no avail.⁷² The Committee notes that the industry is strongly supportive of the AUSFTA.⁷³

Wine

- 7.60 The Wine industry has exhibited significant growth in export markets in recent years, moving from approximately \$400 million in 1995-96 to approximately \$2.5 billion in the last financial year.⁷⁴

- 7.61 The industry recognises that

The Free Trade Agreement between Australia and the United States is a key element in the Australian wine industry's strategy for success. The United States market remains the key driver for growth for the Australian wine industry.⁷⁵

- 7.62 The industry has also expressed its concern to the Committee by pointing out that

Failure to progress the FTA would mean that our key competitors on the United States market would enjoy preferential treatment. South Africa already has preferential

70 Mr Brian Jeffriess, *Transcript of Evidence*, 6 May 2004, p. 9.

71 Tuna Boat Owners Association, *Submission 186*, p. 2.

72 Mr Brian Jeffriess, *Transcript of Evidence*, 6 May 2004, p. 9; Tuna Boat Owners Association, *Submission 186*.

73 Mr Brian Jeffriess, *Transcript of Evidence*, 6 May 2004, p. 9; Tuna Boat Owners Association, *Submission 186*.

74 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 2.

75 Winemakers Federation of Australia, *Submission 154*, p. 1.

tariff treatment in the United States, while Chile has negotiated a phase-out of tariffs and Argentina is likely to also gain preferential access through the Free Trade Agreement of the Americas.⁷⁶

- 7.63 The industry was disappointed in some of the outcomes of the AUSFTA, notably, the issue of labelling and blending and the tariff phase out periods over 11 years.⁷⁷ However, despite the issue of labelling and blending the industry is supportive of the establishment of a working group to deal with matters set out in Chapter 9 (technical barriers to trade) as well the Committees established in Agriculture, Sanitary and Phytosanitary Matters (SPS) and the Joint Committee, as it provides a platform for further liberalisation of impediments to trade such as the labelling issue.⁷⁸
- 7.64 The Committee heard that industry were supportive of the changes in intellectual property in respect of Geographical Indications (GIs), namely changing the legislation to allow for cancellation of GIs and to recognise pre-existing rights in trademarks.⁷⁹ For further information on GIs, please refer to Chapter 16 on Intellectual Property. Overall, the Committee notes that the industry is supportive of the AUSFTA.⁸⁰

Other provisions in respect of Agriculture

- 7.65 Aside from the specific commitments on agriculture, included in the Agriculture Chapter are some other provisions, notably multilateral cooperation, a Committee on Agriculture, an agreement not to use export subsidies on agricultural goods traded into each other's market and a side letter on BSE (Bovine Spongiform Encephalopathy – mad cow disease).⁸¹
- 7.66 The Committee heard and received evidence from a range of interested parties on some aspects of these other provisions. This was mostly confined to the establishment on the Committee on Agriculture. Most parties did not make any specific comments. One

76 Winemakers Federation of Australia, *Submission 154*.

77 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 5.

78 Winemakers Federation of Australia, *Submission 154*.

79 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 5 and Winemakers Federation of Australia, *Submission 154*.

80 Winemakers Federation of Australia, *Submission 154*; Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 6.

81 DFAT, *Guide to the Agreement*, pp. 22-24.

party was supportive of the establishment of the Committee⁸² but some parties were concerned that its establishment may provide another platform, other than the SPS working group, for the United States to lobby against our quarantine regime.⁸³

Concluding observations

7.67 Even though the Committee heard that the outcome on agriculture was disappointing from several aspects, the final position from peak bodies is to support the AUSFTA.

NFF is disappointed with aspects of the US FTA and NFF's expectations were clearly not met in a range of areas, particularly in regard to the outcome on sugar and beef. However, on balance, as the market access benefits for several Australian agricultural industries are significant, and ... NFF supports the US FTA and believes all political parties should support the agreement through the Australian Parliamentary system.⁸⁴

7.68 The Committee notes that industry supports the outcomes on beef, noting that the Agreement does deliver gains, albeit modest, to the Australian beef industry as a whole.⁸⁵

7.69 The Committee notes that some outcomes were disappointing and did not meet expectations which had been buoyed by the positive manner in which negotiations proceeded. The Committee noted with interest that the canned tuna industry was one clear example where the outcome clearly exceeded the highest expectations, and accepts that in all trade negotiations there are often disappointing results that owe more to the domestic policies in sensitive sectors of the other Party, not the efforts of the negotiators.

7.70 The Committee notes that at the multilateral level, the government will continue to promote the ideals of global agriculture reform in all sectors and agrees that the AUSFTA should be seen as a step towards achieving that task.

82 Winemakers Federation of Australia, *Submission 154*.

83 Australian Chicken Meat Federation, *Submission 26*; Australian Pork Limited, *Submission 108*.

84 National Farmers Federation, *Submission 153*. Similar comments were made by the South Australian Farmers Federation, *Submission 212*.

85 Australian Red Meat Industry, *Submission 61*, National Farmers Federation, *Submission 153* and the Cattle Council of Australia, *Submission 173*.

Sanitary and Phytosanitary Measures

Introduction

- 8.1 The SPS Chapter covers market access issues affecting quarantine and food safety, consistent with WTO rules. According to the *Guide to the Agreement*, both Parties reaffirm that decisions on matters affecting quarantine and food safety will continue to be based on scientific assessments of the risks involved in the commercial movement of animals and plants and their products.

This affirmation is made to reflect the primacy of existing rights and obligations under the WTO Agreement on Sanitary and Phytosanitary Measures.¹

- 8.2 The SPS comprises four articles and annex. According to the DFAT Guide to the Agreement

The Chapter recognises that both Australia and the United States are major agricultural producers and exporters but with different environmental conditions and pest and disease status. Nothing in the Chapter undermines the right of either Party to determine the level of protection it considers appropriate.²

- 8.3 Two committees will be established under the Agreement, for the purpose of improving each Party's understanding of the other's SPS

1 DFAT, *Guide to the Agreement*, p. 35.

2 DFAT, *Guide to the Agreement*, p. 35.

measures and associated regulatory processes. According to the *Guide to the Agreement*, one will focus on general matters and one on a more specific set of plant and animal health (quarantine) matters. The Committee received evidence from several individuals and organisations regarding the role of these Committees and will consider this issue later in this Chapter.

- 8.4 The affirmation of the WTO SPS Agreement which is provided for in the AUSFTA means that there is no dispute settlement under the Agreement for SPS matters.

This is because the Chapter creates no new SPS rights or obligations so there is no need for the Parties to have recourse to dispute settlement under the Agreement. Rights under the WTO dispute settlement mechanism would continue to apply for each Party.³

Proposed impact of SPS measures

- 8.5 The Committee notes that, despite reassurances from the Department of Agriculture, Fisheries and Forestry (AFFA) and DFAT at paragraphs 8.1 and 8.2, there are many differences of opinions with regard to the impact of the SPS measures in the Agreement. The Australian Conservation Foundation states that

while the AUSFTA has not resulted in any immediate changes to Australian quarantine laws, it puts in place procedures that may, in the future, weaken those quarantine laws and also laws governing the environmental release of GMOs [genetically modified organisms]⁴

and the NSW Government suggests that

the procedures outlined in the proposed AUSFTA raise some doubt about the future integrity of quarantine procedures as an entirely Australian process.⁵

- 8.6 The Committee also notes evidence from Ms Kathleen Plowman from Australian Pork Ltd that

3 DFAT, *Guide to the Agreement*, p. 35.

4 Australian Conservation Foundation, *Submission 127*, p. 2.

5 NSW Government, *Submission 66*, p. 5.

the quarantine concessions that have been negotiated in the US FTA are significant and have serious implications for Australia's pork industry and other food-producing industries, and we believe that they will inevitably be extended to other countries.⁶

- 8.7 The Committee notes these concerns and the influence they have had on the debate about the impact of the Agreement on Australian quarantine standards.

Status of quarantine standards

- 8.8 The Committee received evidence from the Federation of Australian Scientific and Technological Societies (FASTS) that Australian quarantine practices have been 'conservative and have been generally very effective in minimising damage from invasive species'.⁷ The Committee further notes the observation from FASTS that Australia has attained 'considerable market advantage to our agricultural and aquacultural producers in the global market' as a result of its quarantine history.⁸

- 8.9 The Committee received evidence which suggested that any reduction in quarantine standards would be detrimental to Australia. Dr Geoffrey Pain stated that 'any reduction in quarantine procedures under an agreement would be disastrous for this country'.⁹ Mr Mark Salter from the Tasmanian Apple and Pear Growers' Association stated that

Our argument is that we need to have the most stringent set of import measures in place, because we do not have the pests and diseases that other countries have; we need to keep them out.¹⁰

- 8.10 The Committee recognises that concerns that Australia would be forced to adopt American quarantine measures were common to many submissions on SPS measures in the Agreement. Dr Geoffrey Pain told the Committee that

The pressure is clearly on from the Americans to relax our fairly severe importation and quarantine rules. They want to

6 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 23.

7 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 32.

8 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 32.

9 Dr Geoffrey Pain, *Transcript of Evidence*, 23 April 2004, p. 27.

10 Mr Mark Salter, *Transcript of Evidence*, 21 April 2004, p. 6.

speed up the access to their farming markets to send material over here; otherwise, we would not be discussing the issue.¹¹

- 8.11 However the Committee notes evidence from officials of Biosecurity Australia that

We are not proposing to integrate the quarantine systems of Australia and the US. We run our quarantine system to our standards to reflect our phytosanitary status just as we respect their right to do the same.¹²

- 8.12 The Committee also acknowledges evidence from Ms Virginia Greville from AFFA, who advised the Committee that

the agreement reaffirms the commitment of each party to the WTO SPS agreement and is very clear that it imposes no new SPS obligations and creates no new SPS rights for either party with respect to quarantine.¹³

- 8.13 Ms Mary Harwood from Biosecurity Australia stated that

nothing in this agreement affects our right to apply quarantine the way we wish to the standard that we wish or our right to use Australian processors for risk assessment and policy determination.¹⁴

Establishment of two Committees

- 8.14 As stated at paragraph 8.3, the Committee is aware that there will be two committees formed under the provisions of Chapter 7 of the Agreement.

- 8.15 The Committee understands that the SPS Committee is a consultative one where the standing working group on animal and plant health has a technical role.

SPS Committee

- 8.16 The SPS Committee, which has clear terms of reference in the Agreement, provides ‘a forum for high level policy discussions and
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11 Dr Geoffrey Pain, *Transcript of Evidence*, 23 April 2004, p. 27.

12 Ms Mary Harwood, *Private Briefing*, 2 April 2004, p. 30.

13 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 65.

14 Ms Mary Harwood, *Private Briefing*, 2 April 2004, p. 28.

facilitates cooperation between agencies.’¹⁵ The Australian Conservation Foundation notes that this Committee will be comprised of ‘US and Australian officials with responsibility for sanitary and phytosanitary matters, such as quarantine and GMO laws.’¹⁶

- 8.17 The Committee notes evidence from Biosecurity Australia that the SPS Committee is for information exchange and for enhancing mutual understanding of each other’s SPS systems. It is essentially a high-level committee for consultation and engagement on SPS issues.¹⁷

From the view of the Department of Agriculture, Fisheries and Forestry and Biosecurity Australia, we are comfortable with the agreement and the provision that it makes for discussions between Australia and the US on quarantine matters as a natural part of our trading relationship.¹⁸

Standing Working Group on Animal and Plant Health

- 8.18 The Standing Working Group on Animal and Plant Health, also known here as the ‘Technical Working Group’, is designed to help with the resolution of specific animal and plant health matters.

This initiative recognises that relating technical exchange and cooperation can assist in resolving matters relating to specific quarantine risks in ways that address the importing Party’s quarantine concerns but do not unduly restrict trade.¹⁹

- 8.19 Ms Virginia Greville stated that

The standing technical working group on animal and plant health actually formalises the arrangement that Biosecurity Australia has already with its counterpart competent authority, the Animal and Plant Health Inspection Service, which is part of the United States Department of Agriculture.²⁰

15 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 66.

16 Australian Conservation Foundation, *Submission 127*, p. 7.

17 Ms Mary Harwood, *Private Briefing*, 2 April 2004, p. 28.

18 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 65.

19 DFAT, *Guide to the Agreement*, p. 36.

20 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 66.

Concerns regarding both Committees

8.20 The Committee is aware that serious concerns have been expressed regarding the establishment and operation of the two Committees. These concerns related mainly to the conflict between the aims of the Committee (the perceived conflict of interest between promoting science-based decisions as well as the promotion of trade), the lack of details regarding their operation, and the overall threat to Australian quarantine standards they represented. The Committee heard from Australian Pork Limited that there were several questions regarding the details of these Committees' operation.

What are their criteria? What are their terms of reference?
What are the processes of consultation? What assurances do we have that they are consistent with our own transparent import risk assessment process—and that those processes are based purely on science?²¹

8.21 The Committee also noted that the concern of FASTS

is compounded by the fact that there are no provisions requiring independent scientific expertise on the membership of either committee.²²

Conflict of interest between quarantine and trade?

8.22 The Committee notes evidence from the Grail Centre that

the objectives of the Committee (7.4.3) are not always compatible objectives. On the one hand, it is charged with protecting human, animal and plant life and health and, on the other, facilitating trade between the Parties,²³

and from FASTS, 'that is, there is an intrinsic conflict in the objectives of both committees.'²⁴

The objectives of both of those committees go to protecting animal, human or plant life and to facilitating trade between the parties. So we would say that there is a potential internal

21 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 26.

22 Federation of Australian Scientific and Technological Societies, *Submission 190*, p. 3.

23 The Grail Centre, *Submission 97*, p. 10.

24 Federation of Australian Scientific and Technological Societies, *Submission 190*, p. 3.

conflict of interest between the two broad objectives of both parties.²⁵

Concerns specific to SPS Committee

Role of trade officials

8.23 The Committee received conflicting evidence regarding the involvement of trade officials in the SPS Committee set up under the agreement. Australian Pork Limited stated

in the actual agreement, we are concerned that there is trade representation on an SPS committee. Our principal concern is that Australia has always advocated that our quarantine assessments are based on science risk analysis, so our question is: why do we need to have trade representation on that committee? We believe it is unnecessary.²⁶

8.24 The Committee notes the statement by Australian Pork Limited that

APL proposes that the role of trade representatives on bilateral SPS bodies be clearly articulated and closely monitored to ensure that particularly US trade representatives confine themselves to ensuring consistency of bilateral SFS activities with WTO disciplines and obligations.²⁷

8.25 The Committee notes the evidence from the NFF that while some groups in Australia have specifically raised the issues of the provision for a US trade official to be present as part of these new Committee arrangements.

NFF is not overly concerned by this, given the agreement relates to a trading relationship between two countries, and NFF sees no capacity for the trade official to influence Australia's Import Risk Assessment Process.²⁸

8.26 This opinion was supported by evidence from Ms Greville, that

it is fair to say that a disconnect between trade officials and scientists can sometimes result in quarantine issues escalating unnecessarily into trade disputes. The inclusion of both in a

25 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 32.

26 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 24.

27 Australian Pork Limited, *Submission 108*, p. 4.

28 National Farmers Federation, *Submission 153*, p. 6.

consultative body can help each to understand better the rules by which the other operates ... The more trade officials who understand the basis for our conservative quarantine regime—the way that our process works and the rigour with which we assess risks—the better our reputation is likely to be.²⁹

8.27 Ms Greville added

While [trade officials] may be present for those conversations and it may facilitate understanding, that is not to say that those trade officials will in any way contribute to or affect the outcome of discussions on matters of science. That is very clearly understood between both parties. I would also like to make the point that neither party—that is, neither the US nor Australia—has any interest in having the scientific and technical matters resolved by anyone other than people with scientific and technical expertise.³⁰

Potential for de facto dispute resolution?

8.28 Australian Pork Limited has made the Committee aware of their concerns that there may be a potential for de facto dispute resolution via the SPS technical working group.³¹ Concerns about the processes for dispute resolution under the Agreement were also raised by Dr Patricia Ranald from AFTINET.

Our worry is that because it is in a trade agreement the disputes process can then be used to challenge the development of policy or particular aspects about quarantine. That means a trade tribunal will be making decisions about quarantine which we believe should be made on a scientific basis in terms of health and environmental issues for Australia.³²

Concerns specific to technical working group

8.29 The Committee is aware of the concern caused by the fact that the groups are yet to be established, and the consequent lack of information on the details of the Groups' anticipated operation.

29 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 66.

30 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 67.

31 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 23.

32 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 38-39.

APL also wishes to understand what processes will be put in place in the Technical Working Group to assure that industries will be notified of such discussions and what communications and consultations will be undertaken with the respective industries concerned.³³

8.30 The Committee also notes concerns expressed by the Grail Centre and Mr Bradley Smith from FASTS, that

the Chapter needs to enunciate a clear working principle in circumstances of conflict. The 'precautionary principle' should receive explicit support in such a situation, not the scientific view which supports the risk of trade.³⁴

We see a problem with the standing working group in that there is no mandate for any scientist or independent scientist to be on it.³⁵

8.31 The Committee notes advice from Ms Greville that

the arrangements do not mean that the US will participate in our quarantine risk assessment policy or decision-making processes, rather they recognise that the interests of both parties—when you are dealing with a technical market access request—are best served if there is early access to the best scientific information available. The working group is a means to facilitate exchange and cooperation to that end.³⁶

Are Australian quarantine standards threatened?

8.32 The Committee is aware that some evidence suggested that reassurance was required that Australian quarantine standards would not be threatened or reduced in future as a result of the Agreement. The Committee notes comments by Ms Liz Turner, from Friends of the Earth, Melbourne, that

the Minister for Trade, Mark Vaile, was questioned by the ABC's AM program on 23 February and he was unable to state that these new bodies would be able to protect

33 Australian Pork Limited, *Submission 108*, p. 4.

34 The Grail Centre, *Submission 97*, p. 11.

35 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 36.

36 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 66.

Australian environments from contamination...Based on this and also Australia's previous practice with regard to quarantine and trade disputes at the WTO, we believe that it is risky for these bodies to be established and we believe that it is risky for the clauses that currently exist in the FTA not to contain provisions that strongly prevent contamination.³⁷

- 8.33 Concerns that State and Territory jurisdictions would be influenced by the Agreement were also brought to the Committee's attention, for example by the Governments of South Australia and Queensland.

South Australia seeks assurances from the Commonwealth Government that these consultative mechanisms will in no way be used to downgrade Australia's and South Australia's jurisdiction over quarantine matters.³⁸

- 8.34 The Queensland Government also sought clarification on the operation of the two committees, claiming that it is unclear how the State and Territory governments might have input into these committee's activities or what status their deliberations might hold.

Reassurance is also sought that the proposed arrangements will not result in increased pressure from US interest on Australia SPS decision making processes.³⁹

- 8.35 The Committee notes these comments and received evidence from departmental officials from AFFA and DFAT that

it is very clear in the text, that this consultative arrangement is about science and technical issues; it is not about the level of protection which is appropriate, the level of risk which is acceptable or the fundamentals of the balance between trade and quarantine.⁴⁰

- 8.36 The Committee also notes comments by Ms Mary Harwood that

What we can work on together technically is...looking at whether there are less trade-restrictive ways of trading a product that still deal with the quarantine risk, or if systems can be streamlined. But nothing in that alters the fact that the

37 Ms Liz Turner, *Transcript of Evidence*, 20 April 2004, p. 63.

38 South Australian Government, *Submission 198*, p. 4.

39 Queensland Government, *Submission 206*, p. 9.

40 Ms Virginia Greville, *Transcript of Evidence*, 14 May 2004, p. 70.

basic right to apply quarantine measures to address the risk as we see it stands and will not change.⁴¹

Positive responses to SPS and Technical Committees

8.37 The Committee notes that while there have been some strongly voiced concerns from several groups, positive responses to the establishment of the committees have also been received. Mr Brian Jeffriess of the Tuna Boat Owners' Association stated that

The committees that are going to be set up under this agreement are, in my view, discussion groups. They certainly will not provide any threat to Australia's scientific approach to biosecurity issues.⁴²

8.38 The Committee also notes the comments made by the National Farmers' Federation with regard to the committees.

NFF understands one of the outcomes of this meeting was an agreement to develop a closer working relationship on SPS-related market access issues. In this regard, NFF is not concerned if this relationship is formalised by the formation of a Committee(s). NFF sees no evidence in the text of the US FTA that US representation on these Committees has the power to undermine Australia's scientific-based system or Import Risk Assessment process in particular.⁴³

Implementation and operation of SPS measures

8.39 Several submissions received by the Committee refer to specific concerns with the management of Australia's SPS regime and the role and competence of Biosecurity Australia. The Committee notes these concerns given the proposed role of that organisation as the lead agency in the implementation of quarantine provisions within the Agreement. The Committee accepts the views of FASTS, and other organisations, that the capability of Biosecurity Australia will be a key issue in the implementation of the AUSFTA. Mr Mark Salter, from the Tasmanian Apple and Pear Growers Association, told the Committee that

41 Ms Mary Harwood, *Private Briefing*, 2 April 2004, p. 30.

42 Mr Brian Jeffriess, *Transcript of Evidence*, 6 May 2004, p. 14.

43 National Farmers Federation, *Submission 153*, p. 6.

it seems to be very clear from industry that, as far quarantine is concerned, there has been a lowering of the bar by the present government and the bureaucracy attached to it.⁴⁴

- 8.40 The Committee received evidence from WTO Watch Queensland, and notes the concerns of Ms Theodora Templeton, who stated that

the Department of Foreign Affairs and Trade has stated on numerous occasions and with some vigour that our quarantine laws will not be traded away. Yet shortly after the text of the agreement was released Biosecurity Australia announced a new draft import risk analysis which makes it easier for entry to Australia for products of interest to the US.⁴⁵

- 8.41 Further, the Committee notes the evidence from Australian Pork Limited with regard to the import risk assessment process, managed by Biosecurity Australia.

we do have a number of reservations ... these include ... indications that the final import risk assessment for pig meat, released by Biosecurity Australia, was potentially influenced by negotiations with the USA about quarantine outcomes in the context of the free trade agreement and, in particular, the timing and release of the final IRA report.⁴⁶

- 8.42 The Committee notes evidence in the submission from Australian Pork Limited that

the US has achieved 'through the back door' significant quarantine concessions and it is a matter of concern to the Australian pork industry that Australia seems to have traded off quarantine for advantages in other areas of this FTA.⁴⁷

- 8.43 The Committee was made aware of industry concerns that

the confidence the agricultural sector and the relevant scientists who do analysis in the area have in Biosecurity Australia has been diminishing over time, primarily due to concerns that trade is becoming inappropriately prioritised over the scientific analysis of risk.⁴⁸

44 Mr Mark Salter, *Transcript of Evidence*, 21 April 2004, p. 2.

45 Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 34.

46 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 23.

47 Australian Pork Limited, *Submission 108*, p. 3.

48 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 33.

and

There have been many debates in the public domain recently – over pineapples, durian, Atlantic salmon down in Tasmania, apples, pig meat, and most recently bananas. The way Biosecurity has handled risk in all those areas has raised concerns in the science, agribusiness and agricultural sectors.⁴⁹

8.44 This perception was supported by evidence from Ms Kathleen Plowman from Australian Pork Limited

... our experience, particularly in relation to this import risk assessment for pig meat which has just been finalised, is that we have concerns that Australia's conservative approach to quarantine is slowly being watered down and that priorities over and above risk analysis are given more attention than is necessary. I believe that the report from the Senate inquiry into pig meat which was released yesterday confirms those views.⁵⁰

8.45 The Committee understands that, based on these concerns, the confidence held by industry groups in the two bilateral committees established under the Agreement will largely depend on the conduct and operation of Biosecurity Australia.

8.46 The Committee is aware that Biosecurity Australia has conducted several recent import risk assessments which have been controversial within the affected industry. Some of the evidence presented to the Committee related to the current operation of Biosecurity Australia.

8.47 FASTS stated that if the AUSFTA were to be ratified, they would strongly urge the government to reform Biosecurity Australia. Mr Smith from FASTS, told the Committee that

Indeed, we would say that the evidence and concerns that are available now warrant reform of Biosecurity Australia, independently of the FTA.⁵¹

Mr Smith added that

Our concern is about the potential conflict with both committees. The key issue then is: given that we are

49 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 33.

50 Ms Kathleen Plowman, *Transcript of Evidence*, 14 May 2004, p. 26.

51 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 34.

potentially in conflict, how robust is the leading Australian agency and how confident are people in it? At no point have we said that trade should not be an element of this. The direction of our argument is about the robustness and appropriateness of Biosecurity Australia's practices.⁵²

Comments in the US

8.48 The Committee received many comments from organisations concerning the US opinion on SPS obligations outlined in the Agreement. The Committee heard from the Australian Chicken Meat Federation that 'the United States side, for its part, clearly believes that important quarantine concessions have been achieved.'⁵³

8.49 The Committee was advised that

Australia Pork Limited contends that the United States' objective is to break down Australia's science-based, legitimate and WTO legal, quarantine protection of its pork and other targeted industries.⁵⁴

8.50 The Committee is not able to comment on the legitimacy of the attitudes reportedly held by Americans about the Agreement's SPS Chapter. Normally the Committee would limit its attention to discussion on issues facing Australia's national interest, but in this case the Committee notes the extent of the debate about domestic quarantine issues that are seen in some international circles as a barrier to trade.

Concluding observations

8.51 A wide range of reactions was received in relation to the SPS outcomes under the Agreement. The Committee notes the positions of the NFF and the Cattle Council of Australia were supportive, the latter specifically stating that 'we certainly see no pitfalls at all in the

52 Mr Bradley Smith, *Transcript of Evidence*, 6 May 2004, p. 39.

53 The Australian Chicken Meat Federation Inc., *Submission 26*, p. 6.

54 Australian Pork Limited, *Submission 108*, p. 11.

SPS arrangements negotiated under this agreement'.⁵⁵ The NFF stated that

We found nothing objectionable in the SPS outcomes of the agreement and in fact supported specifically the side letter on BSE that advocates both countries working together in international fora to bring about a better trading regime with regard to that disease.⁵⁶

- 8.52 Support for the SPS outcomes under the Agreement was also expressed by Mr Peter Corish from the NFF who stated that the 'NFF does not believe the US FTA undermines Australia's quarantine system'⁵⁷ and Mr Jeffriess who stated that 'there is no indication that this agreement provides any sort of biosecurity issues'.⁵⁸
- 8.53 The Committee is aware of the level of concern following recent import risk assessments conducted by Biosecurity Australia. If the AUSFTA is ratified, the Committee notes Departmental assurances that quarantine decisions will continue to be made on the basis of scientific assessment. The Committee further notes the opinions of bodies such as the NFF and the CCA that there is nothing in the SPS Chapter which should undermine our current quarantine decisions. The Committee shares the view that any weakening of Australian quarantine standards would be detrimental to the national interest.

Recommendation 8

The Committee recommends that the Department of Agriculture, Fisheries and Forestry Australia and Biosecurity Australia undertake widespread consultations with stakeholders during the initial implementation phase of the AUSFTA, with a view to maintaining a high level of confidence in Australia's quarantine standards and their preservation.

55 Mr Brett de Hayr, *Transcript of Evidence*, 3 May 2004, p. 3.

56 Dr Peter Barnard, *Transcript of Evidence*, 3 May 2004, p. 3

57 Mr Peter Corish, *Transcript of Evidence*, 4 May 2004, p. 79.

58 Mr Brian Jeffriess, *Transcript of Evidence*, 6 May 2004, p. 14.

Technical Barriers to Trade

Introduction

- 9.1 Chapter 8 of the Agreement builds on the existing rights and regulations under the WTO Agreement on Technical Barriers to Trade (TBT). The Chapter applies to ‘all standards, technical regulations, and conformity assessment procedures of the central government that may, directly or indirectly, affect trade in any product between the parties.’¹
- 9.2 The Chapter establishes a mechanism for the Parties to address issues relating to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures.² DFAT has stated that
- a better understanding of respective technical regulations and standards should lead to reduced production costs for exports of food and manufacturers.³
- 9.3 The Committee heard from several witnesses regarding the TBT Chapter, notably the representatives from the National Association of

1 AUSFTA, Article 8.1.

2 DFAT Fact Sheet 18 Technical Regulations and Standards, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/18_tech_regs_standards.html viewed on 2 June 2004.

3 DFAT Fact Sheet 18 Technical Regulations and Standards, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/18_tech_regs_standards.html viewed on 2 June 2004.

Testing Authorities (NATA), the Winemaker's Federation of Australia, Holden Australia and the Western Australian Government. Witnesses at the public hearings did not challenge the Chapter, although concerns were raised over the possible implications of harmonisation of standards for the current Australian system. A number of individuals and community groups made submissions to the Committee in regard to Chapter 8.

- 9.4 A submission to the Committee from Holden Australia summarised the provisions of Chapter 8.

The intent of the text is that positive consideration be given to regulations applying in either country but that each country may apply its local regulations where it considers them to be more appropriate. Both countries have agreed to facilitate the acceptance of each other's conformity assessment procedures (Article 8.6). Both Australia and the US have affirmed their existing rights and obligations to each other under the WTO Technical Barriers to Trade (TBT) Agreement (Article 8.2) and have agreed to use, to the maximum extent possible, international standards (Article 8.4). In addition, both parties have agreed to establish a mechanism to address issues raised by either party relating to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures (Article 8.9).⁴

- 9.5 Chapter 8 does not apply to 'technical specifications prepared by government bodies for the production or consumption requirements of such bodies'.⁵ Sanitary and phytosanitary measures under Annex A of the SPS Agreement do not fall within the ambit of Chapter 8.⁶
- 9.6 Among the measures outlined below, the Federal Government must provide information to State and Territory Governments and relevant bodies in order to encourage them to adhere to obligations under Chapter 8.⁷

4 Holden, *Submission 148*, p. 8.

5 AUSFTA, Article 8.1(a).

6 AUSFTA, Article 8.1(b).

7 AUSFTA, Article 8.3.

Concerns about the US system and implications for Australian system

- 9.7 Several parties have raised concerns about the nature of the US regime and the implications of this for Australian testing authorities and exporters.
- 9.8 In Australia, the Commonwealth and State and Territory Governments coordinate on technical regulations for food and goods. In contrast, the US has numerous government and non-government standard-setting bodies operating at both the federal and sub-federal levels.⁸ DFAT has acknowledged the contrast between the Parties' standards regimes

The United States has a very complicated standards regime. Certainly Australia has and Australia presents a much more uniform market such that a saleable good in one state is a saleable good in another state by virtue of the mutual recognition arrangements that are in place. The United States market is much more complicated because they have standards and technical regulations. Standards are normally voluntary but technical regulations that need to be met are mandatory—and they operate quite often at the federal and the subfederal level; sometimes they even go down to the city and the county level. Then there are those that are developed by private bodies as well as government bodies. So it is a very complex market to work in.⁹

- 9.9 The Committee heard evidence from NATA, outlining its support for the current Australian system. NATA stated that it wished to draw to the Committee's attention the fact that the regimes are not equivalent, and that the Australian accreditation system for conformity assessment is well-recognised, as well as the oldest and most extensive in the world.

Our accreditation covers a larger number of fields and areas than any other in the world, and we believe we have something rather strong and robust which, through what is being proposed—unless some of these points of detail can be clarified—could well be undermined, making it rather more

8 DFAT Fact Sheet 18 Technical Regulations and Standards, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/18_tech_regs_standards.html viewed on 2 June 2004.

9 Mr Remo Moretta, *Transcript of Evidence*, 2 April 2004, p. 73.

difficult for good test results to be recognised and accepted and easier for poor ones to be accepted instead.¹⁰

- 9.10 The Committee was interested to hear evidence of NATA's opinion on the US regime. NATA advised the Committee that the standards framework in the US is

less structured and there is less acceptance in the entire country that accreditation is the best option for determining competence in laboratories ... There are a very large number of accreditation bodies in the United States ... However, only three of them actually have come through the International Laboratory Accreditation Cooperation MRA process. Many, many more are being formed as we speak—often very specifically related to sectors ... Often they are not related to the international standard for laboratories, which is ISO 17025 ... It is not necessarily going to be in Australia's interests to not query these points with the United States, because we will end up with a lower standard of testing coming into this country.¹¹

- 9.11 The Committee notes the concerns of Uniting Care in relation to the threat of the Agreement undermining current Australian standards practice, including that the Chapter 'does not acknowledge that there are different values underpinning policy differences'.¹²

- 9.12 Whilst acknowledging these concerns, the Committee is satisfied with statements from DFAT that harmonising or accepting technical standards and regulations is in the interests of Australian exporters

We have pursued with the United States an agreement that positive consideration will be given by both parties to regarding each other's technical regulations as equivalent if they meet the same objectives even though they are different. That was the most favourable way to proceed. We also pursued the concept of equivalence with respect to conformity assessment procedures, because a lot of our manufacturers were complaining that once they had a product tested for this market it was not entering into the US market unless it was tested all over again, and these duplicative testing procedures can inflate the costs associated

10 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 91.

11 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 92.

12 Uniting Care (NSW/ACT), *Submission 169*, p. 3.

with getting product to market. So again we pursued with the United States the concept of regarding as equivalent conformity assessment procedures and avoiding those duplicative tests¹³

and

it is fair to say that the major problems in market access for Australian industry relate to standards, technical regulations and conformity assessment procedures and the requirement to meet all those in a very complex market like the United States.¹⁴

- 9.13 Concerns were raised by witnesses and in submissions that the adoption of the provisions of Chapter 8 may require change to Australia's current procedures. However the Committee notes that, according to the NIA, no legislative or regulatory change is required to implement the Chapter, and is thus satisfied that there will be no formal change to Australia's current practice.¹⁵ The Committee is satisfied with DFAT's statement that the Agreement facilitates a recognition, rather than adoption, of US procedures.¹⁶

Cooperation between the Parties

Recognition and acceptance of assessment procedures

- 9.14 Articles 8.5 and 8.6 of the Agreement encourage the Parties to accept each other's assessment procedures for technical regulations. There has been some concern over how these provisions will operate in practice and whether they will require Australia to change its current system. There has also been significant support for the provisions, particularly from industries which will benefit from a mechanism to facilitate recognition of standards and regulations.
- 9.15 The Committee was interested to hear evidence from DFAT regarding the way in which the Agreement will assist Australian exporters experiencing difficulties in market access, namely the ability of each Party to draw market access problems to each other's attention, 'and

13 Mr Remo Moretta, *Transcript of Evidence*, 2 April 2004, pp. 73-74.

14 Mr Remo Moretta, *Transcript of Evidence*, 2 April 2004, p. 72.

15 NIA, Annex 8.

16 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 30.

to have those followed through hopefully with a viable solution enabling market access to go ahead as a result.¹⁷

9.16 However, Dr Patricia Ranald, representing the Australian Fair Trade and Investment Network (AFTINET), asserted that pressure would be placed on Australia to adopt US standards under the provisions of Chapter 8.¹⁸ This was a view raised by other groups who presented issues in a similar vein to AFTINET.

9.17 The Committee was assured by DFAT the chapter would only facilitate recognition, rather than adoption, of US standards.

We do have in the standards and technical barriers to trade outcomes a process established under the agreement to encourage that where there are these sorts of barriers, where it can be easier to facilitate trade and where we can streamline mutually recognised standards—not adopt US standards but recognise US standards—if they do meet ours and vice versa. We certainly see this as very much more an offensive interest of ours in the United States. It is much simpler really. Our standards-setting bodies are much more transparent and there are not nearly as many as there are in the United States, so we do see that as a very substantial outcome to the agreement. It is one that does and will and can only evolve over time.¹⁹

Article 8.5: Technical Regulations

9.18 The provisions of Article 8.5 promote the removal of non-tariff barriers to trade by recognising that although the Parties may have different technical regulations, they may, in practice, achieve the same result.²⁰

9.19 Article 8.5.1 establishes that the US and Australia are obliged to ‘give positive consideration to accepting as equivalent technical regulations of the other Party’, even where the regulations of the other Party differ from its own, provided that the regulations ‘adequately fulfil the objectives of its regulations.’²¹ Article 8.5.2 states that where a Party does not accept the regulation of the other Party as equivalent

17 Mr Remo Moretta, *Transcript of Evidence*, 2 April 2004, p. 74.

18 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 32.

19 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 30.

20 DFAT, *Guide to the Agreement*, p. 39.

21 AUSFTA, Article 8.5.1.

to its own, it must, at the request of the other Party, explain its reasons for not doing so. Further consideration of the matter may take place through the establishment of an *ad hoc* working group under Article 8.9.3, if the Parties both agree to this occurring.²²

9.20 Article 8.5.3 provides that the dispute settlement provisions of the Agreement do not apply to matters arising under Article 8.5.²³

9.21 The Western Australian Government supports mechanisms under Article 8.5.1 which

address the development, adoption, application or enforcement of standards, technical regulations or conformity of standards, technical regulations or conformity assessment procedures.²⁴

9.22 However, it was noted that ‘this process does not deliver immediate gains and there is no means to assess the rate of progress’.²⁵

9.23 NATA raised several concerns regarding Article 8.5.1 in its submission to the Committee.

We would prefer to see some specificity on the means for being satisfied that technical regulations adequately ‘fulfil the objectives of their own regulations’. Are there objective criteria to be applied, and is the objective to have equivalent outcomes? Will confidence enhancing practices be involved, such as independent assessment of the technical competence of bodies determining compliance with technical regulations, through processes such as accreditation?

How will disputes or differences be resolved without a settlement process? Could not the *ad hoc* group referred to in 8.5.2 be one such mechanism?²⁶

9.24 The Committee notes a submission received from Uniting Care which also raises concerns with 8.5,

given the differences in US and Australian economic power, interests and values. There are a number of areas where Australians want something different from what is acceptable in the USA. The question is how will Australia ensure that

22 AUSFTA, Article 8.5.2.

23 AUSFTA, Article 8.5.3.

24 WA Government, *Submission 128*, p. 4.

25 WA Government, *Submission 128*, p. 4.

26 NATA, *Submission 23*, p. 2.

high Australian design standards and consumer safeguards are maintained.²⁷

- 9.25 The Committee took evidence from the wine industry which detailed the difficulties faced by Australian producers in exporting to the US, which are addressed under the Agreement. The different standards for labelling in the US increase costs to Australian exporters and cause logistical difficulty. Blending conditions in the US also contribute to this problem, and the Australian industry had sought to have the US accept Australian blending conditions and labelling of those conditions under the Agreement.²⁸
- 9.26 Mr Henry Steingiesser, from the Western Australian Government, advised the Committee that because of US regulation standards for vintages and blending, Australian producers have to change usual blending and labelling practice in order to export to the US. This then entails an additional cost as a separate production line is required for exports to the US, resulting in particular difficulty in for smaller wine producers seeking to export to the US.²⁹ Mr Steingiesser expressed that these, and other issues relating to exportation, should have been resolved under the Agreement.
- 9.27 Although disappointed that there was no resolution on labelling issues, the Winemakers Federation of Australia strongly supported the provisions as an opportunity to address issues through the working groups.³⁰
- 9.28 The Australian Wine and Brandy Corporation advised Article 8.5.1 was of particular interest for the Australian wine industry because ‘gives it a clear formal avenue in which to raise issues surrounding wine technical regulations and standards with the US (including wine labelling).’³¹

27 Uniting Care (NSW/ACT), *Submission 169*, p. 12.

28 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, pp. 3-4.

29 Mr Henry Steingiesser, *Transcript of Evidence*, 23 April 2004, pp. 5-6.

30 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 5.

31 Australian Wine and Brandy Corporation, *Submission 152*, p. 3.

Recommendation 9

The Committee recommends that the Australian Government, in consultation with the wine industry, actively pursues the issue of blending and labelling through the Chapter Coordinators or other working groups.

Article 8.6: Conformity Assessment Procedures

- 9.29 Under Article 8.6, Parties agree to facilitate the acceptance of each other's procedures to determine whether products fulfil relevant standards and technical regulations. Where a Party rejects the other Party's procedures, it must explain the reason for refusal in detail, and upon agreement by the parties, working groups may be established to resolve the problem.³²
- 9.30 The Committee heard that NATA's largest concern under Chapter 8 was Article 8.6.1, which states that 'a broad range of mechanisms exist to facilitate the acceptance of conformity assessment results', and subsequently lists examples of such mechanisms.³³ NATA's concerns centre around its assertion that the Article does not recognise international memoranda of understanding in relation to conformity assessment, to which Australia is a party.³⁴ Ms Regina Robertson from NATA told the Committee about Mutual Recognition Agreements currently in place on International Laboratory Accreditation Cooperation and Asia-Pacific Laboratory Cooperation, which
- cover the competence of accreditation bodies such as NATA all around the world, and certainly in the Asia-Pacific region in the case of APLAC. This actually ensures that bodies such as NATA do our job effectively and that the laboratories and facilities that we accredit are actually competent and capable of producing reliable results. There is no mention made of knowledge about this ...³⁵
- 9.31 Ms Robertson agreed that the range of mechanisms in Article 6.1 reflected current practice in the US, but stated that

32 DFAT, *Guide to the Agreement*, p. 40.

33 AUSFTA, Article 8.6.1(a) – (f).

34 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 90.

35 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 90.

It is not very coherent—in fact, it is not coherent at all—whereas in Australia we have what we are calling the national measurement infrastructure. We believe that that is well described, that it provides reliable results from conformity assessment bodies. We are not as convinced of that from the United States.³⁶

9.32 NATA also raised concerns about Article 8.6.1(a) which lists reliance on a supplier's declaration of conformity as a mechanism to facilitate acceptance. In their submission to the Committee, NATA noted that

while listed as one mechanism that exists, [reliance on a supplier's declaration of conformity] does have inherent risks if such declarations are not subjected to market surveillance in the importing country and are not subject to, any recourse or sanctions for non-compliance of the products with the importing party's technical regulations. Additionally, the risk of such acceptances are ameliorated if there is independent evaluation (through accreditation etc), of the competence of the supplier's laboratories etc, to meet the technical regulations of the importing party.³⁷

9.33 In their submission and during the public hearing on 19 April 2004, NATA outlined further concerns relating to conformity assessments but the Committee understands that these concerns have subsequently been resolved through discussions between NATA and DFAT.

GM Labelling

9.34 The Committee received submissions from individuals and community groups, concerned that under Article 8.5 Australia would be forced to give 'positive consideration' to accepting the US' technical regulations, including their standards for the labelling of food containing genetically modified organisms (GMOs).³⁸ Further, it was argued that Article 8.7 would allow for the US to have input on Australian policy formation. The Committee noted concerns that these provisions would result in a lowering of Australia's labelling standards.³⁹

36 Ms Regina Robertson, *Transcript of Evidence*, 19 April 2004, p. 92.

37 NATA, *Submission 23*, p. 2.

38 Uniting Care (NSW/ACT), *Submission 169*, p. 12.

39 See particularly AFTINET, *Submission 68*, p. 16, and also *Submissions 6, 13, 44, 46, 48, 57, 58, 68, 74, 86, 89, 90, 102 and 137*.

- 9.35 Whilst mindful of these concerns, and grateful to the groups and individuals that brought them to the attention of the Committee, the Committee is satisfied with information available from DFAT that Australian labelling requirements for GM foods are not affected by the AUSFTA.⁴⁰

Trade Facilitation

Article 8.7 Transparency

- 9.36 Under this Article, Parties are obliged to allow persons of the other Party to participate in the development of standards, technical regulations and conformity assessment procedures. Parties also agree to measures to ensure transparency in processes.⁴¹

- 9.37 NATA informed the Committee of its concern that the provision for cooperation may interfere with the current national system for preparing standards. Uniting Care expressed in its submission that the provisions of Article 8.7 were too broad and far-reaching.

The provision to include the other party in the development of standards and regulations is unacceptable, as it does not serve local consumer interests and confuses the rights of foreign companies with the rights of citizens. Also, it undermines democracy by intruding one government's interests into another government's work.

The provision for parties to recommend that non-government organisations allow representatives of the other party in their deliberations on standards is unacceptable, intruding government into the work of civil society.⁴²

- 9.38 The Committee acknowledges these concerns, but notes that Article 8.7.2 requires a recommendation only, and as such is not enforceable against non-government organisations. The Committee is again satisfied with DFAT's assurance that there will be no change required to the current Australian system.

40 DFAT, Australia-United States Free Trade Agreement: Frequently Asked Questions, http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html, viewed 4 June 2004.

41 DFAT, *Guide to the Agreement*, p. 40.

42 Uniting Care (NSW/ACT), *Submission 169*, p. 3.

Chapter Coordinators

- 9.39 Article 8.9 establishes a mechanism whereby Parties may address issues relating to the ‘development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures’.⁴³
- 9.40 Established to facilitate implantation of Chapter 8, Chapter Coordinators are ‘responsible for coordinating with interested persons in the Party’s territory and communicating with the other Party’s Coordinator’ in relation to matters pertaining to the Chapter.⁴⁴ Under Annex 8-A, Australia’s Chapter Coordinator will be the Department of Industry, Tourism and Resources (or its successor).⁴⁵
- 9.41 Where matters are unable to be resolved through the Chapter Coordinators, an *ad hoc* technical working group, comprised of representatives from both parties, may be established in order to identify a ‘workable and practical solution that would facilitate trade’.⁴⁶
- 9.42 Mr Remo Moretta from DFAT explained the role of the Chapter Coordinator as facilitating, with their US counterpart, viable solutions to particular problems with market access that may be experienced by stakeholders in relation to standards and technical regulations.

If that means putting practitioners in contact with practitioners or regulators in contact with regulators or standards developers in contact with standards developers, that is how it will work. We felt there was great utility in having such a mechanism, because it is very costly and very difficult for our industries to navigate their way through a very complex US market.⁴⁷

Consultations

- 9.43 The Government undertook consultations with stakeholders and with State and Territory Governments prior to the negotiation of the Agreement. NATA, Holden, the Australian Wine and Brandy
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43 DFAT, *Guide to the Agreement*, p. 40.

44 AUSFTA, Article 8.9.1.

45 AUSFTA, Annex 8-A (a).

46 AUSFTA, Article 8.9.3.

47 Mr Remo Moretta, *Transcript of Evidence*, 2 April 2004, p. 74.

Corporation, the Winemaker's Federation of Australia, the Business Council of Australia, and AFTINET were all consulted by the Government either before or during the negotiations.⁴⁸

Benefits of the removal of technical barriers to trade

- 9.44 The Committee received substantial evidence in support of the inclusion of the TBT chapter in the AUSFTA. The Committee appreciated the involvement of the Western Australian Government, which stated that although it did not foresee immediate gains to Australia resulting from the provisions Chapter 8, and noted that there was no means to assess the rate of progress

The establishment of a mechanism to address the development, adoption, application or enforcement of standards, technical regulations or conformity of standards, technical regulations or conformity assessment procedures is welcome.⁴⁹

- 9.45 Mr Andrew Stoler supported the inclusion of the Chapter in the Agreement by noting that the area of technical standards and regulations affecting trade in products

will be a very important area where this agreement can change the situation in the future. I am personally familiar, for example, with the operation of a mutual recognition agreement that exists between the United States and the European Community for medical devices that has made a tremendous amount of trade possible that would have been very difficult to conduct otherwise.⁵⁰

- 9.46 The Committee heard that non-tariff barriers can impede market access, demonstrating the necessity of the TBT Chapter. Mr Moretta stated that

it is fair to say that the major problems in market access for Australian industry relate to standards, technical regulations and conformity assessment procedures and the requirement

48 NIA, Annex 1.

49 WA Government, *Submission 128*, p. 5.

50 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 13.

to meet all those in a very complex market like the United States.⁵¹

- 9.47 Ms Freya Marsden, from the Business Council of Australia supported the role played by Chapter 8 provisions in the removal of non-tariff barriers to trade.

As we bring tariffs down it becomes clearer that there is a whole range of technical standards and regulations that block our companies doing well in the US. These are just as effective blockers of trade as tariffs are. We now have a system where we can move forward. For these reasons the BCA supports this agreement.⁵²

Concluding observations

- 9.48 Whilst acknowledging concerns raised, the Committee is satisfied with DFAT's assurances that the provisions of this Chapter will not require Australia to adopt US standards. Parties have agreed to use international standards as a basis for their technical regulations, to the maximum extent possible.⁵³
- 9.49 The Committee accepts that, under current practice, Australian exports face difficulty and financial expense in complying with the different standards and technical regulations which operate across the United States. The use of international standards where possible will therefore benefit Australian exporters.⁵⁴

51 Mr Remo Moretta, *Transcript of Evidence*, 2 April 2004, p. 72.

52 Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 99.

53 AUSFTA, Article 8.4(1).

54 DFAT, *Guide to the Agreement*, p. 39.

Safeguards

Introduction

- 10.1 Chapter 9 of the AUSFTA 'provides a mechanism for protecting industries in both Australia and the United States from injury from increased imports during the transition to free trade under the Agreement'.¹ The 'transition period' operates for 10 years after the entry into force of the Agreement, except where a period of tariff elimination for a particular good is stated otherwise in Annex 2-B.² The Committee understands that this general transitional safeguard differs from other safeguards applicable under Agreement in that it is applied on the basis of an 'injury test'.³
- 10.2 Parties retain their rights and responsibilities under Article XIX of GATT 1997 and the Safeguards Agreement. Article 9.5 states that the Agreement
- does not confer any additional rights or obligations on the Parties with regard to global safeguard measures, except that a Party taking a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof.⁴

1 DFAT, *Guide to the Agreement*, p. 41.

2 AUSFTA, Article 9.6.7.

3 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 20.

4 AUSFTA, Article 9.5.

- 10.3 The Committee notes that little specific evidence was received which commented on the purpose or operation of this Chapter.

The imposition of a safeguard measure

- 10.4 The Committee notes information from the *Guide to the Agreement* outlining the process by which the Parties may implement safeguard measures. During the transition period, where products from the other Party are being imported in increased quantities as a result of the reduction of tariffs under the Agreement, and this is causing or threatening serious injury to the domestic industry, then the Party suffering such injury may suspend further reductions of customs duties (tariffs) for products from the other Party, returning the tariff rate to either
- the most-favoured nation rate at the time of the decision (i.e. the rate applying to the same good from all other countries)
 - the rate that applied before the Agreement came into force, or
 - for horticultural goods, or other goods to which a seasonal tariff applies, the level that applied during the last corresponding season.⁵

Conditions and limitations

- 10.5 When applying a safeguard measure, Parties must also follow certain conditions and limitations under Article 9.2. The Committee notes that a measure can only be applied to the extent that it is necessary to prevent or remedy serious injury and to facilitate adjustment.⁶
- 10.6 The Party applying the measure must conduct an investigation in accordance with that required by the WTO, in order to justify the application of a safeguard.⁷ The investigation must be completed within one year of its initiation.⁸

5 DFAT, *Guide to the Agreement*, p. 41, AUSFTA, Article 9.1.

6 AUSFTA, Article 9.2.5(a).

7 DFAT, *Guide to the Agreement*, p. 41, AUSFTA, Articles 9.2.2 and 9.2.3.

8 DFAT, *Guide to the Agreement*, p. 41, AUSFTA, Article 9.2.4.

- 10.7 A safeguard measure can only be applied for a period of up to two years. It may then be extended only after a further investigation.⁹ The measure must only be applied during the agreed transition period,¹⁰ and can only be applied once on any given product.¹¹ Where the measure is expected to last for more than a year, the tariff is to be ‘progressively liberalised’.¹²

Provisional safeguard measures

- 10.8 The *Guide to the Agreement* states that

Where the threat of damage to an industry is particularly urgent, and delay would make the damage difficult to repair, either government may impose a safeguard measure on a provisional basis. The provisional safeguard may only apply for 200 days, during which the government is required to carry out an investigation and, where appropriate, apply a normal transitional bilateral safeguard under Article 9.2.¹³

- 10.9 The Committee notes that, where such investigation determines that the provisional safeguard measure was not justified, any tariff increases charged by a government during application of the measure must be refunded by that government.¹⁴

Compensation

- 10.10 Under Article 9.4.1, where a Party imposes a transitional safeguard measure, it must provide trade-liberalising compensation in the form of concessions on a tariff elsewhere in the Agreement. The application of the concessional tariff must occur through mutual agreement of the two parties.

9 DFAT, *Guide to the Agreement*, p. 42; AUSFTA, Article 9.2.5(b).

10 DFAT, *Guide to the Agreement*, p. 42; AUSFTA, Article 9.2.5(c).

11 DFAT, *Guide to the Agreement*, p. 42; AUSFTA, Article 9.2.6.

12 DFAT, *Guide to the Agreement*, p. 42; AUSFTA, Article 9.2.7.

13 DFAT, *Guide to the Agreement*, p. 42; AUSFTA, Article 9.3.

14 DFAT, *Guide to the Agreement*, p. 42; AUSFTA, Article 9.3.

- 10.11 Where the two Parties are unable to reach agreement on compensation arrangements, the Party whose goods are being subjected to the safeguard mechanism can

suspend the application of concessions with respect to originating goods of the other Party that have trade effects substantially equivalent to the safeguard measure.¹⁵

Global safeguard measures

- 10.12 According to the *Guide to the Agreement*, Article 9.5

commits each Party to consider excluding products from the other Party from any global safeguard measure (i.e. a safeguard measure applied to all imported products of a particular type, regardless of their country of origin, under the World Trade Organisation Agreement). Australian products may, for example, be excluded where they are not a substantial cause of the serious injury being suffered by the US industry.¹⁶

- 10.13 The Committee notes information from DFAT that in order to implement this obligation, the US will establish a process for advising the US President whether or not to exclude Australian products.¹⁷ Safeguards are also discussed in Chapter 5 of this Report.

Other remedies

- 10.14 The Committee notes that Australia and the United States will retain their rights to anti-dumping and countervailing action under WTO agreements, and that no legislative change is necessary as a result of Chapter 9 of the Agreement.
- 10.15 Textiles safeguards and Agricultural safeguards are discussed under Chapters 5 and 7, respectively, of this Report.

15 AUSFTA, Article 9.4.2.

16 DFAT, *Guide to the Agreement*, p. 42.

17 DFAT, *Guide to the Agreement*, p. 42.

Cross Border Trade in Services

Introduction

- 11.1 Chapter 10 of the Agreement adopts a three-pronged definition of ‘cross-border trade in services’ (CBTS). It is the supply of a service
- from the territory of one Party to the territory of the other Party
 - in the territory of one Party by a person from that Party to a person from the other Party or
 - by a natural person of a Party in the territory of the other Party.¹
- 11.2 According to the National Interest Analysis (NIA), the Services Chapter
- binds liberal access for Australian service suppliers, including for professional, business, education, environmental, financial and transport services. A framework to promote mutual recognition of professional services has been developed.²
- 11.3 The Regulatory Impact Statement (RIS) explains that the US regulatory regime is currently bound across most service sectors. Under the Agreement, the US cannot introduce more restrictive measures than those currently in place. There are a range of measures listed in the Agreement, whereby the US unilaterally liberalises these

1 DFAT, *Guide to the Agreement*, p. 45.

2 NIA, para. 8.

provisions, such level of liberalisation will become bound under the Agreement. The RIS states that this will

benefit important Australian services exports, such as financial and legal services, as well as other professional services such as engineering, architecture and accounting, by guaranteeing liberal access to the US market.³

- 11.4 This report will consider Chapter 10 in two sections: first, it will detail the substantive provisions in the Chapter, relating to professional and public services; second, it will focus on the audiovisual sector, particularly in regard to local content requirements under the AUSFTA. This second section will largely cover the effects of Annex I and Annex II to the Agreement.

Professional and public services

Background

- 11.5 The Committee notes the importance of the services sector for both the Australian and US economies, and the gains to be made for that sector under the Agreement. As the Business Council of Australia stated,

As two mature economies, Australia and the US rely increasingly on the production and trade of services to support their growth and welfare. The services sectors in both economies generate between 70 and 80 percent of GDP. Services industries generate most new jobs in today's advanced economies. The United States has the largest and most competitive services sector in the world and the Australian economy can benefit from closer integration in that market ... AUSFTA enhances both growth and employment in the Australian services sector. The Agreement ensures that Australian service providers receive treatment equal to other foreign service providers in the US. Progress in multilateral services liberalisation involving the US has been slow and modest. Legal benefits for the service sector under AUSFTA are immediate and comprehensive.⁴

3 RIS, p. 7.

4 Business Council of Australia, *Submission 132*, p. 3.

11.6 Despite this support for the Chapter, the Committee has heard a variety of concerns relating to its impact on the Australian services sector, including disappointment with the Chapter, claiming that it did not go far enough. The Queensland Government stated

The Queensland Government is disappointed that the AUSFTA chapter on services does not offer significant overall gains in the immediate term. For the most part, the agreement binds current levels of non-conformity with the obligations of the chapter representing a 'status quo' trade position in relation to services.⁵

11.7 In addition, the Committee received evidence expressing concern over the impact of the Agreement on the ability of governments to regulate in the public interest. These concerns will be considered in detail below.

Scope and coverage

11.8 The CBTS Chapter applies to measures adopted or maintained by a Party that affect cross-border trade in services by a service supplier of the other Party.⁶

11.9 The Chapter adopts what has been termed a 'negative list' approach, in that all measures not specifically reserved fall within the scope of the Chapter.

11.10 This approach has raised some concern among the public, particularly as it differs from the 'positive list' approach used in the GATS provisions.⁷

Core obligations

Non-discrimination

11.11 Chapter 10 imposes obligations on both Parties to accord National Treatment and Most-Favoured Nation (MFN) Treatment to services and service suppliers of the other Party.⁸

5 Queensland Government, *Submission 206*, p. 10.

6 AUSFTA, Article 10.1.1.

7 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 19; Ms Sharan Burrows, *Transcript of Evidence*, 20 April 2004, p. 48; Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 34.

8 DFAT, *Guide to the Agreement*, p. 46.

- 11.12 Under the National Treatment provision of Article 10.3, Parties must ‘accord to service suppliers of the other Party treatment no less favourable than it accords, in like circumstances, to its own service suppliers.’
- 11.13 Article 10.3 states that Parties are to extend MFN treatment to suppliers of the other Party. That is, it shall treat them no less favourably than it does service suppliers of a non-party, in like circumstances.
- 11.14 The Australian Services Roundtable criticised the provisions as limited⁹, but admitted that it was difficult to ascertain their full benefit because of the negative list approach. Ms Jane Drake-Brockman stated that
- National treatment is a very important thing to achieve for all service providers. To what extent is this a significant achievement? The answer to that is: to what extent we have achieved in this agreement bindings from the US for national treatment that we did not already have under the WTO General Agreement on Trade in Services. Because the FTA has a negative list approach and the WTO has a positive list approach, it requires some analysis to actually work out the answer to that question. It is clear that in the case of the United States we have achieved national treatment on half a dozen or so sectors that we did not have national treatment commitments to in the WTO—some aspects of transport, some aspects of communication, certain business services, some aspects of R&D, education; it would require me to make further analysis, but some aspects of environmental services and energy services also.¹⁰
- 11.15 Ms Drake-Brockman also advised that Australia had entered into bindings in relation to water supply, postal and courier services, above its WTO commitments.¹¹
- 11.16 However, the Committee notes evidence received in support of these provisions, stating that they represent ‘substantial practical benefits to Australian services exporters’¹² and are a

9 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 92-93.

10 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 92-93.

11 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 92-93.

12 Australian Pensioners and Superannuants League, *Submission 30*, p. 13.

potentially significant acceleration of liberalisation for those services where no such commitment was given under the World Trade Organisation (WTO) General Agreement on Trade in Services.¹³

- 11.17 On this basis, the Committee notes the achievements made for Australian service suppliers under the MFN and national treatment provisions.

Market access

- 11.18 Under Article 10.4(a), Parties are prohibited from

placing limits, either on the basis of a regional subdivision or on the basis of its entire territory, on:

- the number of service suppliers;
- the value of service transactions or assets;
- the number of service operations or the quantity of services output; or
- the number of natural persons that may be employed in a particular service sector or that a service supplier may employ.¹⁴

- 11.19 Article 10.4(b) prohibits Parties from restricting or placing requirements on the type of legal entity through which a supplier may supply a service. The Committee heard evidence that

the market access obligation which is intended to prevent quantitative restrictions (such as caps on the number of providers permitted to operate in a particular sector) appears to have been made somewhat redundant due to the reservation that both parties have taken.¹⁵

- 11.20 However, the Committee notes that, whilst the Agreement did not achieve increased market access for suppliers for providers of professional services, evidence suggests it provides

frameworks for improving a range of areas. We believe that is a foot in the door, an important gain and above what we would have got through, say, the WTO process.¹⁶

13 Australian Chamber of Commerce and Industry, *Submission 133*, p. 1.

14 DFAT, *Guide to the Agreement*, p. 47.

15 Queensland Government, *Submission 206*, p. 10.

16 Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 101.

Local presence

- 11.21 Under Article 10.5, Parties are prohibited from requiring that service suppliers of the other Party establish or maintain a representative office or any form of enterprise in its territory, or that it be a resident in its territory, as a condition for the cross-border supply of a service.

Non-conforming measures

- 11.22 Article 10.6 allows Parties to maintain or adopt measures that are not consistent with the market access, national treatment, MFN treatment and local presence provisions. Such measures are identified in Schedules for each Party contained in Annex I and Annex II to the Agreement.
- 11.23 Issues arising in relation to regulation in the public interest under this Article are discussed below. The section on Local Content deals with the non-conforming measures for the audiovisual sector.

Domestic regulation

- 11.24 Article 10.7.1 provides that where a Party requires a service supplier to be authorised in order to supply such service, the competent authorities of that Party must, within a reasonable period of time after submission of a completed application, inform the applicant of the decision concerning the application.¹⁷
- 11.25 Article 10.7.2 requires that ‘a Party do its best to make sure that authorisation requirements do not create unnecessary barriers to trade in services.’¹⁸ It must ‘endeavour to ensure’ that its requirements are
- a) based on objective and transparent criteria, such as competence and the ability to supply the service;
 - b) not more burdensome than necessary to ensure the quality of the service; and
 - c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.¹⁹
- 11.26 Article 10.7.3 provides that if new obligations in respect of domestic regulation arise through GATS or other international negotiations in

17 AUSFTA, Article 10.7.1; DFAT, *Guide to the Agreement*, pp. 48-49.

18 DFAT, *Guide to the Agreement*, p. 49.

19 AUSFTA, Article 10.7.2.

which both Parties participate, then Article 10.7 will be amended to incorporate these.

11.27 Ms Drake-Brockman stated that Article 10.7

is limited in scope, but the fact that it is included at all is an achievement for the Australian government because it is not something which the US government would naturally have wanted to include.²⁰

11.28 The Committee notes concerns raised in relation to the criteria in Article 10.7.2. These will be discussed below in relation to public interest regulation.

Transparency in development and application of regulations

11.29 Article 10.8 exists in addition to obligations on transparency in Chapter 20 of the Agreement. Article 10.8.1 requires that Parties ‘maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding the regulations relating to the subject matter of this Chapter’.

11.30 If a Party does not give advance notice of, and opportunity to comment on, proposed new laws, regulations, procedures or rulings in relation to a matter in the CBTS Chapter, as it is required to do under Chapter 20, then, under Article 10.8.2, it must explain why it did not do so.

11.31 Under Article 10.8.3, each time a Party adopts final regulations relating to Chapter 10, it must, where possible, give a written response to ‘substantive’ comments received in relation to the proposed regulation.²¹

11.32 Parties must provide notice of the requirements of final regulations before they come into effect, where possible.²²

Transfers and payments

11.33 Under Article 10.10.1, Parties must permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory. Article 10.10.2 provides that Parties must allow such transfers and payments to be ‘made in a

20 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 93-94.

21 DFAT, *Guide to the Agreement*, p. 49.

22 AUSFTA, Article 10.8.4.

freely useable currency ... at the prevailing market rate of exchange.’²³ Under Article 10.10.3, a Party can still ‘prevent or delay such transfers through the equitable, non-discriminatory, and good faith application’ of various laws, including those relating to bankruptcy, insolvency, dealings in securities, and criminal or penal offences.

Express delivery services

- 11.34 ‘Express delivery services’ are defined under Article 10.12.1 as ‘the collection, transport and delivery of documents, printed matter, parcels and other goods on an expediated basis while tracking and maintaining the control of the items throughout the supply of the service.’ Air transport services, services supplied in the exercise of government authority and maritime transport services are not included, and nor are services reserved exclusively for supply by Australia Post.²⁴
- 11.35 Under Article 10.12.2, where one Party believes that the other is not maintaining the level of market access for express delivery services that existed at the time the FTA was signed, then the Parties must consult, and the other Party must provide information in response to inquiries about the level of access and other related matters.²⁵
- 11.36 Each Party confirms its intention to prevent the use of revenues derived from its monopoly postal services to confer an advantage to its own or any other suppliers’ express delivery service in a manner inconsistent with the Party’s law and practice in relation to the monopoly supply of postal services.²⁶

Denial of benefits

- 11.37 Under Article 10.11, the benefits of the Chapter may be denied to a service supplier of the other Party where the service supplier is an enterprise owned by persons of a non-Party, with whom the denying Party does not maintain diplomatic relations, or has in place sanctions with the non-Party or the person of the non-Party that prohibit transactions with the enterprise.²⁷

23 DFAT, *Guide to the Agreement*, pp. 50-51.

24 AUSFTA, 10.12.2, and Footnote 10- 2.

25 DFAT, *Guide to the Agreement*, p. 51.

26 DFAT, *Guide to the Agreement*, p. 51.

27 DFAT, *Guide to the Agreement*, p. 51.

- 11.38 A party may also deny benefits conferred under Chapter 10 to a serviced supplier of the other party where that supplier is an enterprise is owned or controlled by persons of a non-Party or of the denying Party, and has no substantial business activities in the territory of the other Party.²⁸

Movement of people

- 11.39 A particular disappointment noted by the Committee is that the Agreement did not make any progress on lowering barriers to the movement of business people.²⁹ The Committee received much evidence on the difficulties that face Australian service providers in gaining entry to the United States. Ms Drake-Brockman of the Australian Services Roundtable stated that such difficulty

has been the experience of a number of different professional service bodies. That is quite consistent. That leads me to comment, if I may, on the absence of a chapter in the FTA on temporary movement of businesspeople, which the services industries were very much looking for. The Australian government also fought very hard to achieve that but was unable to do so, given the security priorities in the United States. Nevertheless, as I have said, if what we are looking for in this agreement is real, new market access opportunity by which to measure some substantial positive impact then the absence of that chapter is really a concern and a problem. In the service industries, firstly, you have to get over the border—you have to get your visa—and, secondly, you have to be able to deliver your service.³⁰

- 11.40 Similarly, Mr Ian Peek of the CPA Australia stated that

In the survey that we have done of our members, especially those who are working over in the US, we saw that the issues about entry and access to the US both for themselves in terms of securing work visas and for their partners continue to be significant.³¹

28 AUSFTA, 10.11.2 ; DFAT, *Guide to the Agreement*, p. 51.

29 See Mr Alan Oxley, *Transcript of Evidence*, 19 April 2004, pp. 25-26; Mr Rob Durie, *Transcript of Evidence*, 19 April 2004, p. 28; Ms Karen Hall, *Transcript of Evidence*, 23 April 2004, p. 15; Mr Rob Rawson, *Transcript of Evidence*, 4 May 2004, p. 46; WA Government, *Submission 128*, p. 6; Queensland Government, *Submission 206*, p. 11.

30 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94.

31 Mr Ian Peek, *Transcript of Evidence*, 20 April 2004, p. 53.

- 11.41 Several witnesses also felt that the lack of progress on this issue was a result of the current security environment.³² However the Committee also received evidence that the reason this was not included in the Agreement was due to a strong congressional view that the movement of business people should not be part of free trade agreements, as it was out of the jurisdiction of the trade negotiators.
- 11.42 The Committee feels that this issue needs to be progressed as a matter of urgency, within the Professional Services Working Group (see recommendation at paragraph 11.56).

Mutual Recognition

- 11.43 Countries may require the fulfilment of certain conditions, such as authorisation, licensing or certification, before a service supplier is authorised to supply a service. Countries may recognise, through formal agreements or unilaterally, the education or experience obtained in another country, or the meeting of that country's requirements or granting of its licences or certifications.³³
- 11.44 Under Article 10.9.1, Parties are not prevented from extending such recognition to persons of other countries. However, under Article 10.9.4, such recognition must not constitute 'a means of discrimination between countries in the application of its requirements'³⁴ or a 'disguised recognition on trade in services'.³⁵
- 11.45 Where a Party extends such recognition to persons of a non-Party, it is not required to accord similar recognition to persons of the other Party under MFN Treatment obligations.³⁶ It must, however, give the other Party an opportunity to demonstrate that it should also be granted such recognition.³⁷
- 11.46 Article 10.9.5 and Annex I0-A provide a formal mechanism by which the two Parties can encourage recognition of their licensing or certification of professional suppliers.³⁸

32 Mr Rob Rawson, *Transcript of Evidence*, 4 May 2004, p. 46; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 93-94; Mr Ian Peek, *Transcript of Evidence*, 20 April 2004, p. 53; Mr Alan Oxley, *Transcript of Evidence*, 19 April 2004, pp. 25-26.

33 DFAT, *Guide to the Agreement*, p. 50.

34 DFAT, *Guide to the Agreement*, p. 50.

35 DFAT, *Guide to the Agreement*, p. 50.

36 AUSFTA, 10.9.2; DFAT, *Guide to the Agreement*, p.50.

37 AUSFTA, 10.9.3, DFAT, *Guide to the Agreement*, p. 50.

38 DFAT, *Guide to the Agreement*, p. 50.

- 11.47 The Committee heard a number of different opinions on the issue of mutual recognition. The Australian Vice-Chancellors' Committee explained the current situation with regard to professional recognition.

Australian educated and trained professionals in many fields often experience considerable difficulty in having their qualifications and experience acknowledged and accepted by US professional organisations, institutions, and licensing bodies. These restrictions tend to be enshrined in professional, state or federal regimes. There are also similar issues in reverse for US graduates gaining recognition in Australia.³⁹

- 11.48 The Australian Chamber of Commerce and Industry expressed support for the Agreement, stating that the outcome under the CBTS Chapter would mean that

an Australian services exporter whose qualifications are recognised in Australia — for example, architects, engineers, lawyers and medical practitioners — will have an entitlement to practice in the United States.⁴⁰

- 11.49 The Committee received evidence that the Agreement did not go far enough in relation to the difficulties faced by Australian professionals in gaining recognition across the US state regulatory regimes. CPA Australia detailed to the Committee the experience of its members.

One of the major problems for our members who are eligible to practise in the US under our reciprocity agreement—and which was raised earlier this morning—is the current US state based licensure and practise rules, which are different for each state. A US CPA who registers with CPA Australia can work anywhere in Australia—that is, they enjoy national recognition. In contrast, the Australian CPA who meets all their qualification requirements then faces the problem of being recognised in a particular state.

The problem arises because, while the states accept the US uniform CPA exam as the basis for practising in the US, for Australians it is different. The international qualifying exam, which the US sets, is not accepted by all states in the US. At

39 Australian Vice-Chancellors' Committee, *Submission 189*, p. 13.

40 Australian Chamber of Commerce and Industry, *Submission 133*, p. 1.

present, 31 of the 50 states will accept our members who meet these specified requirements.⁴¹

11.50 Ms Drake-Brockman supported that claim, agreeing that

it is very difficult for professional service providers to operate. The FTA does not do anything immediately about those issues, nor could it. However, the inclusion of this article does indicate to the US government that Australia is serious about pushing this envelope and it would like both governments to help industry to push that envelope. We would have to say that we are pleased to have this new process in place; it does not deliver us anything today, but we have a process.⁴²

11.51 In support of the outcome regarding mutual recognition, Mr Alan Oxley of the Australian Business Group for a Free Trade Agreement with the United States stated that the Agreement creates a framework to address the issue, which

was probably the only way to do it. If you held up the agreement to secure a negotiation on mutual or cross-recognition of all of these professional qualifications, it would probably have taken 20 years to negotiate ... There is a framework agreement which now creates a process to do it. In this respect, I think that the acid test will come from people watching it—the scrutiny from parliament and the private sector seeing that the government actually makes an effort to give this thing a bit of a push-along. It is just the sort of thing that could actually die through being an endless bureaucratic process.⁴³

Professional Services Working Group

11.52 Annex 10-A provides for the establishment of the Professional Services Working Group. The Working Group must report to the Parties within two years of the entry into force of the Agreement, with any recommendations for initiatives to promote mutual recognition of standards and criteria.⁴⁴

41 Mrs Ann Johns, *Transcript of Evidence*, 20 April 2004, p. 51.

42 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94.

43 Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, pp. 26-27.

44 AUSFTA, Annex 10-A.9; DFAT, *Guide to the Agreement*, p. 50.

- 11.53 The Working Group will look at the provision of professional services, focusing particularly on ‘exploring ways to foster the development of mutual recognition arrangements among the relevant professional bodies, and on the scope to develop model procedures for the licensing and certification of professional service suppliers.’⁴⁵
- 11.54 Evidence received by the Committee related largely to the possibility of progress on the issues of mutual recognition and the movement of people, through the Working Group Framework.⁴⁶
- 11.55 Notwithstanding the failure of the CBTS Chapter to address these issues, the Committee heard wide support for the establishment of the Working Group.⁴⁷ It was described as a key outcome of the Agreement, the most important of all consultative processes established.⁴⁸
- 11.56 The Committee notes statements received that the success of the Working Group will depend upon the Parties to encourage consultation between professional bodies.⁴⁹

Recommendation 10

The Committee recommends that the issues of mutual recognition of qualifications and movement of business people be made a priority within the Professional Services Working Group.

45 DFAT, *Guide to the Agreement*, p. 50.

46 Ms Melinda Cilento, *Transcript of Evidence*, 20 April 2004, p. 101; Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 102; Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 13; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94; Business Council of Australia, *Submission 132*, p. 4; Australian Vice-Chancellors’ Committee, *Submission 189*, p. 13; Queensland Government, *Submission 206*, p. 10.

47 Ms Melinda Cilento, *Transcript of Evidence*, 20 April 2004, p. 101; Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 102; Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 13; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94; Business Council of Australia, *Submission 132*, p. 4; Australian Vice-Chancellors’ Committee, *Submission 189*, p. 13; Queensland Government, *Submission 206*, p. 10.

48 Queensland Government, *Submission 206*, p. 10; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94.

49 Queensland Government, *Submission 206*, p. 10.

Recommendation 11

Notwithstanding the operation of the Professional Services Working Group, the Committee recommends that the Australian Government pursue through all other available diplomatic channels the issues of the mutual recognition of qualifications and the movement of business people between Australia and the United States.

Public and essential services

11.57 The Committee has heard and received a large amount of evidence which has raised concerns about the effect of the CBTS Chapter on the ability of Australian governments to regulate for services in the public interest.⁵⁰

Domestic regulation

11.58 The Committee notes concerns in regard to the requirement under Article 10.7.2 that qualifications, licensing and standards are ‘not more burdensome than necessary’ and do not constitute an ‘unnecessary barrier to trade’. It was presented to the Committee that these tests are ambiguous.⁵¹

11.59 Particularly worrisome to those individuals and organisations that expressed concern in this area is the use of these criteria in relation to the licensing requirements of health professionals and those supplying environmental services.⁵²

50 See for example: Ms Jacqueline Loney *Submission 86*; Ms Kerry Brandy, *Submission 168*; Mudgee District Environment Group, *Submission 58*; Annette Bonnici & Mike Hanratty, *Submission 35*; C.A. Roberts, *Submission 6*; Ms Katherine Martin, *Submission 40*; Mr Robert Downey, *Submission 1*; Ms Isabel Higgins, *Submission 46*; Mr Bill McClurg, *Submission 48*; Ms Pauline Stirzaker, *Submission 57*; Mr Jonathon Schultz, *Submission 51*; Catholics in Coalition for Justice and Peace, *Submission 59*; Mr John Morris, *Submission 73*; Mr Niko Leka, *Submission 89*; Mr Liam Cranley, *Submission 113*; Quaker Peace & Justice, *Submission 124*; Uniting Care (NSW/ACT), *Submission 169*; Conference Leaders of Religious Institutes NSW, *Submission 196*; Mr Tony Healy, *Submission 203*.

51 Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 30; Australian Council of Trade Unions, *Submission 130*, pp. 4-5; Mr W. Smith, *Transcript of Evidence*, 6 May 2004, p. 71; AFTINET, *Submission 68*, p. 13.

52 See Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 22; Mr Wayne Smith, *Transcript of Evidence*, 6 May 2004, p. 66; Australian Pensioners and Superannuants League, *Submission 30*, p. 6; StopMAI (WA) Coalition, *Submission 95*, pp. 7-8.

Annex II measures

- 11.60 Under Article 10.6, Australia has listed a number of sectors in Annex II as non-conforming measures, including social security, social insurance, social welfare, public education, public training, health and child care. These measures are reserved 'to the extent that they are established or maintained for a public purpose' (Annex II-4).
- 11.61 Australia has also reserved the right to 'adopt or maintain any measure with respect to primary education' (Annex II-10). Further, it may 'adopt or maintain any measure according preferences to any indigenous person or organisation for providing for the favourable treatment of any indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the services sector' (Annex II-1). The impact of the Agreement on Indigenous Australians was discussed at Chapter 3, and also arises in the Intellectual Property Chapter of this Report (Chapter 16).
- 11.62 The Committee notes concerns of the State Public Services Federation that the requirement that services are reserved to the extent that they are 'established or maintained for a public purpose' is ambiguous and that it is difficult to envisage how this would be assessed in practice.⁵³ Friends of the Earth Melbourne stated that the ambiguity may result in the term 'public purpose' being construed narrowly.⁵⁴
- 11.63 The Committee heard concerns that public health care may not be completely exempt. It was argued that privatisation of health services would, in the event of a dispute, support the conclusion that they are not 'established or maintained for a public purpose'.⁵⁵ A similar argument was raised for other services that are provided on a privatised or mixed public/private basis for the benefit of the public.⁵⁶
- 11.64 Concerns were raised over the impact of the Agreement on Australia's tertiary education sector, in relation to increased access under the Agreement.⁵⁷ However, the Committee notes a submission from the Australian Vice-Chancellors' Committee stating that 'on

53 CPSU-State Public Services Federation *Submission 80*, p. 4.

54 Friends of the Earth Melbourne, *Submission 119*, p. 12.

55 Australasian Society for HIV Medicine, *Submission 75*, p. 4; Doctors Reform Society, *Submission 87*, pp. 4-5.

56 Victorian Government, *Submission 91*, pp. 3-4.

57 Australian Pensioners and Superannuants League, *Submission 30*, p.13; Mr Phillip Bradley, *Submission 84*; Ms Annie Nielsen, *Submission 96*; NSW Teachers Federation, *Submission 205*, p.1.

analysis, the services provisions of the Agreement provide for little substantive change in the operation of university education in both Australia and the United States.⁵⁸

Services supplied in the exercise of government authority

- 11.65 Services supplied in the exercise of government authority are exempt from the Agreement under Article 10.1.4(e). Services must be supplied ‘neither on a commercial basis, nor in competition with one or more service suppliers’.
- 11.66 The Committee heard concerns that this definition of government services is ambiguous, considering that many services are operated on a mixed public/private basis and that government services are often in competition with private service-suppliers.⁵⁹

Public utilities and transport

- 11.67 Of particular concern was the ability of governments to freely regulate for essential services under the Agreement. The Queensland Government submitted that public utilities are
- supplied in an environment where commercial suppliers exist, and to some extent compete, with government, these services do not meet the criteria of ‘services supplied in the exercise of government authority’.⁶⁰
- 11.68 The Committee notes the grave concern expressed to it regarding the regulation of water supply. It was stated that under the Agreement, governments may be restricted from regulating water supply for public policy purposes to limit who is able to provide services and how they may be provided.⁶¹ Similar concerns were raised in relation to the provision of electricity⁶² and transport services.⁶³

58 Australian Vice-Chancellors’ Committee, *Submission 189*, p. 13.

59 Ms Thoedora Templeton, *Transcript of Evidence*, 5 May 2004, p. 35; National Civic Council, WA, *Submission 5*, pp. 3-4; AFTINET, *Submission 68*, pp. 12-13; CPSU-SPSF, *Submission 80*, p. 4; Victorian Government, *Submission 91*, pp. 3-4.

60 Queensland Government, *Submission 206*, p. 6.

61 Queensland Government, *Submission 206*, p. 7. See also: WA Government, *Submission 128*, p. 9; Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 35; Mr Gregory McLean, *Transcript of Evidence*, 6 May 2004, pp. 58-59; Australian Pensioners and Superannuants League, *Submission 30*, p. 13; Australian Services Union, *Submission 43*, p. 13; AFTINET, *Submission 68*, p. 14; Ms Dee Margetts MLC, *Submission 74*, pp. 6-7; The Grail Centre, *Submission 97*, p. 8; Ms Templeton, *Transcript of Evidence*, 5 May 2004, p. 35.

62 Queensland Government, *Submission 206*, p. 7.; WA Government, *Submission 128*, p. 9; Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 35; AFTINET, *Submission 68*,

11.69 The Committee understands these concerns. However, it notes information available from DFAT which states that

There is nothing in AUSFTA that would undermine the right of governments, at any level, to adopt measures for the management of water or for the sustainable management of any other natural resource. There is no obligation to privatise such services, nor anything in AUSFTA inhibiting proper regulation of water services for health or environmental reasons. AUSFTA would require any company with monopoly rights to supply a particular service, such as water, in a particular market to treat companies from the other country on a non-discriminatory basis, and that it should not abuse its monopoly position. That is fully consistent with the approach taken in Australia's current legislation, e.g. under the Trade Practices Act.⁶⁴

and

There is nothing in AUSFTA that would undermine the right of governments to adopt appropriate regulations that are in the public interest, for example, to achieve health, safety or environmental objectives. Nor does it require the privatisation of government services. Public services provided in the exercise of governmental authority will also be excluded from the scope of the services chapter.⁶⁵

Local content

11.70 Chapter 10 of the Agreement also applies to television, radio and other broadcasting and audiovisual services, except to the extent that these are excluded as non-conforming measures under Annex I and Annex II of the Agreement.

p. 14; The Grail Centre, *Submission 97*, p. 8; Ms Thoedora Templeton, *Transcript of Evidence*, 5 May 2004, p. 35.

63 Australian Rail, Tram and Bus Industry Union, *Submission 45*, pp. 1-2; AFTINET, *Submission 68*, p. 13; WA Government, *Submission 128*, p. 9.

64 DFAT, AUSFTA - Frequently Asked Questions, http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html, viewed on 15 June 2004.

65 DFAT, AUSFTA - Frequently Asked Questions, http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html, viewed on 15 June 2004.

- 11.71 Under Article 10.6, Articles 10.2 (National Treatment), 10.3 (Most-Favoured-Nation), 10.4 (Market Access) and 10.5 (Local Presence) do not apply to existing non-conforming measures set out by Australia in its Schedule to Annex I.⁶⁶ Further, they do not apply to measures adopted with respect to sectors, sub-sectors or activities set out in Australia's Schedule to Annex II.⁶⁷
- 11.72 In Annex I-14, Australia has listed as a non-conforming measure the requirement for transmission quotas for local content on free-to-air television broadcasting services. Australia is able to maintain its existing requirement of a 55 per cent local content quota on programming and 80 per cent quota on advertising. These quotas apply to both analogue and digital free-to-air commercial TV, but not to multichanneling. Subquotas for particular program formats (such as drama or documentary) may be applied within the 55 per cent quota.⁶⁸
- 11.73 Under Annex II, Australia has listed a number of reservations relating local content requirements for the broadcasting and audiovisual sectors. These allow the Australian Government to adopt or maintain certain measures in relation to digital multichanneling on free-to-air commercial television, subscription television, radio broadcasting, interactive audio and/or video services and future co-production arrangements with other countries.⁶⁹
- 11.74 The provisions relating to local content have received a high level of public interest throughout the negotiation period and since conclusion of the Agreement.⁷⁰ Particular concerns will be detailed in the below sections.

Local content and its impact on culture

- 11.75 The Committee heard evidence on the importance of local content requirements for the Australian television and music industries and

66 AUSFTA, 10.6.1(a)(i).

67 AUSFTA, 10.6.2.

68 AUSFTA, Annex I-14. See also DFAT Backgrounder: '*The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*' http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html viewed on 9 June 2004.

69 AUSFTA, Annex II-6-9. See also DFAT Backgrounder: '*The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*' http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html viewed on 9 June 2004.

70 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 38.

for Australian culture, to the extent that ‘successive federal, state and local governments in Australia have recognised that access to Australian arts, entertainment and audiovisual product is essential for the well being of this society.’⁷¹

- 11.76 Dr Patricia Ranald from Australian Fair Trade and Investment Network (AFTINET) reiterated to the Committee that local content rules are a ‘cultural issue’

Australia does have a flourishing cultural industry, partly because we have Australian content rules and because we are a small market. Most countries have local content rules for cultural reasons – to ensure there is local content in the media. Local content does not just mean Australian content generally; it also ensures that Indigenous voices and voices from ethnic communities are heard – that the specific and varied cultures in Australia are reflected in the media.⁷²

- 11.77 The Committee received numerous submissions from concerned individuals and groups detailing the importance of the presence of Australian ‘stories and voices’ on television and radio.⁷³ The Australian Pensioners and Superannuants League stated that

Australia's cultural identity is preserved through Australian content rules, a vital support that ensures Australian stories are told on film and television in reinforcement of our own unique cultural identity. These rules also help to retain a local skills base that enables quality, culturally supportive films and television programs to be made here. The removal of

71 Media, Entertainment and Arts Alliance, *Submission 67*, p. 6.

72 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 37.

73 Ms Nizza Siano, *Submission 54*; Unfolding Futures Pty Ltd, *Submission 64*; Evelyn Rafferty, *Submission 25*; Ms Thea Ormerod, *Submission 29*, on behalf of 20 signatories; Mr Peter Youll, *Submission 32*; Ms Dee Margetts, *Submission 74*, p. 7 Ms Jacqueline Loney, *Submission 86*; AMWU, *Submission 125*; Mrs Catherine Dahl, *Submission 131*; Ms Kerry Brandy, *Submission 168* Katherine Martin, *Submission 40*; Annette Bonnici & Mike Hanratty, *Submission 35*; Ms Nicole da Silva, *Submission 55*; Ms Pauline Stirzaker, *Submission 57*; *Mudgee District Environment Group*, *Submission 58*; Mr John Koch, *Submission 65*; Mr Oliver Baudert, *Submission 82*; Mr Niko Leka; *Submission 89*; Stop MAI (WA) Coalition, *Submission 95*; Mr Zenon ‘Butch’ Sawko, *Submission 104*; Ms Luci Temple, *Submission 107*; Ms Jane Seymour, *Submission 109*; Mr John Campbell, *Submission 110*; Ms Vera Raymer OAM, *Submission 118*; Friends of the Earth, Melbourne, *Submission 119*; Quaker Peace & Justice, *Submission 124*; Ms Ruth Williams, *Submission 139*; Mr Bruce Kirkham, *Submission 150*; APRA/AMCOS, *Submission 156*; Moonlight Cactus Music, *Submission 166*; Uniting Care (ACT/NSW), *Submission 169*; Ms Isabel Higgins, *Submission 46*; Catholics in Coalition for Justice and Peace, *Submission 59*.

these rules would be an attack on Australia's culture and would also destroy a vital and growing industry.⁷⁴

- 11.78 Appearing before the Committee as a member of the Media, Entertainment and Arts Alliance (MEAA), Australian performer Ms Bridie Carter spoke emphatically of the importance of Australian film and television to the national psyche.

Australians like to watch and hear about Australian stories and Australian points of view. We like it because we can all relate to it. It reflects our culture, our identity, our spirit and our sense of belonging. Movies like *Lantana* and *Shine* resonate with us because they have Australian faces telling Australian stories.⁷⁵

- 11.79 The MEAA expressed to the Committee the unique position of the arts, entertainment and audiovisual sector in society and in relation to trade.

the product, the manufactured goods and services created by and delivered by the cultural industries cannot be compared with the product or manufactured goods created by any other industry. Cultural products and services emanate from and are determined by the society from which they arise. Some of its manufactured goods are tangible and have a physical permanence – for instance, literature and paintings. Others are ephemeral and can only be experienced in the moment – for instance, plays, opera and dance – and, whilst they can be repeated and recreated, every performance will be a unique experience. And yet others can also be experienced in the moment – for instance, films and television programs – but can be experienced time and again.⁷⁶

- 11.80 The Committee acknowledges the position of the audiovisual sector in Australian society as an instrument for the expression and reinforcement of the diversity of Australian culture. In agreement with those who appeared before or made submissions to the Committee on the importance of local content, the Committee does not wish to see any lowering of current standards.

74 Australian Pensioners and Superannuants League, *Submission 30*, p. 12.

75 Ms Bridie Carter, *Transcript of Evidence*, 19 April 2004, pp. 66-67.

76 Media, Entertainment and Arts Alliance, *Submission 67*, p. 5.

The Australian audiovisual market

- 11.81 The Committee acknowledges the vibrancy of the Australian audiovisual sector, noting that in NSW alone
- the combined value of the film, television and video industries ... is now worth \$4 billion to the State's economy, a 54 per cent jump over the past five years. The industry accounts for 55,000 direct and indirect jobs, proving to be one of the fastest growing sources of employment ... In addition, the industry has injected \$10 million into regional economies over the past five years and directly employed almost 3,000 local people on local productions.⁷⁷
- 11.82 However, the Committee heard evidence that the Australian film and television industry will be adversely affected by any lowering of local content standards. The Committee understands that this assertion is based upon the perception that, under the AUSFTA, the industry will be threatened by increased imports of US product at the expense of Australian audiovisual products.
- 11.83 Mr Simon Whipp, National Director of the MEAA, advised the Committee of the threat that increased export of American film and television would impose. He stated that American product is sold to Australian broadcasters at much cheaper rates than it costs to produce Australian programs, as the American producers have recovered their production costs in America and are exporting at a profit. Conversely, Australian producers recover only a fraction of the cost of production in Australia, and export (mainly to Europe rather than the US) in order to make up the balance.⁷⁸ This claim was supported by evidence that
- an American television drama program that costs US\$1 million per episode to produce can recoup that investment within America and be sold to an Australian network for between US\$20 000 and US\$65 000 per hour. Conversely, an Australian program that might cost US\$320 000 to produce per episode can expect a sale to an Australian broadcaster to cover only half the investment and is therefore reliant on international sales to recoup the full investment.⁷⁹

77 NSW Government, *Submission 66*.

78 Mr Simon Whipp, *Transcript of Evidence*, 19 April 2004, p. 67.

79 Media, Entertainment and Arts Alliance, *Submission 67*, p. 9.

- 11.84 The Committee heard that this disparity exists despite the fact that Australia produces film and television considerably more cheaply than the American industry does. The MEAA contend that the Australian market is ‘too small to sustain a diverse range of program types and recoup production costs’, giving the American market a ‘competitive advantage that Australia will never overcome’.⁸⁰
- 11.85 In its submission to the Committee, the Music Council of Australia addressed the link between Australian culture, the production of Australian films and government assistance.

Our films are produced very economically, very efficiently. But given the realities of the world market, this does not, of itself, ensure that they are produced nor shown. Nor is it the primary reason for their production or exhibition. They affirm, reflect and develop national identity and character - a bipartisan government aspiration as revealed in the language of the charters of the ABC, the Australia Council, the Australian Broadcasting Authority/Broadcasting Services Act. We need them because in them, we see ourselves. But the market alone will not ensure production of Australian film. Government intervention is needed, as the government acknowledges.⁸¹

- 11.86 The Committee inquired as to the necessity of government intervention in the industry. Mr Scot Morris of the Australasian Performing Rights Association (APRA) and Australasian Mechanical Copyright Owners Society (AMCOS) stated that this was a result of the cost differences outlined above, rather than a product failure.

We believe that there is a systemic market failure in terms of particular audiovisual product and broadcasting, comparing our market to the United States, and that is why to date there have been mechanisms to ensure that Australian content is available to Australian audiences. We believe that it has been necessary for governments to intervene to ensure that those products do have Australian content and that investment is made in Australian content, because market forces alone will not provide that result.⁸²

80 Media, Entertainment and Arts Alliance, *Submission 67*, p. 7.

81 Music Council of Australia, *Submission 31*.

82 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 26.

- 11.87 It is claimed that in the absence of local content rules, there will be a decline in the production of Australian drama programs as they are unable to compete with those imported from the US. It was submitted to the Committee that this has occurred in New Zealand and Canada.⁸³

Measures to ensure local content in the audiovisual sector

- 11.88 Despite claims by industry groups, community organisations and concerned individuals, DFAT has advised the Committee that the AUSFTA will not adversely affect quotas for local content in Australian broadcasting services. According to the NIA, Australia 'retains the power to regulate for Australian content, not only in existing forms of media, but also, where necessary, in new media.'⁸⁴ Similarly, Mr Deady informed the Committee that

we have negotiated a very good outcome for the Australian industry. The current local content requirements are fully preserved under the agreement and we have also ensured a large amount of flexibility for future governments to make sure that there is adequate Australian content in all forms of potential new media.⁸⁵

- 11.89 DFAT provided the Committee with an overview of the provisions of the AUSFTA relating to the audiovisual sector

we have preserved the local content requirements on free-to-air television—the 80 per cent advertising and 55 per cent local content on the commercial stations. We have introduced the capacity to extend those local content requirements as we move into a new era of perhaps multichannelling on free-to-air television. We have some existing constraints on pay television. We have flexibility for future governments to extend those requirements on pay television quite substantially in the future. In the area of the so-called new media, the things that we perhaps do not know about as fully, we have a capacity here for the government of Australia to make a finding. If it is a determination that there is inadequate Australian content in some of this new media in

83 Media, Entertainment and Arts Alliance, *Submission 67*, p. 9.

84 NIA, para. 8.

85 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 74.

the future, then a future government can introduce measures to ensure there is adequate local content on that technology.⁸⁶

11.90 The Australian Coalition for Cultural Diversity (ACCD), however, disputes DFAT's analysis. The Coalition argued before the Committee that regulation under the Agreement represents a 'practical standstill' for free-to-air and pay television. Further, it was stated that cinema, video stores and other media currently are, under the Agreement, all exempt from future government regulation.⁸⁷

11.91 The Committee questioned DFAT representatives about claims in the US report of the Advisory Committee for Trade Policy and Negotiations that the US has gained increased market access for US film and television programs. Dr Milton Church responded that

Essentially what they are talking about here is the annex 2 reservation. The whole point here is what it gives to the US: some certainty about the regulatory environment which US service providers are going to face in the Australian market in the future ... what this does, essentially, through these bindings, is to continue to allow Australian governments into the future not only to maintain existing local content requirements but to respond to changes in the market and changes in technology. But there are certain limits. We do not have a totally free hand. We cannot go to a situation in which we ban all the US content. Those sorts of commitments do give some certainty of service providers in the United States.⁸⁸

11.92 The Committee received submissions from the Governments of the ACT, South Australia and Western Australia expressing concern over any potential restriction on future regulation of local content.⁸⁹

Annex I measures

Free to air television broadcasting

11.93 Under Annex I of the Agreement, Australia has maintained its transmission quota on free to air commercial television, for both analogue and digital broadcasting. This has two aspects. Firstly, it includes a requirement that up to 55 per cent of content transmitted

86 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, pp. 74-75.

87 Mr Simon Whipp, *Transcript of Evidence*, 19 April 2004, p. 60.

88 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, p. 44.

89 ACT Government, *Submission 180*, p.4; South Australian Government, *Submission 198*, p.5; Western Australian Government, *Submission 128*.

annually between 6.00 a.m. and midnight consist of Australian content. Subquotas for particular formats, such as drama or documentary, may be applied within the 55 per cent quota.⁹⁰ Secondly, it involves a maximum 80 per cent local content quota for advertising on free to air commercial television.⁹¹ These quotas are consistent with the current local content requirements in Australia.

Ratchet mechanism

11.94 The measures included in Annex I are subject to a ratchet mechanism. Mr Deady advised the Committee that the mechanism

covers what happens if Australia or the United States liberalise any one of these reservations. The clearest example would be: if a future Australian government reduced the local content requirement on analogue television to 45 per cent, then under the commitments in this agreement a future government could not increase it back to 55 per cent. The 45 per cent would then become the binding commitment that future Australian governments would have to adhere to. That would also apply to the move to digital television—that is an annex 1 reservation, which is effectively a standstill reservation, so it is a binding at a current level.⁹²

11.95 The Committee notes evidence from DFAT that the mechanism applies only to single channel free to air, and will only come into operation should a government choose to actually lower content requirements

The ratchet mechanism applies only while we continue to have single channel, free-to-air TV. There is nothing in the agreement which in any way requires us to actually change the 55 per cent programming quota or the 80 per cent advertising quota. That would be purely up to any future Australian government. If a future Australian government made that decision and actually cut it, the ratchet mechanism would come in.⁹³

11.96 The Committee received evidence criticising the ratchet provisions

90 AUSFTA, Annex I-14(a).

91 AUSFTA, Annex I-14(b).

92 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 39.

93 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, p. 43

This Agreement would make it impossible for any future government to make any change to local content rules, except downwards. Furthermore an action of that kind would in turn bind governments thereafter to local content quotas no higher than that level.⁹⁴

11.97 However, DFAT advised the Committee that the ratchet mechanism is

quite a strong part of the agreement. You do not have anything similar in the WTO. It is one of the strong parts in terms of locking in liberalisation over time between us as bilateral partners.⁹⁵

Advertising

11.98 The quota for television commercials under Annex I is bound at a ceiling of 80 per cent. This operates consistent with current practice, so that 80 per cent of commercials must have Australian content, rather than previous policy which dictated that all commercials must have 80 per cent local content. The Committee notes that, under the Agreement, it would not be possible to revert back to the previous quota requirements.⁹⁶

Subquotas

11.99 DFAT has stated that subquotas for various programming formats may be imposed within the 55 per cent local content requirement.⁹⁷ The Committee received evidence from the Australian Broadcasting Authority (ABA) noting the benefit of subquotas within local content requirements.

Current Australian content regulation has requirements for relatively high cost adult and children's drama, and for documentary programs. While all program categories contribute to the mix of Australian programs and are important to audiences, the sub-quota programs are particularly important. They provide a minimum safety net for Australian 'voices' in genres particularly vulnerable to

94 Friends of the ABC NSW, *Submission 60*, p. 3.

95 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, p. 43.

96 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, p. 40.

97 DFAT Backgrounder: '*The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*' http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html viewed on 9 June 2004.

replacement by less expensive genres or imports (especially adult drama, children's programs and documentaries), notwithstanding demonstrated audience appeal.⁹⁸

11.100 The Committee has heard concerns that subquota provisions will be caught by the ratchet provisions and will thus be restricted to their present level. MEAA submitted that

Department of Foreign Affairs (DFAT) trade agreement negotiators have advised that Australia will be free to introduce or amend, by way of increasing if considered appropriate, the subquotas. However, this interpretation sits uncomfortably with a reading of Clause 10.6.1. which allows for nonconforming measures as set out in Annex I to be retained but such retained non-conforming measures can only be amended if the amendment 'does not decrease the conformity of the measure as it existed immediately before the amendment'. This would seem to imply that additional subquotas could not be introduced, for instance in respect of music, nor could existing subquotas – adult drama, children's programs and documentaries – be increased, even within the 55 per cent overall transmission quota, rather the existing subquotas could only be amended by reducing the effect of the measure and, if decreased, the ratchet provisions will prevent the requirement from being increased in the future.⁹⁹

11.101 However, the ABA informed the Committee that it had received advice that

sub-quotas are not caught within the 'ratcheting' rule and can be altered and possibly increased provided that overall the 55 per cent cap is adhered to. The ABA has also been advised that the wording of the reservation, 'e.g. drama and documentary,' means the way is open to introduce new sub-quotas, provided the 55 per cent cap is not exceeded. The ABA strongly supports the flexibility that has been maintained in regard to the subquotas in the wording of this reservation.¹⁰⁰

98 Australian Broadcasting Authority, *Submission 135*, p. 3.

99 Media, Entertainment and Arts Alliance, *Submission 67*, p. 12.

100 Australian Broadcasting Authority, *Submission 135*, p. 4.

Application of Annex I to multichannelling on free-to-air

11.102 The Committee notes advice from DFAT that Annex I reservations apply to both digital and analogue broadcasting. However, if Australia were to move to a multichannel environment, Annex I and the ratchet mechanism would not apply to multichannel free to air television.¹⁰¹

Recommendation 12

The Committee recommends that the Government take immediate action to incorporate the current quota levels for local content under the *Broadcasting Services Act 1992* which are subject to the ‘ratchet’ provisions of the Treaty as schedules under the Act so that they can only be changed by a deliberative decision of the Parliament.

Annex II measures

11.103 Under Annex II Australia has reserved the right to maintain and introduce measures relating to the audiovisual sector. The Committee was informed by DFAT that the Annex II reservations give Australia flexibility ‘not only to maintain existing measures but to introduce new measures’.¹⁰² Annex II reservations are not subject to a ratchet mechanism.¹⁰³

Multichannelling

11.104 Under Annex II-6(a) Australia reserves the right to adopt local content requirements on multichannelled free-to-air commercial television broadcasting services. The provisions allow for a maximum quota of 55 per cent of programming. The quota can be imposed on no more than 2 channels or 20 per cent of the total number of channels offered by a service provider, whichever is greater. It cannot be imposed on more than 3 channels of any individual broadcaster. Subquotas may be applied within the 55 per cent quota ‘in a manner consistent with existing standards’.¹⁰⁴ An advertising quota of up to 80 per cent on

101 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, p. 81.

102 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, p. 81.

103 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, p. 81.

104 AUSFTA, Annex II-6(a).

individual channels of a service provider may be imposed on no more than 3 channels of that provider.¹⁰⁵

11.105 In response to questioning from the Committee, Dr Church explained the operation of the multichanneling provisions

If we go to multichannelling, irrespective of the number of channels each service provider provides, we can impose local content requirements on at least two of those channels ... For example, say we have Channel 7 and Channel 9 as they are at the moment. They all become digital multichannels and, if each of them has two channels, we could impose local content requirements on each of those two channels—in other words, six channels in total ... There are two parts to what we have done. We have said, ‘You can have at least two channels, or you can impose the local content requirement on 20 per cent of the total number of channels.’ That really only kicks in when you reach 10 channels for each service provider. If Channel 7, for example, had 10 channels, two channels equals 20 per cent. If they go beyond that and they get to 15 channels, you can go to three channels.¹⁰⁶

11.106 Several parties informed the Committee of their concerns that the multichanneling provisions were limited. Dr Ranald stated that

while multichannelling will mean a vast increase in the amount of material available to Australians – and that is positive – the Australian content rule will only apply on up to three channels. So the proportion of Australian content generally will be limited. Our concern is that that will mean an overall reduction in Australian content and the opportunity to hear Australian voices.¹⁰⁷

11.107 Similarly, the ABA stated that

The capacity to ensure local content on possible free-to-air multi-channels, provided in Annex II is important in light of the anticipated continuing strength of commercial television in digital-era media. The ABA notes that the reservation limits regulatory options that might be considered for these services, constraining the number of multichannels that might

105 AUSFTA, Annex II-6(a).

106 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, pp. 83-84.

107 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 37.

be regulated, and restricting the approach to the existing transmission quota model applied to single channels,¹⁰⁸

and

In practice it is likely that only the main service and one other could be subject to Australian content requirements, as each network's 7 MHz channel potentially provides for five or so multi-channels. The number of multichannels would have to be fifteen or more, to allow local content regulations to be imposed on three channels (or 20 per cent of channels)...

Depending on the number of multi-channels and the nature of the programming on these channels, the ABA accepts that the content of some of the digital multi-channels could be predominantly foreign.¹⁰⁹

11.108 MEAA argues that no matter what the effect of multichannelling would be, it is more likely to be introduced on pay television, rather than on free-to-air, because of the reliance of free to air television on advertising revenue. The MEAA stated that advertising industry was likely to become more focused on pay TV, rather than free to air.¹¹⁰

11.109 Mr Michael Baume AO appeared before the Committee, refuting claims that free to air television would suffer in any way due to an increase in subscription television. Mr Baume argued that 'although pay-TV has been in Australia since 1992 and the internet since 1997, the resultant fragmentation of audience has not caused advertising revenues for [free-to-air] networks to fall.'¹¹¹

Subscription television

11.110 Under Annex II, Australia is able to impose a local content quota on subscription, or pay, television services. The quota is to take the form of the current requirement of 10 per cent of program expenditure. Quotas can be imposed on service providers for arts, children's, documentary, drama and educational programming.¹¹² However, no one channel will be subject to an expenditure quota for more than one of these categories.¹¹³

108 Australian Broadcasting Authority, *Submission 135*, p. 4.

109 Australian Broadcasting Authority, *Submission 135*, p. 5.

110 Media, Entertainment and Arts Alliance, *Exhibit 18*, p. 10.

111 Mr Michael Baume AO, *Transcript of Evidence*, 6 May 2004, p. 49.

112 AUSFTA, Annex II-7(d)

113 AUSFTA, Annex II-7(d), footnote 2.

11.111 Additionally, the expenditure quota may be increased up to a maximum of 20 per cent if an Australian government was to find that the 10 per cent quota was insufficient to meet the government's stated goal for such expenditure. The government must make such a finding through a transparent process that includes consultations with any affected parties, including the US. The reservation requires that any increase in expenditure quota imposed by the government be 'non-discriminatory and no more burdensome than necessary.'¹¹⁴

11.112 Mr Deady informed the Committee that the provisions allowed future governments flexibility to impose broader requirements than those currently in place

we have a 10 per cent expenditure requirement now on drama channels on pay TV, as you know. We have the capacity under the agreement to double that—so 20 per cent on drama channels—and we also now have a capacity to establish completely new expenditure quotas; that is, up to 10 per cent of programming expenditure on four additional services: children's television, documentary, educational and the arts. So that is a significant increase—the current arrangements allow for just the 10—and that is building in flexibility for future Australian governments to ensure Australian content on those pay TV platforms.¹¹⁵

11.113 In response to a question from the Committee, Dr Church confirmed that the 10 per cent expenditure quota is an aggregate amount

The point about our pay television obligations is that we can place expansion requirements on each service provider. For example, if you had two pay TV providers and each of them had, say, 10 drama channels, then the expansion requirement could be imposed on each of the drama channels on each of the pay TV providers. I think that is very important to emphasise. I think that is true at the moment under our existing pay TV. There are about 14 drama channels, so we can impose that expansion requirement on all 14 drama channels. In the future, as pay TV expands in the Australian market, as one would expect, and as we see more channels being provided, and as we know what is happening with digital plans, we would expect that this 10 per cent—and

114 AUSFTA, Annex II-7(d)

115 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 77.

certainly if we move to 20 per cent—would be quite a significant amount of money.¹¹⁶

11.114 A major concern presented to the Committee regarding subscription television was over the actual value of expenditure quotas and the fact that the Agreement restricts the government from introducing any other form of regulation for local content in subscription TV.

11.115 Witnesses sought to impress upon the Committee the inadequacy of expenditure as a measure of content. Ms Megan Elliot from the Australian Writers' Guild commented that a 10 per cent expenditure quota may not amount to much in situations where American content is being purchased for very small amounts.¹¹⁷

11.116 The Committee notes with interest that

Australian Film Commission research demonstrates that a 10 per cent expenditure requirement delivers only three percent of content. If the AUSFTA enters into force, the most that future governments will be able to mandate is an increase to 20 per cent which is likely to deliver six to seven percent content.¹¹⁸

11.117 Of particular concern to members of the audiovisual industry is the effect of growth in the pay TV market on Australian culture, in light of the Annex II reservation.

Free-to-air television now has the lion's share of the audience in terms of the screens that people are watching, but we know that in 20 years time that will not be the case. Ten years ago free-to-air television had 100 per cent of the audience. It now has an 80 per cent share, and it will not have that in 10 years time. Free-to-air television is relatively well regulated for local content. Pay television will never be well regulated for local content. The rules which are now in place deliver 3.2 per cent Australian programs. As a result of what the government has agreed, we know that 3.2 per cent is the most that we can expect for Australian children's programs, arts and entertainment, educational programs and documentaries. On pay television, that may be a little bit more, subject to consultation with the US. So on pay television we certainly

116 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, p. 79.

117 Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, p. 81.

118 Media, Entertainment and Arts Alliance, *Submission 67*, p. 13.

know that levels of local content in the long term will be significantly less.¹¹⁹

11.118 The Committee took evidence from the Western Australian Government on the potential consequence of this:

A greater take-up of Pay TV, with low levels of Australian content, also has important implications for Australia's ability to maintain its cultural identity. Australia needs to retain its right to ensure local voices are heard and local stories are told on its most popular broadcasting mediums. The AUSFTA should take into account the potential growth of subscription television in Australia.¹²⁰

11.119 The Committee received evidence that, even with the possibility of increasing the expenditure quota on pay television, the reservation will not allow governments to regulate sufficiently for the protection of Australian culture, particularly with regard to expected growth in the subscription television market.

11.120 The Australia Screen Directors' Association and Australian Writers Guild stated that

The caps on expenditures on Australian adult drama (20 per cent) and children's, documentary, arts and education channels (10 per cent), will be the lowest in the developed world (see Appendix 2) and take no account of the future potential of the digital Pay TV platform in this country, particularly as the television market fragments with digital take-up.¹²¹

11.121 The Western Australian Government submitted to the Committee that

The low caps on Pay TV expenditure have implications for the viability of Australia's film and television sector into the future. The AUSFTA restricts the ability for Australia, and Western Australia, to take up opportunities that might emerge from the growth of the Pay TV industry to a point where it could afford higher levels of expenditure on Australian product. A larger market would assist in

119 Mr Whipp, *Transcript of Evidence*, 19 April 2004, p. 74.

120 Western Australian Government, *Submission 128*, p. 8.

121 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 11.

developing the film and television industry, which would enable it to be more competitive in the global market.¹²²

11.122 The Committee notes evidence from the Screen Director's Association and Writers Guild that

the FTA caps only match the industry's recommendations to the ABA's Review of Australian Content on Subscription Television (February 2003), which we considered modest to reflect the still emerging economics of the Pay TV industry in this country.¹²³

11.123 The Committee understands that the industry is concerned, not with the current use of expenditure quota, but with the restriction placed on the Government under the AUSFTA, which prevents future reassessment of the use of expenditure quotas as a form of regulation. The Committee notes concerns that

this approach locks in the 'expenditure' as the only way to intervene in subscription television. If the industry has learned anything from the lessons of history in broadcasting, it has been that it is important to be able to alter policy settings in order to respond to changes in technology, commerce and viewing patterns.¹²⁴

11.124 The Committee heard similar concerns from the ABA

While expenditure requirements may be the most appropriate form of regulation at the sector's current stage of development, this could change with the shift to digital transmission anticipated to increase take up of subscription television - increasing ratings and advertising revenue in the future years.¹²⁵

11.125 DFAT advised the Committee that an expenditure quota of 10 per cent presented more certainty that would have been possible had it been attempted to negotiate content quota

In terms of this general point that the industry has raised about transmission time, it is important to note that it is very

122 Western Australian Government, *Submission 128*, p. 8.

123 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 11.

124 Australian Screen Directors' Association and Australian Writers Guild, *Submission 164*, p. 11.

125 Australian Broadcasting Authority, *Submission 135*, p. 5.

difficult to compare what we do on free-to-air TV, where we have a single channel and therefore a known quantum of the hours which are being transmitted, with pay TV, where no-one has any idea of what that quantum will be. At the moment we have a certain number of channels, but we could find ourselves in a situation in the future where there might be 500 channels or 1,000 channels. We have no idea of the amount of hours there will be at the time. If we had gone into this negotiation saying to the Americans, 'We want to put a percentage number there'—say, 20 per cent of total transmission hours—when we have no idea of what that will be in 20 years time, I think we would have been very much in a situation where the Americans would have said, 'You can have no more than five per cent,' working on the assumption that in 20 years time the amount of transmission hours is going to be infinitesimal ... Of course, Australia has adopted this approach on pay TV because it is a very different medium. We certainly do not see that as the most effective tool—to try to use transmission hours—first, because the amount of hours is so much greater; and, second, because there are a lot of reruns and things like that.¹²⁶

- 11.126 Dr Churche also noted that an expenditure quota generated new money for the industry, which in turn would ensure that new productions were shown on television

The whole point about the expansion requirement is that it is an expansion requirement in relation to new programming. So it is new money going into the making of new production. It is not about saying 10 per cent has to be Australian produced at some time in the future. It is no good showing Skippy or whatever to fill in. It has to be new money generated into the industry. That is why it is very important. That is why we think what we have here is a very good outcome.¹²⁷

- 11.127 The Committee notes that, under the Agreement, there is no provision for local content in advertising on subscription television.¹²⁸

126 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 79.

127 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, pp. 79-80.

128 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Estimates Hearings*, Department of Communications, Information Technology and the Arts, Answer to Questions on Notice, Question 84.

Commercial radio broadcasting

- 11.128 Under Annex II, Australia reserves the right to impose transmission quotas for local content on commercial radio services. The quota may be up to a maximum of 25 per cent of the programming on individual stations of a service provider.¹²⁹
- 11.129 The entertainment industry has expressed some concern at the ‘capping’ of music quotas at 25 per cent. Appearing before the Committee, Dr Richard Letts of the Music Council of Australia stated that the 25 per cent quota is lower than requirements for local music on radio in countries such as France and Canada. In the Music Council’s submission to the Committee, it commented that in addition to having higher quotas, France and Canada also have ‘other regulations that might possibly have been emulated to the benefit of the Australian music sector and the national accounts.’¹³⁰
- 11.130 The ABA submitted to the Committee that
- Levels of Australian music are currently set by means of the Commercial Radio Codes of Practice, and vary depending on station format. Annex II in AUSFTA caps any transmission quotas for local content/Australian music at 25 per cent, which equates with the highest format level currently specified in the Code. Maintaining the right to regulate for Australian music, beyond codes of practice, provides flexibility.¹³¹
- 11.131 However, the Music Council argued that if quotas were to be lowered or terminated, then both broadcasters and record companies would withdraw support for Australian music, which would evidently affect the vitality of the industry. An increase of quotas would, in turn, strengthen the industry.¹³²
- 11.132 The Committee also heard that that the Annex II quota applies only to commercial radio, and not to the community radio sector. Dr Letts stated that the exclusion of community radio from Annex II may prevent government from regulating for Australian content on community radio which, is often responsible for exposing a wider range of musical styles than are played on commercial radio.¹³³

129 AUSFTA, Annex II-7(e).

130 Music Council of Australia, *Submission 31*, para. 19

131 Australian Broadcasting Authority, *Submission 135*, pp. 5-6.

132 Music Council of Australia, *Submission 31*, para. 23.

133 Dr Richard Letts, *Transcript of Evidence*, 19 April 2004, p. 65.

Interactive audio and/or video services

11.133 The Australian Government has reserved the right to take measures to ensure that Australian content on interactive audio and/or video services is 'not unreasonably denied' to Australian consumers. A government may take such measures only where it finds that Australian audiovisual content is 'not readily available' to Australian consumers.

11.134 Measures must be 'implemented through a transparent process permitting participation by affected parties.' Further, they must be based upon objective criteria and be the minimum necessary. Measures must be 'no more trade restrictive than necessary' and must 'not be unreasonably burdensome'. They can be applied only to a service that is provided by a company which 'carries on a business in Australia in relation to the supply of that service'.¹³⁴

11.135 Mr Deady advised the Committee that these provisions ensured a large amount of flexibility for future governments to make sure that there is adequate Australian content in all forms of potential new media.¹³⁵

Definition

11.136 Evidence taken by the Committee on the interactive audio and/or video services provision centred around two major issues. Firstly, it was contended that, as a definition intended to capture new forms of media, 'interactive audio and/or video' is ambiguous. Secondly, concern was expressed over the process required in order for the Government to introduce new regulations in relation to 'interactive audio and/or video services'.

11.137 Much of the evidence heard by the Committee on the issue of new media related to the use of the terminology 'interactive audio and/or video'. The Committee notes that there is much concern over the ambiguity of the provision. Ms Elliot of the Australian Writers' Guild expressed to the Committee concern that

the definitions within the agreement only speak about new media in terms of interactive audio and/or video. We do not know what that means; it does not provide a meaning for us.¹³⁶

134 AUSFTA, Annex II-7(f)

135 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 74.

136 Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, p. 72.

11.138 Mr Morris of APRA/AMCOS commented in relation to the terminology of ‘interactive audio and/or video services’ that

there may be some problems with clarity in terms of what services will come within that definition that may be subject to the existing intervention and the digital products that will be liberalised under the agreement.¹³⁷

11.139 MEAA questioned specifically the use of the term ‘video services’, claiming that

the word ‘video’ could be considered to be technologically specific. The lack of certainty and the doubt about the extent to which the reservation for new media will encompass all media now known or yet to be invented is likely to have unintended consequences in years to come. As such, the Alliance considers that the drafting of the reservation is seriously flawed. It also appears the negotiators are relying on the use of the word ‘interactive’ and consider that this terminology would capture such services as VOD and pay-per-view (PPV) because the services are delivered to a delivery platform with interactive capability.¹³⁸

11.140 Appearing before the Committee, Ms Anna-Louise Van Rooyen Downey from the Australian Interactive Media Industry Association (AIMIA) stated that

interactive audio and/or video could be just about anything. It could be explained away as something which is not what we refer to as the powerful future of digital content industries, which might be a broadband movie which is paid for through an e-commerce channel. To me that is not an interactive audio or video; it is an e-commerce digital product. I would like to see much clearer definition of what actually constitutes interactive audio and/or video.¹³⁹

11.141 The Committee heard concerns relating to the possible capture of new digital media by provisions relating to e-commerce

interactive and new media are not defined in the text of the agreement. What is defined in the e-commerce chapter is ‘digital products’, and it is clear that the meaning of digital

137 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 21.

138 Media, Entertainment and Arts Alliance, *Submission 67*, p. 15.

139 Ms Anna-Louise Van Rooyen Downey, *Transcript of Evidence*, 19 April 2004, p. 6.

products includes all forms of digitised media. So what we are seeing is that anything that does not meet this hazy definition of interactive media would be caught by the e-commerce chapter. Already, we can see that e-cinema and perhaps those aspects of datacasting which are not interactive are caught by the e-commerce chapter. We are fearful because, as we have said, we do not know what new media are coming and, because it is not defined in the reservation, we fear that it will be captured by the e-commerce chapter and subject to liberalisation.¹⁴⁰

11.142 Mr Jock Given submitted to the Committee that

the definition of the services to which measures may be applied ... appears to cover most forms of internet, mobile and video-on-demand services but not digitally-delivered 'e-cinema'. Even if the delivery of cinema services to customers is still done in the future by a local service provider, there may be no interactivity involved. 'Datacasting', as currently defined under the Broadcasting Services Act, would be covered to the extent that it was interactive, but not to the extent that it wasn't. This is potentially significant given the broadcast-style content which is able to be transmitted under a datacasting licence.¹⁴¹

11.143 A submission from the Australian Screen Director's Association and the Australian Writers' Guild stated that

A problem is that these services are not defined in the agreement, but the key seems to be that the service has to be interactive in some way. Exactly how interactive is not certain and we are concerned that the absence of a definition could provide the ground for challenges to future government action. Already it can be seen that at least two of the new media services identified in the AFC's report would not meet this definition. These are electronic cinema, whereby feature films are delivered directly to theatres by electronic means and then also projected electronically, and datacasting services licensed by the ABA. It may be that there are other

140 Mr Nic Herd, *Transcript of Evidence*, 19 April 2004, p. 73.

141 Mr Jock Given, *Submission 147*, p. 4.

technologies or delivery systems that are similarly questionable.¹⁴²

11.144 Confusion over which technology will fall within the provision has led to concerns that the government will be precluded from regulating local content on emerging media forms which are deemed not to fall within the scope of the provision. The Government of NSW expressed concern that ‘the proposed Agreement does not provide for similar local content regulation in relation to new and emerging media.’¹⁴³

11.145 The Australia Council for the Arts stated that

Many impacts on the cultural sector arising from the AUSFTA will not become apparent until as-yet-unconceived technologies come into play. By 2010, virtually all entertainment and media is expected to be in digital formats, easily fed via satellite to cinemas and homes from sources outside Australia. As a result, many of the existing broadcasting rules governing local content will become irrelevant, and new forces will come into play.¹⁴⁴

11.146 In response to a question from the Committee regarding the meaning of the provision, Dr Church stated

We have used the term ‘interactive audio and/or video services’ deliberately to cater for the fact that we do not know what those technologies of the future might be. We have used the term ‘interactive’ because we are trying to cover media platforms which are not covered by other things such as free-to-air television or subscription TV ... We have a problem here; we need a way to cater for uncertainty about technological change. That is one of the things we have tried to address there. There is no fixed definition there ... Interactive audio and/or video services is, in our view, quite a broad category...The danger is that, if we try to define what that is, do we just do it on the basis of our current knowledge about what technologies are available now or do we look into our crystal ball to see what we think is going to appear in the next 10 or 20 years? We think we have a very broad catch-all

142 Australian Screen Directors’ Association and the Australian Writers’ Guild, *Submission 164*, p. 13.

143 NSW Government, *Submission 66*, p. 1.

144 Australia Council for the Arts, *Submission 157*, p. 2.

category which can bring in a whole range of new media platforms.¹⁴⁵

Recommendation 13

The Committee acknowledges the need for flexibility in the AUSFTA given the new and emerging technologies at the intersection of e-commerce, telecommunications and multimedia. The Committee recommends that the Australian Government be responsive to the need to ensure that future domestic legislation is consistent with the AUSFTA and the requirements of innovators and consumers and in particular that future regulation of such technologies will have to be more carefully targeted as a consequence.

Recommendation 14

The Committee, noting evidence that terminology regarding audio and/video services is ambiguous, recommends that future reviews of the AUSFTA need to ensure that terminology can encompass emerging technology.

Regulation for new media

- 11.147 The Committee received evidence regarding the process by which an Australian government could implement new measures for interactive audio and/or video services. Concerns centred around the possibility of consultation with the US prior to implementing new measures, and tests to determine whether Australian content was 'readily available' or 'unreasonably denied', and that measures were not 'unreasonably burdensome' and were the 'minimum necessary'. Questions were also raised regarding the implications of a restriction in application only to service providers carrying on business in Australia.
- 11.148 Annex 2-7(f) provides that Australia can only act to ensure Australian content on these services is 'not unreasonably denied' to Australians and can only do so after making a finding 'that Australian

145 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, p. 43.

audiovisual content or genres thereof is not readily available to Australian consumers'. There are thus two tests to be met before the Australian government can act. It is not enough that there be a finding that Australian content on any of these services is not available to Australians, but it must also be established that the absence of such content is because of some unreasonable denial.¹⁴⁶

11.149 Friends of the ABC NSW submitted to the Committee that

This is a particularly negatively-framed provision of the Agreement: it aims to ensure that Australian content is 'not unreasonably denied' to Australian consumers of these services. To demonstrate this the Government has to find that the Australian content is not readily available, and must do so in a way which according to the Agreement is 'no more trade restrictive than necessary'.

This is a particularly timid provision when the future of broadcasting is such an unknown quantity. The only certainty is that it will be a quite different broadcasting environment to today's and that it is a near future, not a distant prospect.¹⁴⁷

11.150 The Queensland Government questioned how onerous a test would be applied in order to determine that Australian consumers were being 'unreasonably denied' access to Australian content.¹⁴⁸

11.151 Mr Jock Given submitted to the Committee that

measures to ensure that ... Australian audiovisual content or genres ... is *not unreasonably denied* to Australian audiences — maybe a very tough test to satisfy. One might argue, for example, that Australian material is already 'not unreasonably denied' to television audiences in the US, despite its very low visibility. In the future, Australian material might be technically available to Australian audiences online via servers, but the search engines and electronic program guides generally used to make viewing/using choices might not readily lead the user to it.¹⁴⁹

146 Australian Screen Directors' Association and Australian Writers' Guild, *Submission 164*, p. 13.

147 Friends of the ABC, NSW, *Submission 60*, p. 3.

148 Government of Queensland, *Submission 206*, p. 11.

149 Mr Jock Given, *Submission 147*, p. 4.

11.152 Examining the possible readings of this provision when taken in the context of other Annex II measures, Mr Harris of the Australian Screen Directors' Association stated

the benchmarks have again been set low. The use of terms like 'unreasonably denied' when you have set the benchmarks for pay TV at levels of 10 per cent and 20 per cent means that if you actually did come to the determination that you wanted levels higher than that it would be very difficult for anyone to argue for it on any of these new media services.

¹⁵⁰

11.153 The Committee notes particular concerns from both the industry and the community that the implementation of new measures would require consultation with affected parties, including the US.

11.154 The Music Council of Australia submitted to the Committee that the provision

raises the question of what happens if, having consulted, the Australian government wishes to proceed with regulations with which the US has stated it is in disagreement. Can the US then retaliate (as it has been seen to do elsewhere, and disproportionately)? Is the knowledge that the US is capable of retaliating likely to inhibit the Australian government from placing Australian cultural interests first? Or are they to be constrained a priori by the US'S view of its own trade priorities?¹⁵¹

11.155 With respect to these concerns, the Committee notes evidence from the Queensland Government that

The Commonwealth Government has advised that this reservation does not require the government to get the approval of any party to implement measures. It merely places a procedural obligation to consult with affected parties. This means that the US would not be able to veto any future measures that the Commonwealth Government may choose to implement on interactive, audio and/or video services.¹⁵²

11.156 MEAA submitted that

150 Mr Richard Harris, *Transcript of Evidence*, 19 April 2004, p. 73.

151 Music Council of Australia, *Submission 31*, para. 28.

152 Queensland Government, *Submission 206*, p. 11.

Of concern is that any future regulatory requirement that might be introduced must 'be the minimum necessary, be no more trade restrictive than necessary, not be unreasonably burdensome'. But of greater concern is the fact that regulation can only be introduced in respect of 'a service provided by a company that carries on a business in Australia in relation to the supply of that service'. As we enter the global information era, media distribution is being revolutionised. Increasingly, companies that do not carry on a business in Australia will be able to deliver services in Australia. However, it will only be those that carry on business in Australia that can be regulated. Consequently, any regulation is likely to be more burdensome on those that have a business in Australia than for those that do not. It will hardly be creating a level playing field for Australian businesses to compete with those from overseas.¹⁵³

Subsidies, grants and tax concessions for the film industry

- 11.157 Under Article 10.1.4(d), the provisions of Chapter 10 do not apply to subsidies or grants provided by a Party.¹⁵⁴ Annex II provides that the Australian government is able to continue to grant taxation concessions for investment in Australian cultural activity, even where eligibility for the concession is subject to local content or production requirements.¹⁵⁵
- 11.158 Members of the Australian audiovisual industry presented to the Committee their concerns that, under National Treatment obligations, the US would be able to object to criteria for funding of Australian productions by the Film Finance Corporation and Australian Film Commission.¹⁵⁶
- 11.159 The Committee questioned DFAT representatives in relation to this matter, and notes that DFAT did not envisage any difficulties with Australia's current practice.¹⁵⁷ It was also suggested that tax

153 Media, Entertainment and Arts Alliance, *Submission 67*, pp. 15-16.

154 AUSFTA, Article 10.1.4(d).

155 AUSFTA, Annex II-7(h).

156 Mr Nic Herd, *Transcript of Evidence*, 19 April 2004, p. 63; Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, pp. 15-16.

157 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, pp. 80-82.

concessions for investment in the industry may be affected.¹⁵⁸ DFAT again confirmed that nothing in the Agreement restricted government flexibility in continuing to grant concessions and even extending them to other audiovisual areas.¹⁵⁹

Impact on public broadcasters

11.160 Article 10.1.4(e) provides that ‘services supplied in the exercise of governmental authority’ do not fall within the scope of Chapter 10. service is deemed to be supplied ‘in the exercise of government authority’ where it is supplied ‘neither on a commercial basis, nor in competition with one or more service suppliers’.

11.161 The Committee heard concerns that the ABC and SBS may not fall within the protection of 10.1.4(e). The ABC submitted that

The Agreement does not make clear, however, the sense of ‘competition’ here. While the ABC does not compete with the commercial broadcasters for advertising contracts, it does operate in a highly competitive environment, particularly in respect of competition for both audiences and programs.¹⁶⁰

11.162 MEAA stated that ABC’s marketing activities might also suggest that it is operating ‘in competition and that the SBS does compete with the commercial networks for advertising.’¹⁶¹

11.163 Taking note of these concerns, the Committee requested clarification of the position from DFAT. Dr Churché stated that

there is nothing in any of the chapters which in any way limits government’s ability to provide public services.¹⁶²

11.164 In regard to the ABS and SBS supplying a service in competition with other suppliers, he advised

if indeed you did have a particular government entity providing a commercial service on a fully commercial basis in competition with the private sector, then the commitments might actually be relevant. However, they would only be

158 Australian Screen Directors’ Association and the Australian Writers’ Guild, *Submission 164*, pp. 15-16.

159 Mr Peter Young, *Transcript of Evidence*, 2 April 2004, p. 40; Dr Churché, *Transcript of Evidence*, 14 May 2004, pp. 80-82.

160 Australian Broadcasting Corporation, *Submission 181*.

161 Media, Entertainment and Arts Alliance, *Submission 67*, p. 17.

162 Dr Churché, *Transcript of Evidence*, 14 May 2004, pp. 80-81.

relevant in the sense that, if we are providing certain advantages to the government entity in that competitive relationship, then we might, under the national treatment obligation, have to extend it to US competitors. That would be the only situation. But there is certainly nothing that says that government, or government agencies, cannot continue to operate or provide public services.¹⁶³

- 11.165 Mr Deady also confirmed that ‘there is nothing in the FTA that affects the capacity of the government or future governments in relation to those public broadcasters’.¹⁶⁴

Australian film exports to the United States

- 11.166 Mr Peter Higgs of the Australian Interactive Media Industry Association informed the Committee that Australia currently imports 50 times more film, digital and interactive content than it exports.¹⁶⁵ It was submitted that exports of the Australian audiovisual sector to the US were, in 2002, worth \$10 million, in comparison to the \$518 million value of US imports into Australia.¹⁶⁶

- 11.167 In response to a question from the Committee regarding increased access to the US audiovisual market under the Agreement, Dr Church advised that

Essentially, in terms of government restrictions, the US has taken no reservations on access to its audiovisual market. What we have here is a strong binding commitment in terms of the access of the Australian industry to that US market.¹⁶⁷

- 11.168 However, the Music Council of Australia submitted to the Committee that

There are no compensating concessions from the USA in the cultural area. The only US concessions that would be of significance to Australia would require US government intervention to provide special access to the US market for, for instance, Australian audiovisual product. Our negotiators proposed that the US introduce a foreign content quota for

163 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, pp. 80-81.

164 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 75.

165 Mr Peter Higgs, *Transcript of Evidence*, 19 April 2004, p. 3.

166 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 1.

167 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, p. 42.

television, possibly more in jest than as a concept that the US government would be likely to entertain.¹⁶⁸

11.169 The Committee heard evidence from members of the Australian Coalition for Cultural Diversity that the US is one of the most closed audiovisual markets, and that even if Australia were able to trade in that market, it would be doubtful that the US would buy Australian product.¹⁶⁹ It was acknowledged, however, that this is not a weakness of the Agreement, but rather, is intrinsic to the market itself:

The truth was that we had very little to gain, really, in terms of the opportunities that an FTA could break open. The reality we face when we face an American market is an enormous production sector which is highly vertically and horizontally integrated. Actually trying to crack that market is more difficult than an FTA is able to deal with.¹⁷⁰

Consultation

11.170 DFAT has advised the Committee that it regularly consulted with members of the audiovisual industry

we consulted with a very wide cross-section of the industry, a large number of groups—the Australian Screen Directors Association, the Screen Producers Association of Australia, the Australian Writers Guild, the Australian Film Commission ... I believe we did have very extensive consultations with all groups.¹⁷¹

11.171 Further, it was stated that

We have actually had a regular consultation process. It is just part of our continuum. Right through the negotiations, and even before the negotiations started, we were in active dialogue. We have met with a broad range of industry players probably at least every second month for the last 14 months or so.¹⁷²

11.172 However, the Committee notes that the Australian audiovisual industry is disappointed with the outcome of the Agreement.

168 Music Council of Australia, *Submission 31*.

169 Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, pp. 67-68.

170 Mr Richard Harris, *Transcript of Evidence*, 19 April 2004, p. 80.

171 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 75.

172 Dr Milton Church, *Transcript of Evidence*, 2 April 2004, pp. 39-40.

Members of the industry have presented evidence that they were advised by negotiators that there would be a total cultural exemption, although with some concessions in the audiovisual area.¹⁷³ The Music Council of Australia has stated that

Because this upending of the position on culture occurred only in the final days of negotiations, it was never discussed with the cultural sector. We had never been presented with the need to consider such a policy nor to advise on its effects. The negotiators have offered no evidence that they had considered its possible effects.¹⁷⁴

Concluding observations

- 11.173 The Committee is disappointed that mutual recognition for professional services and the issue of work visas for business people was unable to be included in the Agreement. However the Committee believes that these issues should be priorities for the Professional Services Working Group and has made recommendations to progress these matters.
- 11.174 The Committee carefully examined the evidence in relation to the audiovisual sector and notes that the maintenance of existing content rules in the AUSFTA will allow Australian content on free-to-air and pay TV.

173 Dr Richard Letts, *Transcript of Evidence*, 19 April 2004, p. 65; Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, p. 78; Music Council of Australia, *Submission 31*, para. 8.

174 Music Council of Australia, *Submission 31*, para. 14.

Investment and Financial Services

Introduction

- 12.1 The Investment Chapter contains obligations that provide investors with an open and secure environment. Amongst the obligations are; national treatment or most favoured nation treatment (whichever is better); protection for investors and their investments through prohibitions on a range of distorting performance requirements and restrictions on transfers and requiring compensation to fair market value on any expropriated investment.¹
- 12.2 Australia will maintain its ability to limit or impose restrictions to foreign investment in newspapers, broadcasting, Telstra, Commonwealth Serum Laboratories, Qantas Airways, Australian International Airlines, other than Qantas, federal leased airports, urban land and shipping.²
- 12.3 There is no investor-state dispute mechanism.³
- 12.4 The Financial Services Chapter provides that both parties provide for open and non-discriminatory treatment of financial services, i.e. service suppliers and investors in each party receive national treatment or most-favoured nation treatment (whichever is better).⁴

1 DFAT, *Guide to the Agreement*, p.53.

2 DFAT, *Guide to the Agreement*, p.56.

3 DFAT, *Guide to the Agreement*, p.59.

4 DFAT, *Guide to the Agreement*, p.67.

The Chapter is written to be complementary to Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Investment).⁵

Investment

- 12.5 The obligations in the Investment Chapter have received considerable attention in both the media, and also from submissions to this inquiry. Indeed, the Department of Foreign Affairs and Trade said after the release of the CIE report of the AUSFTA done in April 2004 that the biggest contributor to the expected \$6 billion increase in annual GDP will be as a result of investment liberalisation.⁶
- 12.6 One of the most significant obligations in the Investment Chapter is the lifting of the Foreign Investment Review Board (FIRB) approval thresholds from \$50 million to \$800 million for takeovers of Australian companies in non-sensitive areas.⁷ The Committee received evidence from a number of sources that were both positive and negative of that impact.

Good for the economy

- 12.7 The Committee heard from a number of witnesses that were supportive of the proposed changes and the additional framework provided under the AUSFTA. Some individuals and companies did not specifically state their reasons, but were broadly supportive.⁸
- 12.8 Several witnesses believed that the loosening of the FIRB restrictions will be ‘one of the most important things that this agreement achieves...’,⁹ and the Committee notes comments from companies such as Alcoa

5 DFAT, *Guide to the Agreement*, p. 67.

6 DFAT, Media Release D6, 30 April 2004.

7 www.dfat.gov.au/trade/negotiations/us_fta/outcomes/09_investment.html, viewed on 7 June 2004.

8 Alcoa Australia, *Submission 18*; Western Australian Government, *Submission 128*; AUSTA Business Group, *Submission 170*; South Australian Government, *Submission 198*; Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, p. 20; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 95; Ms Meg McDonald, *Transcript of Evidence*, 23 April, p. 44; Mr Andrew Stoekel, *Transcript of Evidence*, 4 May 2004, p. 3; Mr Robert Rawson, *Transcript of Evidence*, 4 May 2004, p. 47.

9 Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, p. 20.

The United States is Australia's most important partner and largest source of investment.¹⁰

12.9 A number of reasons were provided to the Committee in support of the changes. These included

by taking those investment barriers off, we basically lower the cost of capital in Australia; we give ourselves greater access to lower cost capital¹¹

and

If US investors are deciding whether they will invest in New Zealand, Australia or Malaysia, they weigh up the various factors. One factor which deters foreign investors is regulatory intrusion.¹²

and

It is less an issue of rejection and more an issue of streamlining the processes and reduction of costs. It is a cost that other companies do not face but we do.¹³

12.10 This is supported by comments from the Treasury that stated

there would be other ways in which an agreement which did not explicitly mention investment would have an impact on investment decisions and would therefore be expected to have an impact on economic welfare.¹⁴

12.11 However, the Treasury noted that the impact of the changes to the FIRB being quite significant had surprised them, as they had believed that

I guess we had reached the view prior to having the benefit of the CIE study that we had got that as well-balanced as we could...¹⁵

12.12 The Committee notes that the interaction with the Cross Border Trade in Services Chapter potentially provides tangible benefits in investment with the Director of the Australian Business Group for the AUSFTA noting that

10 Alcoa Australia, *Submission 18*.

11 Mr Andrew Stoekel, *Transcript of Evidence*, 4 May 2003, p. 3.

12 Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, p. 29.

13 Ms Meg McDonald, *Transcript of Evidence*, 23 April 2004, p. 44.

14 Mr Chris Legg, *Transcript of Evidence*, 14 May 2004, p. 37.

15 Mr Chris Legg, *Transcript of Evidence*, 14 May 2004, p. 37.

one of the primary vehicles for delivering services is investment. Investment is also the primary vehicle for delivering technology. So the importance of this agreement for these broader issues which have received scant attention in public debate—how much do you hear about trade; how little do you hear about investment?—lies in the fact that this agreement, in fact, recognises what the modern state of the US economy is today. This agreement therefore is of fundamental importance for dealing with the circumstances of the future.¹⁶

No discrimination

12.13 The Committee heard evidence from some witnesses that the changes being proposed in the AUSFTA should be extended multilaterally, i.e. they should be applied on a MFN basis.¹⁷ The Australian Services Roundtable noted that they

would be very concerned if this were implemented on a discriminatory basis. It is the view of our members that this investment liberalisation is in Australia's greater economic interest if implemented, on an MFN basis, for all investors rather than for US investors only. We accept that 'binding' is only for the US, but we would like to see the practical implementation as a FIRB reform across the board, whatever the nationality or ownership of the investor.¹⁸

12.14 There may be implications for the Treaty of Nara which was signed by Australia and Japan in 1976,¹⁹ which contains provisions related to investment. Evidence received by officials from DFAT indicated that Japan had not raised this issue with Australia.²⁰

16 Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, p. 21.

17 Dr Brent Davis, *Transcript of Evidence*, 3 May 2004, p. 44; Mr Rob Rawson, *Transcript of Evidence*, 4 May 2004, p. 47

18 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 95.

19 Basic Treaty of Friendship and Co-operation between Australia and Japan, signed by then Prime Ministers Malcolm Fraser and Takeo Miki on 16 June 1976, entered into force 20 August 1977.

20 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p.34; Mr Chris Legg, *Transcript of Evidence*, 14 May 2004, pp. 45-46.

Concerns heard

- 12.15 The Committee heard a number of concerns²¹ from interested parties such as the similarities between the obligations in this Agreement and the Multilateral Treaty on Investment (MAI), the provisions on expropriation and its affect on the environment; performance requirements; the number of directors required to be resident, the impact on the cultural sectors and the investor-state dispute mechanism.
- 12.16 In response to the economic modelling completed by the CIE, the Committee heard evidence that the predicted gains from investment liberalisation are likely exaggerated.²² Professor Ross Garnaut believed that the CIE report failed the laugh test

The laugh test is: can someone who knows the real world that is meant to be described by the modelling exercise look at the results and not laugh? I do not think that this exercise passes the laugh test. Most of the gains, the \$5.6 billion annual gains in GNP after 10 years, come from the partial liberalisation of the Foreign Investment Review Board.²³

21 For the record the following Submissions and evidence was received that was not supportive of changes in any investment related area; Mr Roy Cox, *Submission 16*; AMWU Retired Members Association (Sydney Branch), AMWU Retired Members Association (Gynea Sub-Branch), *Submission 22*; *Submission 24*; Ms. Evelyn Rafferty, *Submission 25*; Australian Pensioners & Superannuants League Qld, *Submission 30*; Mr Peter Youll, *Submission 32*; Ms Annette Bonnici & Mr Mike Hanratty, *Submission 35*; Ms Isabel Higgins, *Submission 46*; B.Barrett-Lennard, *Submission 47*; Ms Nizza Siano, *Submission 54*; Unfolding Futures Pty Ltd, *Submission 64*; NSW Government, *Submission 66*; Mr John Morris, *Submission 73*; Mr Phillip Bradley, *Submission 84*; Ms Jacqueline Loney, *Submission 86*; Mr Niko Leka, *Submission 89*; Progressive Labour Party, *Submission 90*; Victorian Government, *Submission 91*; StopMAI (WA) Coalition, *Submission 95*; Annie Nielsen and Phil Bradley, *Submission 96*; Grail Centre, *Submission 97*; Robyn Doherty, *Submission 98*; Cleo Lynch, *Submission 100*; The Rainforest Information Centre, *Submission 101*; WTO Watch, QLD, *Submission 112*; Liam Cranley, *Submission 113*; AMWU, *Submission 125*; Australian Conservation Foundation, *Submission 127*; Hammerthrow Films, *Submission 137*; Combined Pensioners and Superannuants Association of NSW (Bathurst Branch), *Submission 163*; Kerry Brady, *Submission 168*; Uniting Care (NSW/ACT), *Submission 169*; Betty Murphy, *Submission 171*; ACT Government, *Submission 180*; ATSI, *Submission 188*; Tony Healy, *Submission 203*; Queensland Government, *Submission 204*; Dr Geoff Pain, *Transcript of Evidence*, 23 April 2004, p. 26.

22 Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 64.

23 Professor Ross Garnaut, *Transcript of Evidence*, 3 May 2004, p. 64.

- 12.17 These concerns were reiterated to the Committee from the Australian Council of Trade Unions.

The ACTU does not subscribe to the view that foreign investment from the US or other countries is detrimental to Australia, nor reject the notion of a dynamic efficiency dividend. However, we believe that the dynamic efficiency argument is over-stated by its proponents.²⁴

Looks familiar...very different

- 12.18 The Committee notes that some of the concerns expressed through the submissions to the Committee centred around the similarities of the negotiations on the Multilateral Agreement on Investment (MAI). These concerns included obligations in respect of national treatment, MFN, the removal of performance requirements and expropriation obligations. The Committee notes that while there may be some similarities, there are differences and there are built-in measures to protect national sovereignty. Perhaps the most significant difference is the absence of an investor-state dispute mechanism.

- 12.19 The Committee understands that Australia will continue to regulate and legislate on domestic matters with respect to investment. Furthermore, there are several reservations that both Parties have taken to the Investment Chapter which gives the Government the right to examine all investment of a major significance.²⁵

- 12.20 The obligations in this Chapter ensure that foreign companies must meet with Australian standards and legislation.²⁶

- 12.21 In this respect, the Committee would like to note its recommendation in May 1998 of the review of the MAI treaty was not to ratify;

The Joint Standing Committee on Treaties recommends that: Australia not sign the final text of the Multilateral Agreement on Investment unless and until a thorough assessment has been made of the national interest and a decision is made that it is in Australia's interest to do so.²⁷

24 ACTU, *Submission 130*.

25 AUSFTA, Chapter 11.

26 AUSFTA, Chapter 11.

27 Joint Standing Committee on Treaties, Report 14, 1 June 1998.

Expropriation and the Environment

12.22 The Agreement provides that either Party may not

directly expropriate or nationalise a covered investment ('direct expropriation'), or indirectly do through measures equivalent to expropriation or nationalisation ('indirect expropriation'), except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and on payment of prompt, adequate and effective compensation.²⁸

12.23 Furthermore, it is understood that the Agreement provides guidance on expropriation, in particular noting that expropriation is constituted only 'if it interferes with a tangible or intangible property right or property interest in an investment.'²⁹

12.24 The Committee heard concerns from mostly environmental groups that these obligations may expose Australian Governments to compensation payments as a result of introducing restrictive environmental laws;

If the compensation issue was not enough, governments will also need to ensure that their environmental laws are not 'more burdensome than necessary'. That is in the services chapter, article 10.7.2. So if you combine the potential for compensation with the need to ensure that the laws are not too burdensome you get what is called regulatory chill: a potential failure to introduce the tough environmental laws that are needed to cut greenhouse pollution and protect our precious rivers and coast.³⁰

12.25 These concerns were raised by four State /Territory governments (Victoria, NSW, ACT and Queensland) in respect of environmental activities they are, or may undertake;

Of particular concern in that there are insufficient guarantees to ensure the Queensland Government's future strategy for sustainable natural resource management will be impeded by the obligations in the investment chapter, particularly the expropriation provision. On this basis the Queensland Government would like the Committee to note its opposition

28 DFAT, *Guide to the Agreement*, p. 58.

29 DFAT, *Guide to the Agreement*, p. 58.

30 Mr Wayne Smith, *Transcript of Evidence*, 6 May 2004, p. 66.

to the inclusion of mandatory compensation provisions with no exclusion for measures relating to the sustainable management of natural resources...³¹

and

The ACT Government remains concerned that the AUSFTA does not include adequate protection for legitimate government regulation to protect and enhance the environment. Australian Governments may be exposed to the risk of litigation and the need to pay compensation as a consequence of environmental regulation. The expropriation provisions of the AUSFTA (Article 11.7) could result in compensation being sought and awarded to US based companies even when no discrimination against a foreign investor was involved and where no compensation would be payable to Australian or other investors under domestic law.³²

Performance Requirements

12.26 The obligations of the AUSFTA

prohibit each Party from imposing or enforcing any of the following requirements in relation to an investment in its territory:

- to export a given level of percentage of goods or services
- to achieve a given level or percentage of domestic content
- to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory
- to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows association with an investment
- to restrict sales of goods or services in its territory that an investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings
- to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory or

31 Queensland Government, *Submission 203*.

32 ACT Government, *Submission 180*

- to supply exclusively from its territory the goods that an investment produces or the services it supplies to a specific regional market or to the world market³³
- 12.27 Article 11.9 provides for some exceptions from the prohibitions listed above in some specified circumstances such as government procurement, actions related to intellectual property rights or competition laws, and measures necessary to protect, animal or plant life or health.³⁴
- 12.28 The Committee heard some concerns that the removal of the performance requirements may be to the detriment of emerging industries or not in the national interest.³⁵ The Australian Council of Trade Unions

thought that those are the sorts of things that you can use to make sure that emerging industries have a potential start in this country so that they can grow to the sort of strength of industry that we might rely on in future and the like.³⁶

Is there a director in the house?

- 12.29 The obligation in the AUSFTA in respect of senior management and boards of directors

provides that a Party cannot require that an enterprise that is a covered investment appoint individuals of any particular nationality to senior management positions. However, a Party may require that a majority or less of the board of directors (or any committee thereof) of an enterprise that is a covered investment be of a particular nationality or be resident in its territory, provided that this requirement does not materially impair the ability of that investor to exercise control over its investment.³⁷

- 12.30 The Committee heard concerns from the Australian Services Union that in some industries, notably the water industry in South Australia where there is only 'one or two Australian directors', the rest being French, there is a concern that

33 DFAT, *Guide to the Agreement*, pp. 54-55.

34 DFAT, *Guide to the Agreement*, p. 55.

35 Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 32.

36 Ms Sharon Burrow, *Transcript of Evidence*, 20 April 2004, p. 38.

37 DFAT, *Guide to the Agreement*, p. 55.

if there is not a component approach or a minimalist approach to the number of directors that must be Australian residents, the sort of culture that a director becomes aware of and the concerns that may be seen as best practice for that business—or the community expectations of general society—may be undermined ... If you are not living in the country, we wonder whether or not you can actually be aware of what the community thinks, unless you have some regular exposure. So that is a concern, and we would ask you to give some consideration to that.³⁸

Cultural investment protected

- 12.31 The Committee received some evidence from groups, such as the Australian Coalition for Cultural Diversity, raising concerns with regard to certain measures contained in the Investment chapter which may impact on policies and investment decisions by organisations such as the Film Finance Corporation and the Australian Film Commission. Mr Herd from the Screen Producers Association in Sydney told the Committee about SPAA's concern for the Australian cultural sector as a result of the Agreement: that Australia may be constrained in its ability to discriminate in favour of funding Australian films that meet the significant Australian content test.³⁹
- 12.32 Dr Milton Church from DFAT stated that, with regard to these points, two elements should be noted.

When the government or government agencies, such as the Film Finance Commission, the Film Finance Corporation or the Australian Film Commission –give tax concessions or grants in any of these areas they can continue to limit this to Australians. In the services and investment chapters, there is a carve-out for subsidies in relation to the national treatment obligation. So there is no obligation here that we have to give any of that money to any American producers who want to have access to it.

On a second issue, which is really about performance requirements, that is a situation where we say to a producer or director that, as a condition for getting a grant or tax concession, there have to be certain limits on they way in

38 Mr Gregory McLean, *Transcript of Evidence*, 6 May 2004, p. 57-58.

39 Screen Producers Association of Australia, *Submission 164*.

which they go about producing a particular film, and it has to meet certain requirements about Australian content. We actually have a reservation which fully covers that situation. There is certainly nothing in the Agreement which will in any way affect what we do at the moment or our capacity not only to keep the grants tax concessions that we have but also to introduce new ones.⁴⁰

- 12.33 The Committee is satisfied that there are sufficient reservations to address the concerns of the cultural industries.

Investor State Dispute Mechanism

- 12.34 As noted, there is no investor-state dispute mechanism, however the Committee received a number of submissions expressing concern over the provision in the Investment Chapter obliging Parties to adopt an investor-state dispute mechanism should there be a 'change in circumstance affecting the settlement of disputes on matters within the scope of [the] Chapter'.⁴¹ This matter has been discussed in Chapter 4 (Institutional Arrangements and Dispute Settlement).

Financial Services

- 12.35 The relatively few restrictions that apply to Australian access to the US financial services sector will now be bound, according to the DFAT Factsheet on Financial Services.⁴²
- 12.36 The Agreement establishes a joint Financial Services Committee (FSC) between Australia and the US to consider any issue referred by either Party. It has been agreed that the FSC will examine regulatory issues affecting access for Australian foreign securities trading screens and collective investment schemes to the US and will report back within two years of the Agreement coming into force.⁴³

40 Dr Milton Church, *Transcript of Evidence*, 14 May 2004, p. 80.

41 AUSFTA, Article 11.16.1, p.11-9

42 At www.dfat.gov.au/trade/negotiations/us_fta/outcomes/06_financial_services.html, viewed on 9 February 2004.

43 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/06_financial_services.html.

12.37 The Committee received one submission from the Australian Stock Exchange (ASX) that was supportive of the changes to this Chapter.⁴⁴ In particular the ASX

views the proposed establishment of a Financial Services Committee (FSC), under the auspices of the free trade agreement, as a potentially important development in resolving a longstanding regulatory issue with the US Securities and Exchange Commission (SEC).⁴⁵

12.38 The ASX believes that resolution of this issue will lead to a greater liquidity of Australian capital markets by allowing direct US investor access to the Australian market.⁴⁶

Concluding observations

12.39 In respect of investment, the Committee notes the concerns of interested parties, especially in respect of the similarities between the Multilateral Agreement on Investment and the AUSFTA. The Committee is satisfied that there is sufficient protection within the obligations contained in the AUSFTA.

12.40 The Committee has made a recommendation in respect of the investor-state dispute mechanism. Please refer to Chapter 4 for further information.

12.41 The Committee notes the provisions on financial services and the benefit that the establishment of the financial services committee will have to the Australian Stock Exchange.

44 Australian Stock Exchange, *Submission No. 185*

45 Australian Stock Exchange, *Submission No. 185*

46 Australian Stock Exchange, *Submission No. 185*

Telecommunications

- 13.1 According to the *Guide to the Agreement*, the obligations in this Chapter apply to government measures affecting trade in telecommunications services. The Committee notes that measures relating to broadcast or cable distribution of radio or television programming are specifically excluded from the Chapter, other than to ensure that enterprises operating broadcasting stations and cable systems have continued access to, and use of, public telecommunications services.¹
- 13.2 The Chapter consists of four broad parts, a total of 25 articles, and an exchange of letters which establishes regular consultation on issues and developments in the communications and IT sectors. There is also a non-binding letter associated with the Chapter which outlines the Government's policy in relation to Government ownership of Telstra.
- 13.3 The Committee notes that little specific evidence was received which commented on the purpose or operation of this Chapter.
- 13.4 The *Guide to the Agreement* makes several references to specific provisions under the Telecommunications Chapter. These include

There are strong provisions on transparency and review for regulatory decisions. Regulators must be independent impartial and properly explain decisions, such as determining which services are subject to regulation and licensing decisions. Australia and the US have also embraced a hands-

1 DFAT, *Guide to the Agreement*, p. 61.

off regulatory approach where markets are functioning competitively.²

Access to and use of public telecommunications services

- 13.5 This section reaffirms the obligations of both Parties under the GATS which ensure that any enterprises of the other Party have access to and use of any public telecommunications service, including leased circuits, offered in its territory or across its borders, on terms and condition that are reasonable and non-discriminatory, including with respect to timeliness. The Committee notes that Parties will only intervene ‘to ensure the security or confidentiality of messages’.³

Obligations for Suppliers of Public Telecommunications Services

- 13.6 The *Guide to the Agreement* states that the commitments in the section are consistent with, and build upon the respective GATS obligations of both Parties and that no legislative or regulatory changes are required.
- 13.7 Both Parties agree to ensure that suppliers of public telecommunications services provide interconnection with suppliers of public telecommunications services of the other Party, number portability, dialling parity and reasonable and non-discriminatory treatment for access to submarine cable systems.⁴

Obligations for Major Suppliers of Public Telecommunications Services

- 13.8 The commitments in this Section cover obligations on the Parties in relation to regulating telecommunications companies that control

2 DFAT, *Guide to the Agreement*, p. 61.

3 DFAT, *Guide to the Agreement*, p. 62.

4 DFAT, *Guide to the Agreement*, p. 62.

essential facilities or have a dominant position in a particular market. The Committee notes DFAT's view in the *Guide to the Agreement* that

A supplier will only be subject to these additional commitments where it is a major supplier for a particular service. That is, a company which is a major supplier for most telecommunications services but not, for example, for mobile services, will not be treated as a major supplier for mobile services.⁵

- 13.9 Further to paragraph 13.6, the Committee notes DFAT's advice that the commitments in this section are consistent with, and build upon, Australia's obligations under GATS and do not require any legislative or regulatory changes. The Committee notes that

the commitments on resale, leased circuits, collocation and access to poles, ducts, conduits and rights of way are additional to our GATS commitments, but similar to provisions contained in the Singapore-Australia FTA.⁶

- 13.10 The Committee has not received any evidence from telecommunications service providers to suggest that these obligations will present any difficulties in the conduct of their business.

Other measures

- 13.11 There are several commitments under this section of the Chapter which add to Australia's existing commitments under the GATS. DFAT have advised that these commitments are consistent with existing laws and practices and do not require any legislative or regulatory change.⁷
- 13.12 Conditions covered in this section include an agreement by the Parties to maintain their approach to transparent and independent regulatory procedures which incorporates basic principles of natural justice.⁸ Both Parties also agree

5 DFAT, *Guide to the Agreement*, p. 63.

6 DFAT, *Guide to the Agreement*, p. 64.

7 DFAT, *Guide to the Agreement*, p. 64.

8 DFAT, *Guide to the Agreement*, p. 65.

To maintain their robust frameworks for enforcing their own laws, and have committed to maintaining some of the basic principles for resolving domestic telecommunications disputes.⁹

Additional letters – consultation and Telstra

- 13.13 The side letter on consultation commits the Parties to discuss and resolve any issues and to maintain a forward-looking and cooperative relationship. According to the *Guide to the Agreement*, initial subjects for discussion include developments in market structure, convergence, technological innovation including in relation to advanced wireless services, Internet charging, voice over Internet protocol, broadband, number portability, and digital products.¹⁰
- 13.14 The side letter on Telstra is a non-binding part of the Agreement. DFAT advised that

[the letter] makes no commitments but serves to explain the current Government's policy with regard to Telstra...it explains that the current Government has long been committed to the full sale of Telstra subject to certain conditions being met. The letter does not commit the Government to selling its remaining share of Telstra. Rather, it explains that the Government had recently tabled a bill in Parliament proposing the full sale of Telstra which was rejected, and any future sale would be conditional on such a bill passing through Parliament. The letter explains Telstra's operational independence, Australia's rigorous regulatory framework and principles of competitive neutrality which ensure that government enterprises such as Telstra do not derive any commercial advantages from having government ownership.¹¹

9 DFAT, *Guide to the Agreement*, p. 65.

10 DFAT, *Guide to the Agreement*, p. 66.

11 DFAT, *Guide to the Agreement*, p. 66.

Concluding observations

- 13.15 The Committee was advised of the views of the Australian Services Roundtable, which is supportive of the Chapter on telecommunications, and refers to the complexity of the area.

There were some very negative and worrying outcomes that could have emerged from this chapter, consistent with the line the US was pushing, and the government has largely resisted those. The Australian telecoms users in particular are pleased that we did not have a horrible outcome. We did not make much forward progress either. All the hard issues are left for Geneva, for the WTO, and we hope that our position in Geneva has been preserved by language in the chapter which agrees to disagree on the definition of value added services. We have a small concern about that. We will be very vigilant about that but, in essence, we did not push the US forward. Basically, Australian telcos cannot invest in the US because of the regulatory chaos in the US. We did not make the investment climate for Australian telcos any better, but nor did we do ourselves any damage. I think that is worth saying because the telcos area is a particularly complex one.¹²

- 13.16 DFAT's view is that the Agreement's provisions in this Chapter will provide greater certainty for Australian telecommunications firms in the US market.

It establishes a framework for regular consultation in relation to the communications and IT sector, which will give both government and industry an avenue to consult with US policy makers on issues of concern and consider developments affecting evolution of this rapidly evolving sector.¹³

12 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 95-96.

13 RIS, p. 8.

Competition-Related Matters

- 14.1 The RIS states that the Agreement will reinforce and build upon existing bilateral agreements with the US on cooperation and mutual assistance in competition policy and antitrust law enforcement.¹
- 14.2 According to the *Guide to the Agreement*, the Competition-Related Matters Chapter commits Parties to take measures to:
- proscribe anti-competitive business conduct
 - cooperate in the area of competition policy and law enforcement
 - ensure that monopolies and government enterprises do not abuse their position in the marketplace
 - enhance cooperation between government agencies in both countries in the area of consumer protection.²
- 14.3 Under the Agreement, business and individuals will be treated fairly in enforcing competition law; consumer protection agencies will work together in combating illegal activity; and consumers and investors defrauded or deceived will have greater redress.³
- 14.4 The Chapter consists of 12 articles and an associated side letter between the two Governments on strengthening cooperation, competition policy and law enforcement.⁴
- 14.5 The Agreement provides a vehicle for addressing competition-related issues of particular concern to Australian companies in the US market, and

1 RIS, p. 8.

2 DFAT, *Guide to the Agreement*, p. 77.

3 NIA, para. 8 and RIS, p. 4.

4 DFAT, *Guide to the Agreement*, p. 77.

established pro-competitive disciplines on monopolies and state enterprises in both countries.⁵

- 14.6 The Committee received little specific evidence addressing the purpose or operation of this Chapter. Unless otherwise stated, information contained in this chapter of the report is taken from the *Guide to the Agreement*.

Competition law and anticompetitive business conduct

- 14.7 The Committee understands that obligations under Article 14.2 are framed in general terms, reflecting the fact that, while both Parties have highly developed and extensive competition and antitrust legislation, there are differences in the legal and institutional frameworks in which they operation. Each Party is obliged to

- maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto
- maintain an authority or authorities responsible for the enforcement of its natural competition laws
- ensure that a company or individual subject to the imposition of a sanction or remedy for anticompetitive business conduct is afforded due process in terms of having an opportunity to be heard, and to present evidence, and to seek review in a court or independent tribunal.⁶

- 14.8 The article also addresses the treatment of companies or individuals of either country in relation to the enforcement of each other's competition laws. Namely, the enforcement policy of each Party's national competition authorities includes treating non-nationals no less favourably than nationals in like circumstances, and that both Parties intend to maintain their policy in that regard.⁷

- 14.9 This article is not subject to dispute settlement and does not require legislative or regulatory change.⁸

5 RIS, p. 8.

6 DFAT, *Guide to the Agreement*, p. 77-78.

7 DFAT, *Guide to the Agreement*, p. 77.

8 DFAT, *Guide to the Agreement*, p. 77.

Cooperation on competition/antitrust

- 14.10 The Committee understands that competition matters often have a cross-border dimension, when companies subject to investigation for anticompetitive conduct may have engaged in business activity in another country's jurisdiction. The *Guide to the Agreement* states that there are well established channels of practical cooperation between Australia and the US, between the Australian Competition and Consumer Commission (ACCC) and its US counterparts, the Department of Justice Antitrust Division and the Federal Trade Commission.
- 14.11 The Committee understands that Article 14.2 of the Agreement commits the Parties to strengthening their existing cooperation on competition law enforcement and policy.⁹ Existing forms of cooperation include mutual assistance, notification, consultation and exchange of information.
- 14.12 Article 14.2 also obliges the respective competition authorities to consider, where feasible and appropriate, requests from their counterparts in the other country to initiate or expand activities to enforce competition. Existing agreements do not include such provisions – sometimes known as 'positive comity' – which would allow either government to encourage the other to address particular business conduct that might affect the interests of the first country. The Committee understands that this provision may be included in discussions on strengthening bilateral cooperation that the US Department of Justice and the US FTC have offered, on behalf of the US, in an associated side letter.¹⁰
- 14.13 Also, Article 14.2 establishes a joint working group that will examine the scope for strengthening support for, and minimising legal impediments to, the effective enforcement of each country's competition laws and policies.¹¹

Monopolies and government enterprises

- 14.14 Articles 14.3, 14.4 and 14.5 contain obligations to ensure that the activities of monopolies (public or private), and state (government) enterprises do not create obstacles to trade and investment. The provisions only apply to

9 DFAT, *Guide to the Agreement*, p. 78.

10 DFAT, *Guide to the Agreement*, p. 78.

11 DFAT, *Guide to the Agreement*, p. 78.

private monopolies created after the Agreement enters into force, and to government monopolies at the central government level.

- 14.15 As with SAFTA, Australia will be obliged to take reasonable measures to ensure that governments at all levels do not provide any competitive advantage to any government businesses simply because they are government owned.
- 14.16 This particular obligation is not subject to dispute settlement.¹²
- 14.17 Article 14.5 clarifies that charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with the obligations on monopolies and state enterprises.¹³

Cross border consumer protection

- 14.18 Under article 14.6, the Parties agree to strengthen their cooperation in areas covered by their consumer protection laws, in particular fraudulent and deceptive commercial practices against consumers.¹⁴ The Committee understands that this builds on existing cooperation between the ACCC and the US FTA.
- 14.19 According to the *Guide to the Agreement*, the Parties will also be required to identify obstacles to effective cross-border cooperation in the enforcement of consumer protection laws, and to consider changing their domestic frameworks to enhance their ability to cooperate, share information and assist in the enforcement of their respective consumer protection laws, including, if appropriate, adopting or amending national legislation.

Recognition and enforcement of monetary judgements

- 14.20 Article 14.7 seeks to facilitate the efforts of government agencies to undertake civil (non-criminal) legal proceedings for the purpose of obtaining monetary restitution to consumers, investors or customers who have suffered economic harm as a result of being deceived, defrauded or

12 DFAT, *Guide to the Agreement*, p. 80.

13 DFAT, *Guide to the Agreement*, p. 80.

14 DFAT, *Guide to the Agreement*, p. 80.

misled. The agencies concerned are the ACCC, the Australian Securities and Investments Commission, the US Federal Trade Commission, US Securities and Exchange Commission and the US Commodity Futures Trading Commission.¹⁵

- 14.21 The *Guide to the Agreement* states that this provision applies in particular to civil proceedings where a an offending party (company or individual) has assets in the other country, and the relevant agency (or parties) are seeking to have a judgement by a court in the first country and enforced by a court in the other country. This provision is not binding but seeks to provide courts with interpretive guidance on the purpose of such legal actions.
- 14.22 The Parties also agree to examine the scope for establishing greater bilateral recognition of foreign judgements of their respective judicial authorities obtained for the benefit of deceived or defrauded consumers, investors or customers.

Transparency, cooperation and consultations

- 14.23 Under article 14.8, 14.9 and 14.10, the Parties will make available to the other, on request, public information concerning the enforcement of their measures proscribing anticompetitive business conduct, exemptions and immunities to their measures proscribing anticompetitive business conduct, and public information concerning monopolies and government enterprises.¹⁶
- 14.24 The Parties agree to enter into consultations on request of the other Party to address specific matters that arise under this Chapter.

Dispute settlement

- 14.25 According to the *Guide to the Agreement*, most of the articles in this Chapter will not be subject to dispute settlement. The only obligations that will be subject to dispute settlement are those relating to:
- monopolies
 - the provisions on government enterprises relating to exercise of delegated authority and non-discriminatory treatment

15 DFAT, *Guide to the Agreement*, p. 81.

16 DFAT, *Guide to the Agreement*, p. 81-2.

- transparency, and
- the obligation to consult at the request of the other Party to address specific matters.¹⁷

17 DFAT, *Guide to the Agreement*, p. 82.

Government Procurement

Introduction

15.1 Australia becomes a 'designated' country in US law, allowing Australian companies to bid on federal government contracts. The six percent penalty imposed under the Buy America Act for Australian products, above agreed thresholds, will be waived, according to DFAT.¹ This removes the discrimination that had applied until now.

15.2 The factsheet states:

- Much procurement in the US is conducted off Federal Supply Schedules, and Australian companies will now have the opportunity to be listed on those Schedules.
- Both sides have agreed to work with their respective States/Territories to improve their offers with a final decision to be made before the Agreement is signed.
- Australian companies will now be able to compete in the \$200 billion US Federal procurement market with firms from over 80 countries already designated under US law, such as the EU, Japan, Korea, Canada and Mexico.²

1 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/07_government_procurement.html

2 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/07_government_procurement.html

- 15.3 Strategic defence procurement is not covered by the Chapter, and the Australian Industry Involvement program for Australian Defence procurement will be retained.³
- 15.4 The Chapter sets out obligations in respect of the specific procedures and rules that will apply to conduct of procurement related activities. Government entities may use three procurement methods
- open tendering in which all interested suppliers may submit a tender;
 - selective tendering in which the procurement entity selects the suppliers eligible to tender; and
 - limited tendering which is a more restricted form of selective tendering to which many of the Chapter's procedures do not apply.⁴
- 15.5 The Chapter creates a presumption of open tendering, which may lead to more tenders being subject to open tendering procedures in Australia. The other forms of tendering are only allowed in specific circumstances.⁵
- 15.6 As of 2 April 2004, 27 of the 37 US states traditionally covered under the government procurement arrangements have signed on to the AUSFTA. Ongoing discussions are continuing in the US to bring more States on board. All Australian State and Territory Governments have provided in principle support.⁶

Recommendation 15

That DFAT uses its US mission to encourage remaining States to sign on to the AUSFTA.

- 15.7 There are exceptions for small and medium sized enterprises, as well as for economic and social programs for indigenous people.⁷

3 DFAT, Factsheet, viewed on 9 February 2004, at www.dfat.gov.au/trade/negotiations/us_fta/outcomes/07_government_procurement.html

4 DFAT, *Guide to the Agreement*, p. 85

5 DFAT, *Guide to the Agreement*, p.88

6 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p.78

7 DFAT, *Guide to the Agreement*, p.85

New opportunities

15.8 The majority of evidence provided to the Committee was supportive of the Government Procurement Chapter, although in each case it was noted that it would be dependent ‘on how effectively Australian businesses respond to these new challenges.’⁸

15.9 Similar comments were provided to the Committee by industry;

The agreement provides the Australian industry with access to the US federal government market and a number of state government markets, which exceed in value a total of \$52 billion, a significant win for our members, we believe. Importantly, the agreement allows us to preserve the arrangements we have for SMEs in our government markets. Of course, the FTA will not of itself deliver export outcomes. We will need to have a proactive strategy involving government and industry to realise the promise of the FTA on government procurement.⁹

and

It will be very important that Australian business works closely with government and other consultants to work out the best ways of taking advantage of these new opportunities.¹⁰

and

it is not to say that there is not potential, but it is the capacity of business to take up that kind of potential.¹¹

15.10 In evidence provided to the Committee by Mr Deady of DFAT, this is

an area where work needs to be done to identify what are still the hurdles, what are the opportunities and how Australian industry can access it. That is a big part of the overall gains over time. It is up to the Australian industry to first understand the opportunities that have opened up and how Australian industry can go about achieving them. It is a big prize that is not there now, and the restriction and

8 Ms Joanna Hewitt, *Transcript of Evidence*, 2 April 2004, p. 9.

9 Mr Rob Durie, *Transcript of Evidence*, 19 April 2004, p. 25.

10 Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 98

11 Mrs Petrice Judge, *Transcript of Evidence*, 23 April 2004, p. 15

discrimination that we face at the moment change with the FTA.¹²

Concerns

15.11 The Committee heard a variety of concerns about the government procurement chapter. These concerns related to ‘catching the US bug for litigation’,¹³ and that Australia should retain the right of flexibility to ‘encourage regional development by imposing requirements on foreign operators.’¹⁴

15.12 The Australian Services Union were concerned that the inclusion of build own operate and similar contracts for the provision of services, most notably in regional Australia (which could include building, building construction works, sewerage treatment works or any infrastructure project etc) where the council / local government authority may wish to give consideration in a favourable way to the value of a local or regional company involved in the construction, employment or on-going operation, and the return benefit to the community of local employment, purchasing etc. Under the draft Trade Agreement the local community might not be able to encourage these local investments or undertakings.¹⁵

15.13 Similar concerns were raised by the Australian Fair Trade and Investment Network, Ms Dee Margets MLC, WTO Watch Queensland, Federation of Australian Scientific and Technological Societies.¹⁶

Disappointments

15.14 The Textiles, Clothing and Footwear Union of Australia were disappointed that the AUSFTA did not manage to negotiate access to

12 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 81.

13 Mr Rob Durie, *Transcript of Evidence*, 19 April 2004, p. 26, and *Submission No. 39*

14 Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 35

15 Australian Services Union, *Submission 43*

16 Australian Fair Trade and Investment Network, *Submission 68*; Ms Dee Margets MLC, *Submission 74*; WTO Watch Queensland, *Submission 112*; Federation of Australian Scientific and Technological Societies, *Submission 190*

the defence procurement market noting that it was ‘a missed opportunity’.¹⁷

15.15 Similar concerns were raised by the South Australian Government.

It is with disappointment that the [South Australian] Government notes that existing strategic defence procurement measures and the majority of the so-called ‘Jones Act’ legislation remains in place.¹⁸

Concluding observations

15.16 The Committee understands that the Government Procurement chapter is an important step forward in ensuring that Australian businesses received non-discriminatory access. However, the Committee notes that this will dependant largely on how well Government and business work in partnership to realise these goals, and the potential economic benefit.

17 Textile, Clothing and Footwear Union of Australia, *Submission 8*.

18 South Australian Government, *Submission 198*

Intellectual Property Rights and Electronic Commerce

IP Rights - Introduction

- 16.1 In the Committee's view, Chapter 17 on Intellectual Property Rights ('the IP Chapter') is the largest of the 23 chapters both in content and substance. The Chapter refers to all the major forms of intellectual property rights and their enforcement including copyright, trademarks, patents, industrial designs, domain-names and encrypted program-carrying satellite signals. The obligations will require legislative amendments to five pieces of legislation.¹
- 16.2 The Chapter contains 29 Articles and 3 exchanges of letters. The exchanges of letters are on Internet Service Provider (ISP) Liability; various aspects of intellectual property that apply to Australia; and national treatment in respect of phonograms.²
- 16.3 DFAT advised that a large number of the obligations are drafted in a way that reflects both Australia and the United States' highly sophisticated intellectual property regimes³ and has been drafted this way to ensure consistency with the US template approach to its free trade agreements.⁴

1 NIA, Annex 8.

2 DFAT, *Guide to the Agreement*, p. 93.

3 Ms Toni Harmer, *Transcript of Evidence*, 2 April 2004, p. 66.

4 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 70.

Background

- 16.4 In general terms, IPRs are the legal rights which arise as a result of intellectual activity. There are two main reasons for the creation of these rights. The first is to give public recognition of the creative, moral and economic rights of the creator and the rules to govern the rights of the public for access. The second reason is to foster creativity and promote innovation by rewarding the creator a monopoly economic right for a limited period of time.⁵
- 16.5 The exclusive right to exploit the innovation quite often conflicts with the idea of competition policy which at its basic level seeks to remove impediments to the functioning of markets such as minimising the power of monopolies. The IP Chapter is designed to reinforce these rights, and in some places strengthen them to take account of developments in technology.
- 16.6 It is not uncommon to see intellectual property included in trade agreements. The Paris Convention for the Protection of Industrial Property of 1883 (the Paris Convention) is the earliest multilateral treaty to recognise the value of intellectual property and its importance to protecting the value of ideas. The Paris Convention was closely followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886. These two conventions recognise the two distinct branches of intellectual property, namely industrial property and copyright.
- 16.7 Since the Paris Convention, there are now more than 23 different intellectual property multilateral treaties all administered by the World Intellectual Property Organization (WIPO).⁶ Australia recognises the value of protecting intellectual creativity and therefore is a party to many of them.

Obligations concerning copyright

- 16.8 The Agreement contains several obligations concerning copyright. The most significant in terms of the evidence received by the Committee, and therefore those which this section focuses on, are the obligations relating to the term of copyright protection and effective
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5 WIPO Intellectual Property Handbook: Policy, Law and Use, Ch.1, p. 3.

6 http://www.wipo.int/about-wipo/en/gib.htm#P61_9104, viewed on 7 June 2004.

technological protection measures. This section will also briefly look at the ratification of the WIPO Internet treaties, temporary copies and IP rights for Indigenous peoples.

Extension to the term of copyright protection

16.9 In 1710, the United Kingdom passed the first piece of legislation (Statute of Anne) which bestows a limited period of exclusive ownership to the creator of the work. The debate about the length of time that someone should have exclusive ownership has ensued ever since.

16.10 Article 17.4.4 of the Agreement treaty sets out the obligations on both parties on the term of copyright protection. The term of protection covers works, photographs, performances and phonograms and

on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death;...⁷

For all other terms where the life of a natural person is not used then the term is

not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram; or⁸

failing such authorized publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.⁹

16.11 Current Australian legislation specifies the term of copyright protection to be generally life of the author plus 50 years. Generally, the treaty obliges Australia to increase its term of protection by an extra 20 years. This is beyond the minimum international standard stipulated in the Berne Convention. With some 50 plus countries including the EU and the US adopting life plus 70, this is emerging as an international standard.

16.12 The Committee received a considerable number of submissions and evidence supporting both sides of the argument. Along with the

7 AUSFTA, Article 17.4.4(a), p. 17-7.

8 AUSFTA, Article 17.4.4(b)(i), p. 17-7.

9 AUSFTA, Article 17.4.4(b)(ii), p. 17-7.

arguments for and against, the Committee looked at the application of the United States ‘fair-use’ regime.

The argument to extend

- 16.13 The Committee received submissions and evidence from a number of organisations supporting the argument to extend the term of copyright protection from life of the author plus 50 years to life of the author plus 70 years. The main arguments as presented to the Committee included harmonisation with our trading partners and owners benefiting from an extended term.
- 16.14 On extension of the term of protection it was clear from submissions and evidence received that bringing our term of copyright protection into line with those of our major trading partners, namely the United States and the European Union, would provide intellectual property owners a benefit that they currently do not receive.¹⁰ There was also evidence to suggest that harmonisation would result in cost savings to collecting societies in managing those intellectual property rights.¹¹
- 16.15 Some of the reasons that were presented to the Committee included the problems associated with obtaining copyright clearances in cross-border environments and that some services such as a digital music delivery system established in Australia may encounter problems with some works that are not protected because of the shorter duration of term, but are protected in other markets such as the United States and Europe.¹² Both the Australian Recording Industry Association and the Business Software Association of Australia noted that with the advent of digital services and online file sharing, there is a need to balance the increased risk posed by piracy.¹³
- 16.16 The Business Software Association of Australia along with proponents for extension referred¹⁴ to the Allens Consulting Group report of July 2003 which concluded that

Overall, the net financial impact of term extension in Australia is likely to be neutral; there are costs, and there are benefits, but to say that one is appreciably larger than the

10 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 17.

11 Ms Caroline Morgan, *Transcript of Evidence*, 19 April 2004, p. 86.

12 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 17.

13 Australian Recording Industry Association (ARIA), *Submission 155*, p. 2, and Business Software Association of Australia, *Submission 126*, p. 4.

14 Business Software Association of Australia, *Submission 126*, p. 4; Australian Copyright Council, *Submission 213*; Viscopy, *Submission 214*.

other lacks credibility. The global trend to harmonisation around a longer copyright term suggests that there will be harmonisation benefits (i.e., costs foregone) in similarly adopting a longer copyright term comparable with Australia's major copyright trading partners.¹⁵

- 16.17 In terms of the actual cost to the Australian community of extending the term of protection, the Committee understands from most parties that estimating the economic impact is virtually impossible. The Committee noted that the Centre for International Economics' modelling did not place a dollar value on this cost.

It is not possible to derive any indication of the magnitude of the costs that may stem from the restriction of new works being produced from existing works.¹⁶

- 16.18 The Copyright Agency Limited. presented evidence to the Committee in respect of the percentage of material copied by the educational sector of out-of-copyright material and noted that

out-of-copyright material is 0.3 per cent of total copying...If you look at the period of 50 to 70 years it is 0.02 per cent, which is roughly two pages out of every 10,000 pages.¹⁷

- 16.19 However, Dr Philippa Dee in a report commissioned by the Senate Select Committee on the Free Trade Agreement between Australia and the United States said

The DFAT/CIE report made some simplifying assumptions in order to quantify the benefits of extending the term of copyright protection. While the report was not able to make the same assumptions to quantify the costs, this has been done in Box 2 [not included in this report], The net effect is that Australia could eventually pay 25 per cent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to \$88 million per year, or up to \$700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia.¹⁸

15 Allens Consulting Group, *Copyright Term Extension, Australian Benefits and Costs*, July 2003, p. 36.

16 Centre for International Economics, *Economic Analysis of AUSFTA, Impact of the bilateral free trade agreement with the United States*, April 2004, p. 39.

17 Ms Caroline Morgan, *Transcript of Evidence*, 19 April 2004, p. 86.

18 AUSFTA – An Assessment, Dr Philippa Dee, June 2004.

The argument not to extend

- 16.20 The Committee noted the significant amount of evidence received which opposed the extension of the copyright term by 20 years.¹⁹ Most of the argument contained in this evidence referred to the economic impact on libraries and educational and research institutions. The main arguments against extension included the extended term of payment of royalties, increased costs through the statutory licenses issued to educational institutions by collecting societies, the extension of transactional and tracing costs, and the reduction of the incentive to create more works.
- 16.21 Along with the Australian Digital Alliance²⁰ and the Australian Library and Information Association²¹ a number of submissions noted that the extended term of payment of royalties will impose significant economic burdens on educational and research providers. This will
- include increased costs for collecting agency statutory licences for universities and schools and involuntary licenses such as those held by government departments and, of course, costs for the so-called orphaned works.²²
- 16.22 The Australian Vice Chancellors' Committee also expressed similar concerns
- The extension of the copyright term in Australia comes at a cost to the Australian economy because Australia is a net importer of third party copyright material. As noted earlier

19 The following *Submissions* all specifically expressed opposition to the extension of the term of copyright protection: Mr Matthew Rimmer, *Submission 27*; Mr Peter Youll, *Submission 32*; Ms Isabel Higgins, *Submission 46*; Electronic Frontiers Australia Inc., *Submission 50*; Mr Phillip Bradley, *Submission 84*; University of the Sunshine Coast, *Submission 63*; Ms Jacqueline Loney, *Submission 86*; NSW Government, *Submission 66*; Media Entertainment and Arts Alliance, *Submission 67*; Australian Fair Trade and Investment Network, *Submission 68*; Ms Annie Nielsen and Phil Bradley, *Submission 96*; Ms Vera Raymer OAM, *Submission 118*; Australian Nursing Federation, *Submission 120*; Colin & Catherine Dahl, *Submission 131*; National Tertiary Education Union, *Submission 129*; Mr Jock Given, *Submission 147*; Australia Council for the Arts, *Submission 157*; Combined Pensioners and Superannuants Association of NSW (Bathurst Branch), *Submission 163*; Uniting Care (NSW/ACT), *Submission 169*; Australian Vice Chancellors Committee, *Submission 189*; Australian Consumers Association, *Submission 195*; Queensland Government, *Submission 206*

20 Miss Miranda Lee, *Transcript of Evidence*, 3 May 2004, p. 47.

21 Ms Jennefer Nicholson, *Transcript of Evidence*, 4 May 2004, p. 63.

22 Ms Jennefer Nicholson, *Transcript of Evidence*, 4 May 2004, p. 63.

the universities and other institutions (such as libraries) are major consumers of copyright material.²³

- 16.23 The Australian Digital Alliance believed that copyright term extension will increase the 'transactional costs of seeking permissions from copyright owners'.²⁴
- 16.24 The Music Council of Australia felt that these changes should not be the subject of trade agreements but should have been done within the domestic environment noting in their submission that
- whether it is an advantage to introduce these changes in the context of an FTA with the USA is, at best, open to doubt.²⁵
- 16.25 The Committee understands that these are not novel arguments. When the United States extended its term of copyright protection from life of the author plus 50 to life of the author plus 70 in 1998 under the *Sonny Bono Copyright Term Extension Act 1998 (US)*, several constitutional challenges were made. In the first of these, *Eldred v Ashcroft*, Justice Breyers made a dissenting judgement, and noted the significant costs imposed by transactional and tracing costs.²⁶ Dr Matthew Rimmer provided the Committee with a number of examples in the United States where this cost has had significant impacts on cultural and socially important projects.²⁷
- 16.26 Dr Rimmer provided evidence to the Committee that contested that extension of the term of copyright is following an emerging international trend. Dr Rimmer reminded the Committee that under the multilateral agreements, like the Berne Convention dealing with copyright, the obligation is life of the author plus 50 years. He further noted that Australia has not been willing to follow emerging trends in other areas of intellectual property protection such as the right of resale or that Australia has not enacted *sui generis* protection for traditional knowledge or data base laws.
- 16.27 Dr Rimmer also pointed out that the discrepancy in retrospectivity²⁸ between Australia, the United States and the EU will need to be

23 Australian Vice Chancellors Committee, *Submission 189*.

24 Miss Miranda Lee, *Transcript of Evidence*, 3 May 2004, p. 47.

25 Music Council of Australia, *Submission 31*, p. 4.

26 *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 806.

27 Dr Matthew Rimmer, *Submission 27*, p. 12.

28 When the extension of the term of copyright protection was enacted in the US and the EU, it was done retrospectively. That is, that all works that had been in the public domain were brought back into copyright under the extended term. The US enacted its legislation in 1998, bringing all works created from 1928 back into copyright. Australia

accounted for in transactional costs. Dr Rimmer specifically referred to the period between 1928 and 1954 where there will be some confusion.²⁹

16.28 The Committee received a submission that observed

This pressure to extend copyright duration clearly comes not from a desire to promote innovation and enhance our nation's public domain, but rather from a corporate desire to enhance monopoly profits.³⁰

16.29 The Committee heard evidence from bodies that did not specifically point to where the costs fall but nonetheless noted areas of concern such as the impact on libraries, universities and schools³¹ and Australian creators of new works.³²

Copyright and competition

16.30 As noted in the background to this section, copyright and competition policy are sometimes in conflict, with one assigning legal rights for a monopoly, the other attempting to minimise its disruption on markets. The Committee heard evidence and received submissions on the interaction with competition policy and the extension of the term of copyright.

16.31 The Committee was referred to the consideration of extending the term of copyright protection conducted by the Intellectual Property and Competition Review (IPCR) in 2000. Arguments presented in that review included the claim that such an extension would be 'anti-competitive and monopolistic'³³, and that there was no economic benefit for extension.³⁴ In its conclusions, the IPCR recommended that the current term should not be extended and that no extension should

would not be required to enact retrospective action under the terms of the AUSFTA. If the Agreement enters into force in 2005, only works from where the author died in 1955 onwards will be protected.

29 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, pp. 51-52.

30 Electronic Frontiers Australia Inc., *Submission 50*.

31 NSW Government, *Submission 66*.

32 Media Entertainment Arts Alliance, *Submission 67*.

33 Dr Matthew Rimmer, *Submission 27*, p. 17.

34 Dr Matthew Rimmer, *Submission 27*, p. 17.

be introduced in the future without a prior thorough and independent review of the resulting costs and benefits.³⁵

- 16.32 The Committee received evidence in respect of an amicus curiae submission made by seventeen economists including five Nobel Laureates in the United States' *Eldred v Ashcroft* case which noted 'a number of circumspect points about the economic effect of the legislation'.³⁶ Specifically it pointed out that there would be only a marginal increase in anticipated compensation for an author; the extension makes no significant contribution to the economic incentive; the extension increases the inefficiency of above-cost pricing and that the extension affects the creation of new works derived wholly or in part from those still in copyright.³⁷
- 16.33 In 2003, the Allens Consulting Group produced a report on the economic effects of copyright term extension, which was presented as an exhibit to the Committee. This report, commissioned by the Motion Picture Association and supported by proponents for extension of the term of copyright, was noted in a submission received by the Committee to have 'been widely discredited'.³⁸ Of particular note was the fact that the Allens Report failed to take account of previous evidence presented to the Supreme Court of the United States that 'it is highly unlikely that the economic benefits from copyright extension under the Copyright Term Extension Act outweigh the additional costs'.³⁹
- 16.34 While it may be easy to dismiss these arguments as being unique to events that occurred in the United States, and therefore irrelevant to the Australian legal environment, the Committee acknowledges evidence and submissions that as Australia is a net importer of copyright material, there is a suggestion that there will be a negative economic impact on users and consumers of copyrighted material.

Time for 'fair use'?

- 16.35 Doctrines exist in both the Australian and United States copyright regimes which allow for exceptions on when copyrighted material

35 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, September 2000, p. 13.

36 Dr Matthew Rimmer, *Submission 27*, p. 18.

37 Dr Matthew Rimmer, *Submission 27*, p. 18.

38 Dr Matthew Rimmer, *Submission 27*, p. 19.

39 Dr Matthew Rimmer, *Submission 27*, p. 19, quoting Milton Friedman's testimony to the Supreme Court of the United States.

may be used without payment of a royalty. In Australia this is known as ‘fair dealing’, and in the United States ‘fair use’.

- 16.36 The Australian legislation provides for four fair dealing purposes: research or study, criticism or review; reporting of news; and professional advice given by a legal practitioner or patent attorney. The US legislation provides also for four fair use aspects: the purpose of the use, the type of the work, the amount of the work used, and the impact on the market.
- 16.37 The US legislation allows for a much broader application than the limited Australian legislation where it is restricted to specific activities. The Committee understands that there is nothing in the Agreement that would prevent the Australian Government from accessing exceptions that meet internationally agreed standards.⁴⁰
- 16.38 The Committee heard evidence and received submissions that should the term of copyright protection be extended then consideration should be given to extending the fair dealing doctrine to a much more open-ended defence, similar to the US legislation.⁴¹ The Committee only heard from one organisation that there was no need to consider extending the fair dealing doctrine.
- 16.39 The arguments presented to the Committee centred around the balance between users and owners in the *Copyright Act 1968*, and the change in balance under the obligations in the AUSFTA. One submission noted

The primary balance provided by the United States to its citizens against strong IP rights is a broad exemption for ‘fair use’ of works...It has the benefit of coping far more flexibly with new technologies...⁴²

whilst another submission said that

40 Ms Toni Harmer, *Transcript of Evidence*, 14 May 2004, p. 51.

41 For the record the following *Submissions* all specifically expressed a desire for Australia to adopt a similar fair use doctrine as appears in US legislation; Dr Matthew Rimmer, *Submission 27*; Anthony Towns, *Submission 37*; Australian Digital Alliance/Australian Libraries Copyright Committee, *Submission 71*, Swinburne University of Technology, *Submission 103*, Professor Ian Lowe AO, *Submission 105*; WTO Watch, QLD, *Submission 112*; Macquarie University, *Submission 117*; National Tertiary Education Union, *Submission 129*; Mr Patrick Caldon, *Submission 138*; Australian Library and Information Association, *Submission 142*; Australian Coalition for Economic Justice, *Submission 151*; The Australian Vice-Chancellors Committee, *Submission 189*; Australian Consumers Association, *Submission 195*, The University of Queensland Library, *Submission 202*.

42 Mr Anthony Towns, *Submission 37*.

Instituting US style copyright law without US style constitutional free speech protection will lead to a gross miscarriage of justice.⁴³

16.40 Dr Rimmer stated that Australia has

adopted all the harsher measures of the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act without any of the good features of the United States regime,⁴⁴

a view supported by peak bodies representing libraries and educational institutions.

If it [the Agreement] comes in, we would have to look at different balancing mechanisms. One which has been raised by a number of the stakeholder groups is the introduction of fair use, which is a balancing mechanism to give broader rights for users. If we were to extend the copyright term, that would certainly be one thing that would be worth exploring in trying to maintain the balance.⁴⁵

and

If you were to go down the track of extending the Australian fair dealing to approximate the fair use of the US act, which includes copying for education, you would go some way to addressing some of the issues that are being, I suppose, undermined by increasing the protection through the FTA.⁴⁶

16.41 The Committee also received two submissions that observed that the Australian standard of originality is low in comparison to the United States, in particular noting the 'full Federal Court decision in *Desktop Marketing Systems v Telstra Corporation* which pitched the threshold of originality very low, requiring mere skill and labour'⁴⁷, as in contrast to the Supreme Court of the United States in *Feist Publications Inc v Rural Telephone Service* which raised the threshold of originality much higher, requiring a creative spark.⁴⁸

43 Mr Patrick Caldon, *Submission 138*.

44 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 56.

45 Ms Miranda Lee, *Transcript of Evidence*, 3 May 2004, p. 49.

46 Mrs Eve Woodberry, *Transcript of Evidence*, 4 May 2004, p. 64.

47 Dr Matthew Rimmer, *Submission 27*, p. 30; Ms Kimberlee Weatherall, *Submission 92*.

48 Dr Matthew Rimmer, *Submission 27*, p. 30.

- 16.42 The application of fair use in the United States as determined by their legal system specifically provides for several unique copyright doctrines, namely time-shifting and space shifting.⁴⁹ An example of time shifting is when consumers record a television program for later use, on a device such as a video recorder, or more recently other types of storage mediums.⁵⁰ Space shifting is when digital content is recorded onto a different device than that for which it was originally assigned, e.g. purchasing a CD and copying it onto an MP3 player.⁵¹
- 16.43 Current Australian legislation makes these activities illegal. The debate as to whether there are exceptions in Australian legislation or case law is beyond the scope of this Committee's review. However, the Committee notes that the application of the US' fair use doctrine may resolve any confusion and correct a legal anomaly should Australia decide to adopt a similar regime.
- 16.44 The Committee heard evidence of an alternative balancing mechanism which would involve creating a system of registration for aging copyright material.
- ...material deemed valuable could be registered for ongoing protection (at an escalating fee to recompense society for the deprivation of public access) while less valuable material would fall automatically into the public domain where it would benefit the culturally enriching processes of recycling and reuse.⁵²
- 16.45 The Committee notes that a similar mechanism has been proposed by Landes and Posner⁵³ and in the Allens Consulting Group report of 2003.⁵⁴
- 16.46 The Committee also learnt that the Public Domain Enhancement Act is currently proposed in the United States. The Bill requires a copyright holder to pay a USD\$1 renewal fee fifty years after the work is first published, and every ten years after until the end of the copyright term, which in the United States is 95 years for corporations
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49 Dr Matthew Rimmer, *Submission 27*, p. 31.

50 http://www.wordiq.com/definition/Time_shifting

51 http://www.webopedia.com/TERM/S/space_shifting.html

52 Australian Consumers Association, *Submission 195*, p. 13.

53 William M Landes and Richard A Posner, *Indefinitely Renewable Copyright*, University of Chicago Law School, John M. Olin Law and Economics Working Paper, No.154 (2D Series), 2002.

54 Allens Consulting Group, *Copyright Term Extension, Australian Benefits and Costs*, July 2003, Appendix A1, p. 38.

and 70 years after the death for an individual.⁵⁵ According to one commentator

The bill seeks to increase works available in the public domain, which is the common pool of information and ideas upon which musicians, authors, filmmakers, etc. derive inspiration and materials for new works, leading to more creativity and innovation.⁵⁶

16.47 The Committee heard from APRA/AMCOS contesting the argument of fair use in Australia saying that

We believe the doctrine of fair use is quite vague and that it may require litigation to determine the boundaries of fair use. We support the existing fair dealing exceptions, the educational provisions and the exceptions as they currently are in the act.⁵⁷

16.48 Similar concerns were raised by Viscopy,

The broader US concept of 'fair use' is very different to the Australian concept of 'fair dealing'. To suddenly use the US concept, as has been proposed by some user groups interested in free access to works of Australian copyright, would have many additional implications for Australian law.⁵⁸

16.49 In assessing the impact of these changes, the Committee takes note of Recommendation 6.35 of the Copyright Law Review Committee's report *Simplification of the Copyright Act*.

The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current set of purposes...but is not confined to these purposes.⁵⁹

16.50 The Committee recognises that Australian negotiators defended the term of copyright protection vehemently, but that the final outcome was necessary to secure the overall package.⁶⁰ In order to ensure that

55 <http://www.publicknowledge.org/content/introductions/legislation-pdea/view>, viewed on 7 June 2004.

56 <http://www.publicknowledge.org/content/introductions/legislation-pdea/view>, viewed on 7 June 2004.

57 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 18.

58 Viscopy, *Submission 214*.

59 Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, p. 63.

60 Mr Stephen Deady, *Transcript of Evidence*, 2 May 2004, p. 71.

the balance of interests between users and owners is maintained as the evidence suggests that it will be altered under the AUSFTA, the Committee is putting forth three recommendations that it believes will not only assist educational, libraries, research, and other similar institutions to discharge their function of providing to community access to knowledge that will enhance the intellectual commons but also resolve a long standing legal anomaly in Australian copyright law.

Recommendation 16

The Committee recommends that the Government enshrine in copyright legislation the rights of universities, libraries, educational and research institutions' to readily and cost effectively access material for academic and related purposes.

Recommendation 17

The Committee recommends that the changes being made in respect of the *Copyright Act 1968* replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair-use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time-shifting and space-shifting that is currently absent.

Recommendation 18

The Committee recommends that the Attorney General's Department and the Department of Communication, Information Technology and the Arts review the standard of originality applied to copyrighted material with a view to adopting a higher standard such as that in the United States

Effective Technological Protection Measures

- 16.51 Effective Technological Protection Measures (TPMs) or Anti-circumvention devices are certain types of technology that are

associated with copyright material.⁶¹ The AUSFTA contains a set of obligations on dealing with TPMs. It will require legislative change, however under the terms of the AUSFTA, there is a two year period from date of entry into force of the Agreement to implement those obligations.⁶²

16.52 The Committee heard that as part of the exceptions which are codified in the Agreement, there is

actually an ability to implement our own exceptions, which we would be looking at after a consultation period with various interests.⁶³

16.53 The Committee notes that this is codified in Article 17.4.7(e)(viii) of the Agreement.

16.54 The Committee heard a range of views supporting these obligations, and concerns on this provision focusing on issues such as DVD region coding and possible harm to the Free and Open Source Software Industry (FOSS).

16.55 The Committee recognises that copyright owners have a right to protect their works and this is apparent in the body of evidence taken, such as

Strong anti-circumvention provisions will become increasingly important as copyright owners in the digital environment rely on technological protection measures to protect their works and reduce piracy.⁶⁴

and

It is CAL's view that Australian content creators have been reluctant to develop electronic products, as opposed to their US counterparts, and that an important contributor to this has been the concern Australian content creators have with circumvention devices generally as well as a perception by them that the current Australian legislation does not afford them any protection.⁶⁵

61 DFAT, *Guide to the Agreement*, p. 97.

62 AUSFTA, Volume 1, Article 17.12, pp. 17-29.

63 Mr Simon Cordina, *Transcript of Evidence*, 14 May 2004, p. 53.

64 Business Software Association of Australia, *Submission 126*.

65 Copyright Agency Ltd (CAL), *Submission 197*.

- 16.56 The Committee recognises that due to the online environment, the music⁶⁶ and film⁶⁷ industries have a unique challenge and thus they have supported the implementation of these obligations. Furthermore, the film industry were keen to see the implementation of these measures incorporated into the *Copyright Act 1968* prior to the end of the two year phase end period.⁶⁸
- 16.57 The Committee recognises that attached with these provisions are obligations in respect of increased remedies in the civil and criminal code. The Committee heard that
- supports the FTA requirements for legislative change to provide increased remedies against circumvention of technological protection measures,⁶⁹...
- and some submissions sought more than what is required under the AUSFTA where they believe that current legislation leaves loop holes, such as in pay per view movies.⁷⁰
- 16.58 The Committee also heard evidence that the proposed changes in AUSFTA will be significantly detrimental to some industries and to consumers. The Committee was concerned with submissions from the open source software industry on the effect of the technological protection measures that exist in the United States under their Digital Millennium Copyright Act and that noted
- The United States has seen their DMCA legislation used to stifle fair competition and, the creation of interoperable products and to severely limit a consumers right to fair use.⁷¹
- 16.59 The Committee received submissions from other interested parties that felt that the TPM provisions in the AUSFTA were too onerous and that it 'would intrude into consumers' lives excessively'.⁷²
- 16.60 Of particularly note were submissions to the Committee that may affect consumers' rights to play legally purchased DVDs on their

66 Australian Recording Industry Association (ARIA), *Submission 155*.

67 Australian Film Industry Coalition, *Submission 161*.

68 Australian Film Industry Coalition, *Submission 161*.

69 Commercial Televisions Australia (CTVA), *Submission 145*.

70 Australian Film Industry Coalition, *Submission 161*.

71 Linux Australia, *Submission 183*.

72 Australian Consumers Association, *Submission 195*.

legally purchased multi region DVD players because of region coding, not just in movies but in software.⁷³ The Committee notes

The ACCC is involved in that case [the upcoming High Court case of *Sony v Stevens*] because they are concerned, essentially, about copyright owners engaging in a regional division of material by devices like mod chips.⁷⁴

- 16.61 The Committee received submissions that noted some consequences of the United States' DMCA legislation in respect of the arrest of the Russian programmer Sklyarov⁷⁵ and the District Court ruling on the use of the Linux DeCSS code, as well as concerns about reverse engineering for interoperability in areas such as printer cartridges and garage doors.⁷⁶
- 16.62 The Committee notes that the advice received from the Government provides for sufficient exceptions that can be crafted to suit Australia's domestic regime, and have been informed that the two year transitional period will flesh out these concerns in much greater depth so as to ensure that no sector, including consumers will be disadvantaged.

Recommendation 19

The Committee recommends that the Attorney General's Department and the Department of Communications, Information Technology and the Arts ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition.

73 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 56, Mr Anthony Towns, *Submission 37*; Mr Alan Isherwood, *Submission 77*; Cybersource, *Submission 85*; Linux Australia, *Submission 183*; Australian Consumers Association, *Submission 195*.

74 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 56.

75 Linux Australia, *Submission 183*; Cybersource, *Transcript of Evidence*, 20 April 2004, p. 89.

76 Cybersource, *Transcript of Evidence*, 20 April 2004, pp. 89-90.

Ratification of the WIPO Internet Treaties

- 16.63 The Committee received several submissions⁷⁷ supporting Australia's ratification of the World Intellectual Property Organization (WIPO) Internet Treaties, or more specifically, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).
- 16.64 The Committee was informed that
- We have agreed to implement the WIPO Internet treaties by the entering into force of the Agreement. We made a commitment to do that within four years in the Singapore FTA, in any event.⁷⁸
- 16.65 The Committee notes that one submission expressed a strong concern that as part of the WPPT implementation that they would strongly oppose any extension of performers' rights to audiovisual works.⁷⁹

Temporary Copies

- 16.66 Temporary copies have been the subject of some debate in copyright circles since the emergence of computers, the internet, gaming machines and so forth. Questions have arisen as to the changing status of a copy in a temporary state, that is, at what point can the owner of the intellectual property no longer determine what or how it should be used, or demand remuneration for it.
- 16.67 The Committee received submissions that expressed concerns that the issue of temporary copies should receive appropriate attention and that failure to do so may disadvantage educational institutions and consumers.⁸⁰ Several submissions specifically raised the issue of forward or proxy caching, including mirror caching for educational purposes.⁸¹ Other factors that need to be considered in this context are buffering, pipelining, virtual paging, context swapping and RAID arrays.⁸²

77 Music Council of Australia, *Submission 31*; Commercial Television Australia (CTVA), *Submission 145*; Australian Recording Industry of Australia (ARIA), *Submission 155*; Copyright Agency Ltd. (CAL), *Submission 197*; Australian Copyright Council, *Submission No. 213*; Viscosity, *Submission 214*.

78 Ms Toni Harmer, *Transcript of Evidence*, 2 April 2004, p. 66.

79 Commercial Television Australia, *Submission 145*.

80 Australian Digital Alliance / Australian Libraries Copyright Committee, *Submission 71*, p. 12.

81 Australian Vice-Chancellors' Committee, *Submission 189*, p. 7.

82 Australian Consumers Association, *Submission 195*, p. 12.

16.68 However, the Committee notes that this issue is being dealt with in the context of the Phillips Fox report of the Digital Agenda Review commissioned by the Attorney-General's Department as part of the *Copyright Amendment (Digital Agenda) Act 2000*. Furthermore, in respect of temporary copies, the Committee notes that two of the recommendations of the Phillips Fox review will address some of the concerns presented to the Committee, namely Recommendation 15, which states

That the sections be further amended by inserting a new subsection to include a definition of 'temporary reproduction' for the purposes of the section, as meaning any transient, non-persistent reproduction that is incidental to the primary purpose or act for which the work is made available and which has no independent economic significance.⁸³

and Recommendation 16, which states

That the educational statutory licence provisions be amended to allow for an educational institution to make active caches of copyright material for the purpose a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner.⁸⁴

IP rights for Indigenous peoples

16.69 The Committee was pleased to receive submissions and evidence from bodies interested in IP rights for Indigenous Australians. The Committee is aware that protection of Indigenous intellectual property through current legislation has limitations and requires further reform, especially in respect of collective rights, duration of copyright in relation to cultural expression, access to traditional knowledge and benefit sharing, development and patenting of products derived from traditional knowledge, resale royalty and breach of confidence in relation to Indigenous knowledge or cultural expression.⁸⁵

16.70 The Committee heard concerns that because Indigenous intellectual property rights were not addressed in the IP chapter, communities

83 Phillips Fox, *Digital Agenda Review, Report and Recommendations*, January 2004, p. 95.

84 Phillips Fox, *Digital Agenda Review, Report and Recommendations*, January 2004, p. 98.

85 Jumbunna, Indigenous House of Learning, *Submission 106*.

may not benefit from the financial rewards of their culture and creativity,⁸⁶ or that it may

limit or discourage Australian parliamentary capacity to increase legislative protection and promotion of Indigenous cultural expression and traditional knowledge.⁸⁷

16.71 Other concerns included that future forms of IP may be covered under the existing provisions and that it is difficult to gauge the full effect of the change, and that it should be monitored.⁸⁸

16.72 The Committee was informed by ATSIIS that

the Minister made it clear to ATSIIS that there is nothing in the AUSFTA that will affect in any way Australia's ability to take whatever action is necessary to protect Indigenous interests should the need arise.⁸⁹

Trade marks, including geographical indications

16.73 The IP Chapter contains a section on trade marks, including geographical indications. The Committee understands that

This Article reaffirms both Parties' commitment to providing world class trademark services. Australia already largely complies with this Article, and it is therefore, in most instances, a reaffirmation of current legislative requirements, policy and/or practice.⁹⁰

16.74 However, the Committee understands that there will be two minor changes required to the Australian Wine and Brandy Corporation Act

in relation to cancellation procedures and grounds for refusing an application for a geographical indication to codify current practice.⁹¹

16.75 The Committee heard that industries that will be affected by these changes are supportive

86 Jumbunna, Indigenous House of Learning, *Submission 106*.

87 Jumbunna, Indigenous House of Learning, *Submission 106*; In similar terms, Ms Ann Pentead, *Submission 177*.

88 Australia Council for the Arts, *Submission 157*.

89 Aboriginal and Torres Strait Islander Services, *Submission 188*.

90 DFAT, *Guide to the Agreement*, p. 94.

91 DFAT, *Guide to the Agreement*, p. 94.

Under the Free Trade Agreement that legislation will be required to be changed to enable that, and we support that as an industry.⁹²

- 16.76 These changes have also been supported by body that administers the Australian Wine and Brandy Corporation Act.⁹³

Patents

- 16.77 The AUSFTA contains a section on Patents.

- 16.78 The Committee understands that the Article on patents generally reflects Australia's current laws and it is not anticipated that major changes to the *Patents Act 1990* will be needed to implement the FTA.⁹⁴

- 16.79 However, the Committee heard and received a body of evidence and that has raised some quite serious concerns, specifically in respect of the granting of software and process patents.

- 16.80 According to the DFAT fact sheet issued on Intellectual Property shortly after the finalisation of negotiations, there are several references to harmonisation and reducing differences in law and practice across areas, such as patents.⁹⁵ Based on material in these factsheets, the Committee heard evidence such as

these proposed changes will actually increase the strength of those laws to the point that they are no longer protecting the open source software industry but are actually preventing it from doing business. In particular I refer to the granting of patents to software.

and

My concerns relate to the braking effect that it will have on small IT companies like mine on innovation and providing solutions for clients. It is a brake on the way that we do business.⁹⁶

- 16.81 The Committee also heard evidence to suggest that

92 Mr Stephen Strachan, *Transcript of Evidence*, 22 April 2004, p. 5.

93 Australian Wine and Brandy Corporation, *Submission 154*.

94 DFAT, *Guide to the Agreement*, p. 99.

95 www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html, viewed on 7 June 2004.

96 Dr Christopher Pudney, *Transcript of Evidence*, 23 April 2004, p. 35.

There is an attempt by the US government to impose extensions to patent law in Australia as well, which will also be to the serious detriment of the information industries, particularly the e-commerce and e-business arenas.⁹⁷

and

the only use of patents against such technology can be to eliminate Open Source projects as competition, reducing consumer choice and doing significant damage to Australian competitiveness and infrastructure.⁹⁸

Business as usual

16.82 The Committee understands that these concerns relate specifically to the process, approach and standards that are used to apply patents by the United States Patent and Trademark Office (USPTO).⁹⁹

I think some of the concerns may be related to the US Patent Office and how they may grant patents, but we are not required to take on board any of those practices in Australia.¹⁰⁰

16.83 However, the Committee is satisfied that the use of the word ‘harmonisation’ in the DFAT fact sheet has led to some confusion in the general community and that the claims made by the various individuals and organisations will not eventuate.

I want to make it very clear, particularly in terms of the issue of patents and what will be patentable in Australia, that the FTA text is completely consistent with our current law. We will not be changing what it is that can be patented in Australia as a result of the FTA.¹⁰¹

97 Dr Roger Clarke, *Transcript of Evidence*, 4 May 2004, p. 22.

98 Linux Australia, *Submission 183*.

99 Federation of Australian Scientific and Technological Societies, *Submission 190*; Australian Centre for Intellectual Property in Agriculture, *Submission 191*.

100 Ms Toni Harmer, *Transcript of Evidence*, 14 May 2004, p. 52.

101 Ms Toni Harmer, *Transcript of Evidence*, 14 May 2004, p. 52.

Measures related to certain Regulated Products

16.84 There is a section in the AUSFTA that deals with regulated products. In the context of the Agreement, this refers to pharmaceutical products and Agriculture/Veterinary chemicals. There will be some changes needed to the *Therapeutic Goods Administration Act 1989* in respect of marketing of a generic version of a patented medicine during the patent term and notification of intent to market during the patent term.¹⁰²

16.85 The Committee notes that

The Article does not require Australia to make changes to its regime for the protection of test data for pharmaceutical products or its existing pharmaceutical patent extension regime.¹⁰³

and

current springboarding arrangements have been preserved.¹⁰⁴

and that

There is no change required to our springboarding provisions that flows on from the agreement.¹⁰⁵

16.86 Furthermore the Committee notes the advice from the Department of Health and Ageing that

there are no changes to our [pharmaceutical] patent term extension regime as a result of the Agreement. In fact, it was not an area where we were being pressed to make changes.¹⁰⁶

and

Of itself, the Agreement does not change the existing practices that each country has in the patents area.¹⁰⁷

102 DFAT, *Guide to the Agreement*, p. 101.

103 DFAT, *Guide to the Agreement*, p. 100.

104 DFAT, *Guide to the Agreement*, p. 99.

105 Ms Carolyn Smith, *Transcript of Evidence*, 2 April 2004, p. 49.

106 Ms Carolyn Smith, *Transcript of Evidence*, 2 April 2004, p. 50.

107 Ms Carolyn Smith, *Transcript of Evidence*, 2 April 2004, p. 50.

Pharmaceutical products

16.87 The impact on the health sector, particularly the Pharmaceutical Benefits Scheme (PBS), has received considerable attention during the Committee's inquiry. This section will deal specifically with the changes that are required to pharmaceutical products and the relationship between innovative and generic products on the PBS.¹⁰⁸

Delay of entry?

16.88 The Committee heard evidence that some of the proposed changes in this area may impact on the entry to the market of generic pharmaceutical products, which in turn may increase the cost of the PBS.

16.89 Specifically the Committee heard that

the free trade agreement proposes changes to Australian patent laws which I believe will delay the introduction of cost-effective generic drugs on the Pharmaceutical Benefits Scheme.¹⁰⁹

and that

Any delay caused to the entry of generic medicines by these free trade provisions will have quite deleterious effects on the pricing and availability of drugs.¹¹⁰

16.90 The Doctors Reform Society stated that

the increased patent rights for pharmaceutical companies will delay the entry of new generic drugs onto the market from the generic industry, maintaining higher prices for longer and thus higher costs for the PBS and ultimately to the Australian people¹¹¹

Evergreening

16.91 The Committee received submissions raising concerns of evergreening, which is the name given to the process in which patent

108 The DFAT Factsheet on the PBS can be found at http://www.dfat.gov.au/trade/negotiations/us_fta/backgroundunder/pbs.html, viewed on 13 June 2004.

109 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 4. This view was echoed in the *Submission 70*, from the Australia Institute.

110 Dr Ken Harvey, *Transcript of Evidence*, 20 April 2004, p. 4.

111 Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 22.

holders maintain exclusivity by progressively filing a series of use patents based around the product, thereby delaying generic manufacturers entering the market. The Committee understands that this process will effectively extend the patent holder's monopoly.

A literal interpretation of Article 17.10.5(a)(ii) would suggest that abuse of the system through the 'evergreening' of patents will be further encouraged.¹¹²

- 16.92 Practices such as evergreening as a result of notification by generic producers are significant problem in the United States, specifically

Experience in the United States shows that manufacturers routinely use this requirement to take legal action against would-be competitors in a bid to protect prices and market share.¹¹³

No delay for Generics

- 16.93 The Committee notes that some of the concerns about the impact of the entry onto the market by generics may have arisen because of evergreening and the use and effect of Bolar provisions in the United States. For the Australasian Society for HIV Medicine, one of their main concerns with the Agreement is

that it potentially undermines the use of 'Bolar Provisions', which were included in TRIPS and allow for the immediate release of generic products upon the expiration of a patent.¹¹⁴

- 16.94 The Committee accepts however that the situation in Australia will be different due to our different legal and regulatory environment, based on evidence from Medicines Australia, who stated in their submission that

These provisions merely clarify that a generic medicine cannot be marketed while a patent is on foot – this is the existing law with an element of greater transparency... Notification provisions on their own do not delay or impede the capacity of generic manufacturers to prepare for generic production. The rules are set out in the Intellectual Property laws, and these rules are unchanged by the FTA.¹¹⁵

112 Generic Medicines Industry Association Pty Ltd., *Submission 83*.

113 National Association of People Living with HIV/AIDS, *Submission 14*.

114 Australasian Society for HIV Medicine, *Submission 75*.

115 Medicines Australia, *Submission 28*.

- 16.95 The Committee received advice from Mr Deady that noted Australia's awareness of the potential impact on the generics industry which may have been caused by the AUSFTA.

We certainly were very conscious in the IP negotiations to ensure that, regarding any commitments we entered into in the patents area in relation to the marketing approval processes for generic drugs, this would not in any way damage the generics industry in Australia and feed into delays that could impact on the Pharmaceutical Benefits Scheme.¹¹⁶

- 16.96 The Committee recognises the concerns expressed by the community in respect of this important matter and are mindful of the impact that it may have on our world class health system.

Recommendation 20

The Committee recommends that in respect of the changes to the *Therapeutic Goods Administration Act 1989* and with respect to the valuable input of the innovator companies, care is to be taken in the implementation to recognise the unique position that generic pharmaceutical companies provide to the Australian community through health programs.

And, accordingly it is essential that in drafting the legislation, there should be no mechanism that will cause undue delay of the entry to the market of generic pharmaceuticals.

Agriculture and Veterinary Chemicals

- 16.97 The Committee understands that some changes will be needed to the *Agriculture and Veterinary Chemicals Act 1994* 'to change the scheme currently in place, including in relation to the time period for protection of agriculture chemical test data'.¹¹⁷

- 16.98 The Committee received a submission that noted

The WA Farmers Federation and generic agriculture chemical manufacturers have expressed concern that the Intellectual Property Chapter of the Agreement extends the data

116 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 48.

117 NIA, Annex 8.

protection for new data to 10 years and that is not consistent with proposed new data protection legislation.¹¹⁸

16.99 However, the Committee notes that in the same submission

The Commonwealth Department of Agriculture Fisheries and Forestry, has advised, however, that the AUSFTA is consistent with the proposed data protection legislation and the obligation extends to eight years only for new data, where it is not accompanied by the conjoint approvals of certain new uses, which in the proposal attracts the three additional one-year extensions.¹¹⁹

16.100 Similar concerns were expressed to the Committee by the NFF.

Moreover, NFF was concerned that significant pressure may be forthcoming from the US to extend the period of data protection for agricultural and veterinary chemicals under current proposed legislative amendments being considered by the Australian Government. NFF believes there is strong justification for Australia maintaining shorter phases of data protection than in the US, helping to ensure generic market competition and cost effective access to chemicals for Australian farmers. NFF understands this outcome was achieved under the negotiated agreement.¹²⁰

16.101 The Committee notes that 'these changes are in line with a scheme already under consideration'.¹²¹ This was restated to the Committee;

The change is consistent with the scheme that the Department of Agriculture has been working on for some time which is the eight plus one plus one plus one scheme...¹²²

Enforcement

16.102 The enforcement articles in the AUSFTA relate to the entire IP Chapter which include obligations in respect of civil and administrative procedures and remedies, provisional measures,

118 WA Government, *Submission 128*.

119 WA Government, *Submission 128*.

120 National Farmers Federation, *Submission 153*.

121 DFAT, *Guide to the Agreement*, p. 100.

122 Ms Toni Harmer, *Transcript of Evidence*, 2 April 2004, p. 66.

border measures, criminal procedures and procedures in relation to Internet Service Provider (ISP) liability.¹²³

- 16.103 The Committee recognises that the enforcement of intellectual property rights is just as important as the legal rights of ownership. The Committee also notes that some of the changes are consistent with some of the recommendations in the House of Representatives Standing Committee on Legal and Constitutional Affairs' December 2000 report *Cracking down on copycats: enforcement of copyright in Australia*.¹²⁴
- 16.104 In the course of the inquiry, the Committee generally heard positive comments about the changes to enforcement¹²⁵. Ms Caroline Morgan, from the Copyright Agency Ltd (CAL), expressed support for the requirement that Australia strengthen its enforcement measures to combat piracy. This was a view also outlined in CAL's written submission.¹²⁶
- 16.105 Other organisations, while supportive of the new enforcement provisions, made comments to the Committee on specific drafting issues such as ex-officio actions in border measures, presumptions in relation to copyright material and additional damages and statutory damages.¹²⁷
- 16.106 The Committee expressed a concern early in the inquiry that the new provisions may lead to arrests where there has been no commercial element, or scenarios such as in the United States where adolescents have had recorded criminal convictions of what would be considered in Australia as minor copyright infringements. The Committee was reassured that 'the provisions for the criminal sanctions are for significant, wilful infringements done essentially for profit'.¹²⁸
- 16.107 One organisation was concerned that

123 DFAT, *Guide to the Agreement*, p. 102.

124 This copy is available electronically at <http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm> (viewed on 14 June 2004).

125 The following organisations support the changes in this area; Australian Information Industry Association, *Transcript of Evidence*, 19 April 2004, p. 26; Business Software Association of Australia, *Submission 126*; APRA/AMCOS, *Submission 156*.

126 Ms Caroline Morgan, *Transcript of Evidence*, 19 April 2004, p. 87, and Copyright Agency Ltd., *Submission 196*.

127 Australian Film Industry Coalition, *Submission 161*.

128 Mr Stephen Fox, *Transcript of Evidence*, 2 April 2004, p. 70.

Criminalisation of consumer behaviour as a response to monopoly market failure is in our view poor public policy.¹²⁹

- 16.108 The Committee is satisfied that the provisions of the AUSFTA will be implemented in a such a way as that it will only combat infringements made for significant and wilful commercial gain.

Internet Service Provider (ISP) Liability

- 16.109 The Internet has no doubt provided society with a new medium by which to communicate ideas and disseminate information. In the context of copyright infringements, it has also allowed for wider and more frequent illegal non-remunerated copying. As consumers log onto the Internet through a Service Provider there has been considerable debate as to the legal liability of who is at fault should an infringement occur. This issue has been addressed in part by current legislation; however it has not addressed the concerns of all parties.

- 16.110 The AUSFTA contains a framework which will require legislative change for

a scheme for immunity of Internet Service Providers (ISPs) for potential copyright infringement in return for compliance with a scheme for the removal of allegedly infringing material on their networks.¹³⁰

- 16.111 The Attorney-General's Department advised the Committee that the scheme will balance the interests of right holders and the interests of the service providers,¹³¹ but the Committee is aware of some concerns that such a scheme's introduction may cause similar privacy issues as have been encountered in the US, some of which are continuing to receive legal attention and social debate.¹³²

- 16.112 The Committee was assured that although the wording in the AUSFTA closely resembles some of the provisions of the US legislation it is not the US system and provides Australia some flexibility in implementation. The Committee was informed that

to some extent I think our implementation will be informed by some of the issues that the US have encountered

129 Australian Consumers Association, *Submission 195*.

130 NIA, Annex 8.

131 Mr Stephen Fox, *Transcript of Evidence*, 2 April 2004, p. 68.

132 Dr Matthew Rimmer, *Transcript of Evidence*, 4 May 2004, p. 57.

domestically. We do not necessarily have to do it exactly the way that they do it.¹³³

16.113 The Committee acknowledges that several organisations are highly in favour of this scheme¹³⁴, noting that the absence of such schemes is a detriment to consumers, and even to investment.

First, the penetration of online gaming is being impeded because the absence of ISP liability provides distributors with little protection; hence Australian consumers are not gaining access to the latest form of games distribution as readily as their counterparts elsewhere in the developed world, meanwhile developers are not investing as much into the local production of online games as the market does not justify such investment.¹³⁵

16.114 Some organisations were concerned that the framework contained in the AUSFTA does not address the emerging issue of illegal peer to peer file sharing¹³⁶. While other organisations supported the current arrangements in that ‘disclosure arrangements in respect of users continue to be a court based process’.¹³⁷ Of some concern was the possible infringement on consumer’s privacy and that allowing access to personal details may provide a dangerous precedent by other claimants such as debt collectors, credit referees and other commercial agents.¹³⁸

133 Ms Toni Harmer, *Transcript of Evidence*, 2 April 2004, p. 69.

134 Interactive Entertainment Association of Australia, *Submission 56*; Business Software Association of Australia, *Submission 126*; Commercial Television Australia, *Submission 145*; APRA/AMCOS, *Submission 156*; Australian Film Industry Coalition, *Submission 161*; Copyright Agency Ltd, *Submission 195*; Viscopy, *Submission 214*.

135 Interactive Entertainment Association of Australia, *Submission 56*.

136 Business Software Association of Australia, *Submission 126*; Commercial Television Australia, *Submission 145*; APRA/AMCOS, *Submission 156*; Australian Film Industry Coalition, *Submission 161*.

137 Australian Vice-Chancellors’ Committee, *Submission 189*, p. 6.

138 Australian Consumers Association, *Submission 195*, p. 18.

Recommendation 21

The Committee recommends that a scheme that allows for copyright owners to engage with Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet be introduced in Australia that is consistent with the requirements of the AUSFTA. In doing so, the Attorney-Generals Department and the Department of Communications, Information Technology and the Arts should

- **take note of the issues encountered by the US as outlined in this Report**
- **tailor a scheme to the Australian legal and social environment**
- **monitor the issue of peer to peer file sharing.**

E-Commerce

16.115 Chapter 16 of the Agreement sets out a number of provisions designed to ensure that trade conducted electronically between Australia and the US remains free. The Chapter consists of nine articles dealing with the electronic supply of services, customs duties, non-discriminatory treatment of digital products, authentication and digital certificates, online consumer protection, paperless trading and definition of terms.

16.116 The Committee understands that the underlying rationale for the E-commerce chapter is reflected in the text of Article 16.1, which states

The Parties recognise the economic growth and opportunity that electronic commerce provides, the importance of avoiding barriers to its use and development, and the applicability of the WTO Agreement to measures affecting electronic commerce.¹³⁹

16.117 The *Guide to the Agreement* states that the Chapter also establishes useful precedents for developing a liberal trading environment for electronic commerce in the region and globally.¹⁴⁰

139 AUSFTA, 16.1.

140 DFAT, *Guide to the Agreement*, p. 89.

16.118 The Committee received one submission that noted

We are anxious that the FTA does not interfere with any established international projects and protocols in this area, undertaken to preserve visual copyright in the new internet and digital circumstances.¹⁴¹

16.119 The NIA states that Australia will still be able to regulate for public policy purposes.¹⁴²

141 Viscopy, *Submission 214*.

142 NIA, p. 4.

Labour and Environment

Introduction

- 17.1 Under Chapter 18 (Labour) and Chapter 19 (Environment) the Parties agree they will ‘not fail to enforce effectively [their] own environmental and labour laws, through a sustained or recurring course of action, in a manner affecting trade between the Parties’.¹
- 17.2 This is the first trade agreement in which Australia has included labour and environment chapters.² DFAT informed the Committee that, in the case of this Agreement, the provisions were included because

labour and environment are both covered in the US Trade Promotion Authority Act, which provides the administration with a mandate which the Congress gives to it to go away and negotiate free trade agreements. The fact that there are these two chapters there does reflect a political compromise. However, another part of that compromise is that the only discipline is not to fail to enforce whatever laws you happen to have on your books. So there is no implication or requirement to do anything other than to enforce your own

1 DFAT, Fact Sheet, viewed on 16 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/19_environment_labour.html

2 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 6.

legislation. In other words, it is not a standards-setting requirement in either labour or environment.³

- 17.3 The Chapters recognise the importance and value of cooperation and consultation on environmental and labour issues.⁴ The Parties retain the right to establish their own domestic environmental and labour standards, and to adapt or modify their own laws.⁵ Neither chapter requires any change to Australian environment or labour law or regulations.⁶
- 17.4 The Committee notes that the majority of evidence received on these chapters support their inclusion in the Agreement. Further, it was stated that these chapters do not go far enough.⁷

Labour

Background

- 17.5 The Chapter aims to ensure that neither Party fails to enforce its labour laws in a manner affecting trade between the Parties.⁸ According to evidence presented to the Committee, its inclusion in the Agreement does not reflect upon Australia's current labour practice

The provision for a relationship between trade and labour really grew out of the earlier US experience with Mexico, and it was instilled in US legislation as a requirement for all of these agreements. I do not think anybody had it in mind as necessarily applying in the case of Australia. It has to be in there because it is part of the US legislative requirements, but

3 Mr Phillip Sparkes, *Transcript of Evidence*, 2 April 2004, p. 82.

4 DFAT, Fact Sheet, viewed on 16 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/19_environment_labour.html

5 DFAT, Fact Sheet, viewed on 16 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/19_environment_labour.html

6 Mr Stephen Deady, *Transcript of Evidence*, 2 April 2004, p. 7.

7 Ms Liz Turner, *Transcript of Evidence*, 20 April 2004, p. 63.

8 DFAT, *Guide to the Agreement*, p. 107; AUSFTA Article 18.2.1(a).

I do not think Australia was the target country at the time when that was drafted.⁹

Core obligations

- 17.6 Under Article 18.2.1(a), a Party must not ‘fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.’
- 17.7 This is the only provision of the Chapter subject to dispute settlement under the Agreement. The Committee notes evidence from DFAT that this enforcement refers to domestic laws only, not obligations under international law.¹⁰
- 17.8 The Committee understands that these provisions apply only to governments, not to Australian, American or multinational corporations
- The mechanisms do not pertain to companies; they pertain to failures of governments to enforce their domestic labour standards. So it would be a matter of a failure on the part of the Australian government to enforce its domestic labour standards.¹¹
- 17.9 The Committee notes statements from witnesses that the obligations of the Chapter do not go far enough.
- The main problem we point out about this is that you can weaken the domestic labour standard, you can reduce it, you can move further away from the ILO standards under the labour chapter of this agreement, and that will not attract any penalty or enforceability. As long as you enforce your weaker, domestic labour standards, you are okay.¹²

Labour standards

- 17.10 Under Chapter 18, the Parties reaffirm their obligations as members of the International Labour Organisation (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* (ILO Declaration).¹³

9 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 27.

10 Mr Stephen Bouwhuis, *Transcript of Evidence*, 2 April 2004, p. 82.

11 Mr Ted Murphy, *Transcript of Evidence*, 20 April 2004, p. 46.

12 Mr Ted Murphy, *Transcript of Evidence*, 20 April 2004, pp. 46-47.

13 AUSFTA, Article 18.1.1.

17.11 The Chapter recognises the right of Parties to establish their own labour standards and to adopt or maintain labour laws, and states that Parties shall strive to ensure that these laws are consistent with internationally recognised labour principles and rights.¹⁴ Parties must strive to ensure that their laws are ‘consistent with the goal of maintaining high quality and high productivity workplaces.’¹⁵ Parties retain the right to exercise discretion in their law enforcement.¹⁶

Labour laws

17.12 The labour laws to which the Chapter relates are the internationally-recognised rights and principles relating to

- the right of association
- the right to organise and bargain collectively
- a prohibition on the use of any form of forced or compulsory labour
- labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour
- acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.¹⁷

17.13 Labour laws for Australia refer to ‘acts of a parliament of Australia, or regulations promulgated pursuant to such acts, directly related to internationally recognised labour principles and rights’.¹⁸ This covers both Federal and State laws.¹⁹ The Federal Government would be held responsible for a failure to enforce effectively either State or Federal laws. If the US raised a concern regarding the failure of a State government to enforce its laws under Article 18.2.1(a), the Federal Government would consult with the State government in relation to the matter.²⁰

14 AUSFTA, Article 18.1.2.

15 AUSFTA, Article 18.1(2), *Guide to the Agreement*, p. 108.

16 AUSFTA, Article 18.2.1(b).

17 AUSFTA, Article 18.7.1.

18 AUSFTA, Article 18.7.2(b).

19 DFAT, *Guide to the Agreement*, p. 109.

20 DFAT, *Guide to the Agreement*, p. 109.

Dispute settlement and consultations

- 17.14 Dispute settlement provisions are detailed in Article 18.6. These mirror the general dispute settlement provisions of the Agreement contained in Chapter 21. A Party may raise with the other Party any matter arising under the Chapter.²¹ The Parties are encouraged to resolve the matter,²² but where they cannot, the Sub-Committee on Labour Affairs can be convened.²³ The Parties may only use the general dispute settlement provisions of the Agreement where the matter is one arising under Article 18.2.1(a).²⁴
- 17.15 Where a matter goes to the dispute settlement process of the Agreement, panellists chosen to resolve the dispute must have expertise or experience in the relevant matter under dispute.²⁵
- 17.16 Penalties for failure to comply with Article 18.2.1(a) consist of a fine which is to be paid into a fund, to be spent on labour initiatives.²⁶

Procedural guarantees and public awareness

- 17.17 The Guide to the Agreement states that

In the interests of transparency and procedural fairness, each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings for the enforcement of the Party's environmental laws.²⁷

- 17.18 This includes ensuring that its procedures for the enforcement of labour laws are fair, equitable and transparent,²⁸ ensuring that persons with a legally recognised interest in relation to a particular labour matter have access to judicial, quasi-judicial or administrative proceedings,²⁹ providing that parties to such proceedings may seek

21 DFAT, *Guide to the Agreement*, p. 109; AUSFTA, Article 18.6.1.

22 DFAT, *Guide to the Agreement*, p. 109; AUSFTA, Article 18.6.2.

23 DFAT, *Guide to the Agreement*, p. 109; AUSFTA, Article 18.3.

24 AUSFTA, Articles 18.4 and 18.5

25 DFAT, *Guide to the Agreement*, p. 109.

26 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 21.12.4

27 DFAT, *Guide to the Agreement*, p. 110.

28 DFAT, *Guide to the Agreement*, p.110; AUSFTA, Article 18.3.2.

29 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.3.1.

remedies to ensure effective enforcement of rights,³⁰ and promoting public awareness of labour laws.³¹

Institutional arrangements

- 17.19 The Joint Committee established to supervise the implementation of the Agreement under Article 21.1.1 may establish a Subcommittee on Labour Affairs to discuss matters related to the operation of the Chapter. The Subcommittee would be comprised of government and agency officials of each Party, and shall normally include a public session.³²
- 17.20 Parties are to designate an office to operate as a contact point with the other Party and members of the public, in order to coordinate on cooperative activities and consider public communications.³³ The Parties may consult with representatives of labour and business organisations on the operation of the Chapter.³⁴ Formal decisions of the Parties regarding the Chapter are to be made public unless otherwise determined by the Subcommittee.³⁵

Labour cooperation

- 17.21 A mechanism for cooperation is established on the basis that the Parties recognise that ‘cooperation provides opportunities to promote respect for workers’ rights and the rights of children consistent with core labour standards of the ILO’. Thus, they agree to ‘cooperate on labour matters of mutual interest and explore ways to further advance labour standards on a bilateral, regional, and multilateral basis’.³⁶
- 17.22 Cooperative activities under the Chapter may include ‘exchanges of information, joint research activities, visits, or conferences, and such other forms of technical exchange as the Parties may agree.’³⁷ Such activities can include work on labour law and practice in the context of the ILO Declaration, and other matters agreed by the Parties.³⁸

30 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.3.3.

31 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.3.4.

32 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.4.1.

33 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.4.2.

34 DFAT, *Guide to the Agreement*, p. 110; AUSFTA, Article 18.4.3.

35 AUSFTA, Article 18.4.4.

36 AUSFTA, Article 18.5.1.

37 AUSFTA, Article 18.5.3.

38 AUSFTA, Article 18.5.2.

- 17.23 The Committee notes comments from the Australian Services Union that it would welcome a mechanism whereby Australian unions could discuss labour issues with their US counterparts.³⁹

Compliance with the Chapter

- 17.24 The Western Australian Government claimed that current Commonwealth laws are ‘in breach of the spirit and intention of the Labour Chapter’, in reference to collective bargaining.⁴⁰ This allegation relates to the Commonwealth *Workplace Relations Act* and ILO Convention 98.

- 17.25 Further, it was presented to the Committee that, in the US

The union officials have strongly condemned this agreement and are fighting against it, but the labour movement in the United States has fought against every trade agreement in recent memory, so this is no exception. But you would probably find it interesting to read this report, because they have all sorts of criticisms of Australian labour law, which they believe will not be affected positively by this agreement. As I think USTR Zoellick puts it, it is maybe going a bit too far to suggest that that is the case.⁴¹

- 17.26 In reference to both the environment and labour chapters, the Committee heard from Alcoa World Alumina Australia that there

are potential issues that arise for Australia, given our constitutional structure, given that labour and environment laws operate predominantly at the state and territory level. We believe that the FTA will create some challenges of coordination within Australia’s federal system. We acknowledge that the labour and environment provisions are such that it would take a particularly egregious situation, involving a repeated and flagrant abuse of labour or environmental law, before a party would take the matter to an FTA dispute settlement process. But, on a broader front, this is an issue about which we think there needs to be quite careful management at both state and territory level and on the part of business to avoid these particular provisions being

39 Mr Gregory McLean, *Transcript of Evidence*, 6 May 2004, p. 58.

40 WA Government, *Submission 128*, pp. 8-9.

41 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 26.

able to be used where governments come under pressure from sectional interests which would seek to resort to the provisions.

In particular, it would be an impost on business where business and government need to manage any claims that would be made about a failure to apply environment or labour laws and to apply resources to demonstrate that there was no legitimate basis for the claims. We have seen on the multilateral front how much public campaigns have the potential to damage corporate reputation. This is something that we would not wish to see used through this agreement. It is an additional layer of complexity that will need to be managed sensibly by governments and business.⁴²

Environment

Background

17.27 Among Australia's objectives in entering negotiations was to

Seek to ensure that trade and environment policies are mutually supportive by maintaining Australia's ability to protect and conserve its environment and to meet its international environmental obligations.⁴³

17.28 Chapter 19 recognises each Party's right to

establish its own levels of environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies...⁴⁴

17.29 Under Article 19.1, the Parties undertake to ensure that their laws 'provide for and encourage high levels of environmental protection'. The Chapter contains various provisions aimed at ensuring that Parties do not fail to enforce their respective environmental laws in a way that affects trade between the Parties.⁴⁵ The Parties recognise the importance of multilateral environmental agreements and agree to

42 Ms Meg McDonald, *Transcript of Evidence*, 23 April 2004, p. 41.

43 DFAT, *Guide to the Agreement*, p. 129.

44 AUSFTA, Article 19.1.

45 AUSFTA, 19.2.1(a), DFAT, *Guide to the Agreement*, p. 113.

‘continue to seek means to enhance the mutual supportiveness’ of multilateral agreements to which they are a party.⁴⁶

Core obligations

17.30 The core obligation for each Party under Chapter 19 is that ‘neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.’⁴⁷ This is the only obligation under the Chapter that is subject to dispute settlement.⁴⁸ The Committee notes evidence from the DFAT that this enforcement refers to domestic laws only, not obligations under international law.⁴⁹

Environmental standards

17.31 Article 19.9 defines environmental laws as

any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through

- the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
- the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.⁵⁰

17.32 Under the Chapter, the Federal Government is responsible for a failure to enforce effectively both State and Federal laws. If a concern were raised under Article 19.2.1(a) about failure to enforce a State law, the Federal Government would consult with the State government to which the concern related.⁵¹

46 AUSFTA, 19.8, DFAT, *Guide to the Agreement*, p. 115.

47 AUSFTA, Article 19.2.1(a)

48 DFAT, *Guide to the Agreement*, p. 113.

49 Mr Stephen Bouwhuis, *Transcript of Evidence*, 2 April 2004, p. 82.

50 AUSFTA, Article 19.9.1.

51 DFAT, *Guide to the Agreement*, p. 114.

- 17.33 Parties retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters'.⁵² They may also continue to 'make decisions regarding the allocation of resources to enforcement of with respect to other environmental matters determined to have higher priorities.'⁵³

Dispute settlement and consultations

- 17.34 Under Article 19.7, a Party may request consultations with the other Party over any matter arising under the Chapter.⁵⁴ If Parties are unable to resolve the matter, they may establish a Subcommittee on Environmental Affairs.⁵⁵ The dispute settlement provisions of the Agreement may only be used if the matter relates to Article 19.2.1(a).⁵⁶
- 17.35 Where a matter goes to the dispute settlement process of the Agreement, panellists chosen to resolve the dispute must have expertise or experience in the relevant matter under dispute.⁵⁷
- 17.36 Penalties for failure to comply with Article 19.2.1(a) are outlined in Article 21.12 of the dispute settlement Chapter. Under that provision, fines for non-compliance are to be paid into a fund to be spent on environmental initiatives in the territory of the Party against whom the complaint was made.⁵⁸

Cooperation

- 17.37 The Parties have agreed to negotiate a Joint Statement on Environmental Cooperation.⁵⁹ They also agree to take into account public comments and recommendations received in relation to their cooperative activities.⁶⁰ Further, the Parties are to share information with each other and the public (where appropriate) on the environmental effects of trade agreements.⁶¹

52 AUSFTA, Article 19.2.1(b).

53 AUSFTA, Article 19.2.1(b).

54 DFAT, *Guide to the Agreement*, p. 115.

55 Article 19.3; DFAT, *Guide to the Agreement*, p. 115.

56 Articles 19.7.4 and 19.7.5; DFAT, *Guide to the Agreement*, p. 115.

57 DFAT, *Guide to the Agreement*, p. 109.

58 DFAT, *Guide to the Agreement*, p. 115.

59 AUSFTA, Article 19.6.1.

60 AUSFTA, Article 19.6.2.

61 AUSFTA, Article 19.6.3.

Procedural guarantees and public awareness

17.38 The Guide to the Agreement states that

in the interests of transparency and procedural fairness, each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to judicial, quasi-judicial, or administrative proceedings for the enforcement of the Party's environmental laws.⁶²

17.39 This includes ensuring that its procedures for the enforcement of environmental laws are fair, equitable and transparent,⁶³ ensuring that persons with a legally recognised interest in relation to a particular matter have access to judicial, quasi-judicial or administrative proceedings,⁶⁴ providing that parties to such proceedings may seek remedies to ensure effective enforcement of rights,⁶⁵ and promoting public awareness of environmental laws.⁶⁶

Measures to enhance environmental performance

17.40 Under Article 19.4, the Parties agree to encourage the development of 'flexible, voluntary, and market-based mechanisms' that 'encourage the protection of natural resources and the environment.'

17.41 Friends of the Earth Melbourne appeared before the Committee, raising concerns with this provision.

Article 19.4 encourages US and Australian governments to engage in voluntary approaches and market based mechanisms for environmental protection. We have a concern about voluntary mechanisms for environmental protection. We believe, based on global practice and the practice of the Australian government and also practices of corporations, that voluntary and market based mechanisms for environmental protection are flawed. One good example of how such voluntary mechanisms are flawed is that we do not believe that they provide protection for the environment.⁶⁷

62 DFAT, *Guide to the Agreement*, p. 116.

63 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.1.

64 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.2.

65 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.3.

66 DFAT, *Guide to the Agreement*, p. 116; AUSFTA, Article 19.3.4.

67 Ms Liz Turner, *Transcript of Evidence*, 20 April 2004, p. 63.

Institutional arrangements

- 17.42 A Joint Committee to supervise the implementation of the Chapter is established under Article 21.1.1. The Agreement establishes institutional arrangements for the Joint Committee under Article 19.5.1.⁶⁸ Parties are to provide an opportunity for public comment on the implementation of the Chapter.⁶⁹ Formal decisions concerning the operation of the Chapter will be made public unless the Joint Committee decides otherwise.⁷⁰
- 17.43 At its first meeting, the Joint Committee will consider reviews by each Party of the environmental effects of the Agreement.⁷¹ The public will have an opportunity to comment on those effects.⁷²

Environmental impact of the FTA

- 17.44 In addition to comments on the Chapter itself, the Committee heard evidence relating to both consequences of specific provisions for environmental regulation, and the environmental impact of the Agreement as a whole. Environmental matters relating to the AUSFTA Chapters 7 (Sanitary and Phytosanitary Measures), 8 (Technical Barriers to Trade), 10 (Cross Border Trade in Services) and 11 (Investment) are discussed in the chapters of this Report pertaining to those Chapters of the Agreement.
- 17.45 Professor David Shearman of Doctors for the Environment Australia spoke to the Committee about the indirect impacts of trade on the environment

There are dozens of externalities that the negotiators have not considered. The externality we are particularly interested in is the use of oil in products—in transport, fertilisers and all those things. That can be accounted for. In terms of greenhouse emissions, when we are accounting for externalities like that, we should perhaps be putting a cost to future generations on them of perhaps five times the present cost of oil. If you are transporting stuff across the Atlantic, that is the calculation you should be putting on it.⁷³

68 DFAT, *Guide to the Agreement*, p. 116.

69 Article 19.5.3; DFAT, *Guide to the Agreement*, p. 116.

70 Article 19.5.2; DFAT, *Guide to the Agreement*, p. 116.

71 DFAT, *Guide to the Agreement*, p. 117.

72 DFAT, *Guide to the Agreement*, p. 117; AUSFTA, Article 21.1.7.

73 Prof David Shearman, *Transcript of Evidence*, 22 April 2004, p. 33.

17.46 It was stated that, in the context of the expected environmental effects of increased trade, that Chapter 19 is ‘inadequate’⁷⁴ and that ‘many of the provisions are aspirational and platitudinous’.⁷⁵

17.47 Concerns were also raised with the Committee that no environmental impact assessment of the Agreement has been undertaken. The Australian Conservation Foundation stated that

The Australian Government is remarkably under-prepared to ensure that trade agreements such as the AUSFTA do not have a negative impact on the Australian environment. For example, unlike under US law, there is no Australian legislation in place that requires the Australian Government to undertake a review of the environmental impacts of free trade agreements. Furthermore, unlike under US law, there is no Australian law that sets out Australian environmental objectives for free trade agreements.⁷⁶

17.48 It was further stated that, without an environmental impact assessment, Australia is unable to fully assess the potential environmental impacts arising from the AUSFTA, which may include

- the impact the AUSFTA will have on Australia’s environmental laws and social policy measures...
- the environmental impacts arising from the predicted increase in Australian agricultural output, which will intensify the impacts of a sector that already accounts for a significant proportion of Australia’s current environmental problems. Increases in agricultural production will probably lead to more tree clearing, more salinity, less water for our rivers, more species on the extinction list and a huge repair bill for the Australian public, unless adequate environment measures are in place.
- the transboundary environmental impacts of ‘two-way traffic’ across the Pacific that will increase under the AUSFTA, and
- the increase in greenhouse gas emissions that will arise as a consequence of the concession made to allow US made ‘petrol-guzzling’ motor vehicles into Australia duty free.⁷⁷

74 Australian Conservation Foundation, *Submission 127*, p. 9.

75 Environmental Defenders Office, *Submission 102*, p. 4.

76 Australian Conservation Foundation, *Submission 127*, p. 11.

77 Australian Conservation Foundation, *Submission 127*, p. 11.

- 17.49 Despite the *Guide to the Agreement* stating that the Australian Government will be preparing an environmental assessment of the Agreement in the context of an overall analysis of the Agreement this assessment has not been forwarded to the Committee for consideration during the course of its review of this treaty.⁷⁸
- 17.50 The Committee notes that the CIE Report undertakes some analysis in relation to the environmental impact of the Agreement, finding that the impact on land and greenhouse gas emissions is difficult to quantify, but that the sectoral results projected do not ‘rely on or imply additional land use or clearing; and that ‘a ‘best guess’ would say that Australia experiences a marginal increase in CO2 emission but without the global context’.⁷⁹

Recommendation 22

The Committee recommends that the Government undertake a review of the environmental impact of the Agreement and that legislation be introduced which will ensure that all future free trade agreements contain results of an environmental impact assessment prior to final agreement.

Conclusions

- 17.51 Regarding the labour and environment chapters, DFAT has stated

In the FTA, Australia and the US recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental and labour laws. Under AUSFTA Australia retains the right to establish its own domestic environmental and labour standards, and to adapt or modify them.

Furthermore, in the agreement Australia and the US have agreed to explore ways to support ongoing bilateral, regional

⁷⁸ DFAT, *Guide to the Agreement*, p. 117.

⁷⁹ RIS, p. 19.

and multilateral activities, in particular in the negotiations in the WTO regarding the environment.⁸⁰

- 17.52 The Committee notes that the labour and environment chapters will not prevent Australia from maintaining and adopting labour and environment laws.

80 DFAT, AUSFTA – Frequently Asked Questions, viewed on 15 June 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html.

Conclusions

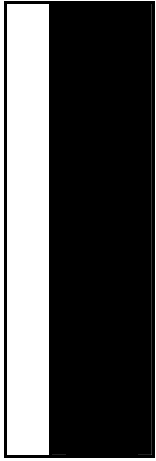
- 18.1 During the course of its three month inquiry into the proposed AUSFTA, the Committee received over 215 submissions and held 11 days of hearings in seven cities. Since its establishment in 1996, the Joint Standing Committee on Treaties has reported on all treaties signed by Australia. The AUSFTA is of unprecedented breadth and complexity.
- 18.2 Looking at the experience of the ANZCERTA since 1983 it is clear that bilateral trade agreements can evolve with time leading to deeper integration and increased trade between the Parties. The Committee has made a number of recommendations which it trusts will assist this liberalisation to Australia's benefit.
- 18.3 The Committee took evidence on the models forecasting the economic benefit of the AUSFTA. Economic models have some use as a guide but rely on their underlying assumptions. While dynamic benefits are hard to quantify, it is reasonable to expect long term dynamic effects on the economy. While the size of the benefit of AUSFTA will no doubt be the result of continuing debate, the Committee has concluded that Australia will receive a positive economic benefit from the AUSFTA.
- 18.4 The Committee also took evidence on the advantages of multilateral trade liberalisation as opposed to bilateral trade liberalisation. Most witnesses agreed that multilateral trade liberalisation was preferable to bilateral trade liberalisation. However in the absence of progress in the Doha round, pursuing a bilateral trade agreement can offer benefits which are not immediately available in the WTO context.

- 18.5 In weighing whether the ratification of the AUSFTA is in Australia's national interest the Committee has carefully taken note of the concerns and potential benefits raised in evidence. It is the Committee's view that ratification of the AUSFTA will be in the Australia's national interest.
- 18.6 The evidence received by the Committee can be divided into three groups: There were those who supported the Agreement and proposed that Australia ratify the AUSFTA; There were those who opposed the Agreement and proposed that Australia not ratify and then there was a third group who highlighted potential problems with particular Chapters without expressing an opinion on whether Australia should ratify.
- 18.7 Having determined that ratification is in Australia's national interest, the approach the Committee has taken to address the concerns of this third group has been to make a number of recommendations which it believes are consistent with the spirit and text of the Agreement. These recommendations can be found throughout this Report.
- 18.8 There has been an extensive public debate about several Chapters of the AUSFTA. The Committee has made recommendations such as the shape of the review mechanism for the Pharmaceutical Benefits Scheme, the extension of copyright term and progressing the issues of mutual recognition and work visas for business people.
- 18.9 Lastly the Committee would like to thank all those who made submissions and appeared before the Committee in a public hearing.

Recommendation 23

The Committee recommends that binding treaty action be taken with respect to the Australia - United States Free Trade Agreement.

Dr Andrew Southcott MP
Chair



Dissenting Report—Mr Wilkie MP, Senator Kirk, Senator Marshall, Senator Stephens, Hon Adams MP and Mr Evans MP

A treaty of the magnitude of the Australia — United States Free Trade Agreement requires substantial analysis and consideration by the Committee and the Parliament in order to determine that the eventual outcome is in the national interest and that the associated consequential legislative, regulatory and administrative actions contemplated by the Treaty are also consistent with the national interest.

Therefore, the dissenting Members:

1. Believe an extension of time should have been sought from the Minister for consideration of the Treaty to allow adequate time to review the evidence presented and to prepare the Report of the Committee.
2. Consider that given the interdependency of the consideration of the Treaty and the legislative, regulatory and administrative measures which must be taken to implement the various terms of the Treaty, it is not possible to determine if it is in the national interest for binding Treaty action to be taken, without first considering the terms of such measures as
 - the appeal mechanism to be established with respect to the PBS and the implications for generic medications.
 - access by universities, educational institutions and libraries to copyright material under the proposed arrangements
 - an environmental impact review of the Treaty
 - legislative safeguards for local content rules subject to ratchet provisions of the Treaty

3. Support the Recommendations contained in Chapters 1 to 17 but oppose the Conclusions in Chapter 18 as they consider these conclusions are premature at this time.
4. Recommend that binding treaty action should not be taken until adequate opportunity has been given to consider the necessary legislative, regulatory and administrative action that underpins the implementation of the Treaty in order to ensure the combination of the Treaty and the associated domestic action is, when taken together, in the national interest. This decision can only be sensibly taken on an informed basis when the relevant measures are tabled before the Parliament or detailed statements are made to Parliament on the structure of non-legislative mechanisms or issues.

Mr Kim Wilkie MP

Senator Gavin Marshall

Hon Dick Adams MP

Senator Linda Kirk

Mr Martyn Evans MP

Senator Ursula Stephens



Appendix A – Submissions

- 1 Mr Robert Downey
- 2 Mr George Sanders
- 3 Ms Lindell White
- 4 Ms Angela Byrne
- 5 National Civic Council WA
- 6 M. C A Roberts
- 7 Mr Bryan Mercurio
- 8 Textile Clothing and Footwear Union of Australia
- 9 John and Margaret Hale
- 10 Friends of the ABC
- 11 Ms Ann Marshall
- 12 M. E A Bazeley
- 13 Ms Mnem Giles
- 14 National Association of People Living with HIV/AIDS
- 15 Mr Ron Clifton
- 16 Mr Ray Cox
- 17 Combined Pensioners and Superannuants Association of NSW Inc.
Urunga Branch
- 18 Alcoa World Alumina Australia

- 18.1 Alcoa World Alumina Australia
- 19 Australian Dairy Industry Council Inc.
- 20 State Library of Victoria
- 21 Queensland Nurses' Union
- 22 Gymea Sub Branch - Australian Manufacturing Workers Union Retired Members Association
- 23 National Association of Testing Authorities
- 24 AMWU, Retired Metal Workers' and Printers
- 25 Ms Evelyn Rafferty
- 26 Australian Chicken Meat Federation Inc.
- 27 Dr Matthew Rimmer
- 28 Medicines Australia
- 29 Dr Neil Ormerod and signatories
- 30 Australian Pensioners and Superannuants League Qld Inc.
- 31 Music Council of Australia
- 32 Mr Peter Youll
- 33 Withdrawn
- 34 Ms Madelaine Chiam
- 35 Ms Annette Bonnici and Mike Hanratty
- 36 Professor Barry Rolfe
- 37 Mr Anthony Towns
- 38 Institute for International Business, Economics and Law
- 39 Australian Information Industry Association
- 40 Ms Katherine Martin
- 41 Mr Mervyn Murchie
- 42 Mr Andrew Gaines
- 43 Australian Services Union
- 44 Dr Michael Slaytor and Petrina Slaytor
- 45 Rail Tram and Bus Union

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- 46 Ms Isabel Higgins
- 47 Mr B Barrett-Lennard
- 48 Mr Bill McClurg
- 49 Murray Goulburn Cooperative Co Ltd
- 50 Electronic Frontiers Australia Inc.
- 51 Mr Jonathan Schultz
- 52 Mr Michael Davies
- 53 Mrs Jan Tendys
- 54 Ms Nizza Siano
- 55 Ms Nicola da Silva
- 56 Interactive Entertainment Association of Australia
- 57 Ms Pauline Stirzaker
- 58 Mudgee District Environment Group Inc.
- 59 Catholics in Coalition for Justice and Peace
- 60 Friends of the ABC (NSW) Inc.
- 61 Meat and Livestock Australia
- 62 Mr Peter Stratford
- 63 University of the Sunshine Coast
- 64 Unfolding Futures Pty Ltd
- 65 Mr John Koch
- 66 New South Wales Government
- 67 Media, Entertainment and Arts Alliance
- 68 Australian Fair Trade and Investment Network (AFTINET)
- 69 Ms Alison Woodham
- 70 The Australia Institute
- 71 Australian Digital Alliance and the Australian Libraries' Copyright Committee
- 72 Dr Thomas Faunce and Professor Peter Drahos
- 73 Mr John Morris

- 74 Ms Dee Margetts MLC
- 75 Australasian Society for HIV Medicine
- 76 Peanut Company of Australia
- 77 Mr Alan Isherwood
- 78 Ms Vivian Miles
- 79 Doctors for the Environment Australia Inc.
- 80 CPSU-State Public Services Federation
- 81 Mr Brendan Scott
- 82 Oliver and Theresa Baudert
- 83 Generic Medicines Industry Association Pty Ltd
- 84 Mr Phillip Bradley
- 85 Cybersource Pty Ltd
- 85.1 Cybersource Pty Ltd
- 86 Ms Jacqueline Loney
- 87 Doctors Reform Society
- 88 Mr Denis Bright
- 89 Mr Niko Leka
- 90 Progressive Labour Party
- 91 Victorian Government
- 92 Ms Kimberlee Weatherall
- 93 Xamax Consultancy Pty Ltd
- 93.1 Xamax Consultancy Pty Ltd
- 94 Australian Industry Group
- 95 Stop MAI (WA) Coalition
- 96 Ms Annie Nielsen and Mr Phil Bradley
- 97 Grail Centre
- 98 M. A J Doherty
- 99 Ms Deborah Scholem

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- 100 Ms Cleo Lynch
 - 101 Rainforest Information Centre
 - 102 Australian Network of Environmental Defender's Offices
 - 103 Swinburne University of Technology
 - 104 Mr Zenon Sawko
 - 105 Professor Ian Lowe AO
 - 106 Professor Larissa Behrendt and Ms Megan Davis
 - 107 Ms Luci Temple
 - 108 Australian Pork Limited
 - 109 Ms Jane Seymour
 - 110 Mr John Campbell
 - 111 Council of Textile and Fashion Industries of Australia Ltd
 - 112 WTO Watch Qld
 - 113 Mr Liam Cranley
 - 114 Baxter Healthcare Pty Ltd
 - 115 Council of Australian University Librarians
 - 116 Marjon and Greg Martin
 - 117 Macquarie University - Sydney
 - 118 Ms Vera Raymer OAM
 - 119 Friends of the Earth
 - 120 Australian Nursing Federation
 - 121 Ford Motor Company of Australia Limited
 - 122 CPA Australia
 - 123 Digital Distribution Global Training Services Pty Ltd
 - 124 Quaker Peace and Justice
 - 125 Australian Manufacturing Workers' Union
 - 126 Business Software Association of Australia
 - 127 Australian Conservation Foundation

- 128 Western Australian Government
- 128.1 Western Australian Government
- 129 National Tertiary Education Union
- 130 Australian Council of Trade Unions
- 131 Dr Colin Dahl and Mrs Catherine Dahl
- 132 Business Council of Australia
- 133 Australian Chamber of Commerce and Industry
- 134 Minerals Council of Australia
- 135 Australian Broadcasting Authority
- 136 Ms Susan Houghton
- 137 Mr Tor Larsen and Darani Lewers AM
- 138 Mr Patrick Caldon
- 139 Ms Ruth Williams
- 140 Mr Mike Willis
- 141 Ms Merrill Jusuf
- 142 Australian Library and Information Association
- 143 Federal Chamber of Automotive Industries
- 144 Ricegrowers' Association of Australia Inc.
- 145 Commercial Television Australia
- 146 Australian Medical Association
- 146.1 Australian Medical Association
- 147 Mr Jock Given
- 148 Holden
- 148.1 Holden
- 149 Australia Meat Holdings Pty Limited
- 150 Mr Bruce Kirkham
- 151 Australian Coalition for Economic Justice
- 152 Australian Wine and Brandy Corporation

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- 153 National Farmers' Federation
 - 154 Winemakers' Federation of Australia
 - 154.1 Winemakers' Federation of Australia
 - 155 Australian Record Industry Association Limited (ARIA)
 - 156 Australasian Performing Rights Association (APRA) and Australasian Mechanical Copyright Owners Society (AMCOS)
 - 157 Australia Council for the Arts
 - 158 Mr Gerard Sont
 - 159 Horticulture Australia
 - 160 Professor Ross Garnaut and Mr Bill Carmichael
 - 160.1 Professor Ross Garnaut and Mr Bill Carmichael
 - 160.2 Professor Ross Garnaut and Mr Bill Carmichael
 - 161 Australian Film Industry Coalition
 - 162 Scientists for Labor
 - 163 Bathurst Branch Combined Pensioners and Superannuants Association of NSW Inc.
 - 164 Australian Screen Directors' Association, Australian Writers' Guild and Screen Producers Association of Australia
 - 165 Mr John Quiggin
 - 166 Moonlight Cactus Music
 - 167 Mr John Wood and Ms Inge Fina
 - 168 Ms Kerry Brady
 - 169 Uniting Care NSW/ACT
 - 170 AUSTA Business Group
 - 171 Mrs Betty Murphy
 - 172 Mr Clem Clarke
 - 173 Cattle Council of Australia
 - 174 Dr Ken Harvey
 - 175 Ms Anne Goddard

- 176 Hinkler Burnett Green and Ms Anne Goddard
- 177 Ms Ana Penteadó
- 178 American Chamber of Commerce in Australia
- 179 Healthy Skepticism Inc.
- 180 ACT Government
- 180.1 ACT Government
- 181 Australian Broadcasting Corporation
- 182 Mrs June Ayres
- 183 Linux Australia
- 184 Mr Paul Russell
- 185 Australian Stock Exchange Ltd
- 186 Tuna Boat Owners Association
- 187 Australian Red Cross Blood Service (ARCBS)
- 188 Aboriginal and Torres Strait Islander Services
- 189 Australian Vice-Chancellor's Committee
- 190 Federation of Australian Scientific and Technological Societies
- 190.1 Federation of Australian Scientific and Technological Societies
- 191 Australian Centre for Intellectual Property in Agriculture
- 192 Mr Michael Baume
- 193 Yagoona Branch Combined Pensioners and Superannuants Association of NSW Inc.
- 194 Mr Colin McQueen
- 195 Australian Consumers' Association
- 196 Social Justice Committee Conference of Leaders of Religious Institutes NSW
- 197 Copyright Agency Limited
- 198 South Australian Government
- 199 Arts Law Centre Australia
- 200 PC Profile

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- 201 Open Interchange Consortium
 - 202 Ms Janine Schmidt
 - 203 Mr Tony Healy
 - 203.1 Mr Tony Healy
 - 204 Professor Peter Drysdale
 - 205 NSW Teachers Federation
 - 206 Queensland Government
 - 207 Mr Roger McDonald
 - 208 Mr Greg Hayes
 - 209 Distilled Spirits Industry Council of Australia Inc.
 - 210 Catholic Women's League Australia NSW Inc.
 - 211 Department of Foreign Affairs and Trade
 - 211.1 Department of Foreign Affairs and Trade
 - 211.2 Department of Foreign Affairs and Trade
 - 212 South Australian Farmers Federation
 - 213 Australian Copyright Council
 - 214 Viscopy
 - 215 Mr A Schiavello



Appendix B – Witnesses

Friday, 2 April 2004 – Canberra

Attorney-General's Department

Mr Stephen Bouwhuis, Principal Legal Officer, Office of International Law

Mr Stephen Fox, Principal Legal Officer, Copyright Law Branch

Australian Customs Service

Mr Victor Baldwin, Assistant Director, Valuation and Origin

Department of Agriculture, Fisheries and Forestry

Ms Virginia Greville, Special International Agriculture Adviser

Ms Mary Harwood, Executive Manager, Biosecurity Australia

Department of Communications, Information Technology and the Arts

Mr Simon Cordina, Acting General Manager, ICTI and Intellectual Property Division

Mr Sceán Kearns, Manager, ICT Innovation Initiatives Section

Mr Peter Young, General Manager, Film and Digital Content Branch

Department of Employment and Workplace Relations

Ms Jean Ffrench, Director, International (ILO) Section, Workplace Relations Policy Group

Department of Finance and Administration

Mr Michael Loudon, Branch Manager

Mr Michael Rombouts, Director, FTA Task Force

Department of Foreign Affairs and Trade

Mr Nick Brown, Assistant Secretary, Trade and Economic Analysis Branch

Ms Michaela Browning, Executive Officer AUSFTA Task force, Office of Trade Negotiations

Dr Milton Church, Services and Investment Negotiator – FTAs, Office of Trade Negotiations

Mr Stephen Deady, Special Negotiator – FTAs, Office of Trade Negotiations

Ms Toni Harmer, Executive Officer, Office of Trade Negotiations

Ms Joanna Hewitt, Deputy Secretary

Mr Andrew Martin, Executive Officer, Agricultural Branch

Mr Remo Moretta, Office of Trade Negotiations

Mr Paul Myler, Legal Advisor, US FTA Task Force, Office of Trade Negotiations

Ms Piggot Rhonda, Office of Trade Negotiations

Mr David Richardson, Director, WTO Regional and Free Trade Agreements Section, Office of Trade Negotiations

Mr Philip Sparkes, Deputy Chief Negotiator, Office of Trade Negotiations

Department of Health and Ageing

Dr Ruth Lopert, Medical Adviser, Pharmaceutical Benefits Branch

Ms Carolyn Smith, Assistant Secretary, Health Liaison

Department of Industry, Tourism and Resources

Ms Ruth Gallagher, Manager, Tariff and Trade Policy, Industry Policy Division

Mr Tim Ward, Assistant Manager, Tariff and Trade Policy, International Trade Branch

Department of the Treasury

Mr Roy Nixon, Manager, International and Compliance Unit, Foreign Investment Policy Division

Monday, 19 April 2004 – Sydney**Arts Law Centre Australia**

Mr Antony Horn, Solicitor

Australian Fair Trade and Investment Network

Dr Patricia Randal, Convenor and Principal Policy Officer, Public Interest Advisory Centre

Australian Information Industry Association

Mr Robert Durie, Chief Executive Officer

Australian Interactive Media Industry Association

Mr Peter Higgs, Director, Deputy Chair, Digital Content and DRM Workgroup

Ms Anna-Louise Van Rooyen Downey, Executive Director

Australian Manufacturing Workers' Union

Mr Doug Cameron, National Secretary

Mr Alister Kentish, National Project Officer

Australian Meat Industry Council

Mr Stephen Martyn, National Director, Processing

Australian Screen Directors' Association

Mr Richard Harris, Executive Director

Australian Writers' Guild

Ms Megan Elliott, Executive Director

Baxter Healthcare Corporation

Mr Frank R B (Toby) Forwood, Trade Consultant

Copyright Agency Limited

Ms Caroline Morgan, General Manager, Corporate Services

Ms Melissa Willan, Corporate Lawyer

Entertainment and Arts Alliance

Ms Bridie Carter, Member

Mr Simon Whipp, National Director, Media

Interactive Entertainment Association of Australia

Ms Beverly Jenkin, Chief Executive Officer

Mr John Watts, President/Director, Vice President, Managing Director
Asia/Pacific, Activision Pty Ltd

Music Council of Australia

Dr Richard Letts, Executive Director

National Association of Testing Authorities

Ms Regina Robertson, Manager, Technical and Corporate Development

Screen Producers' Association of Australia

Mr David Herd, Member

Tuesday, 20 April 2004 – Melbourne**Individuals**

Dr Ken Harvey

AUSTA Business Group

Mr Alan Oxley, Director

Australian Council of Trade Unions

Ms Sharon Burrow, President

Mr Ted Murphy, International Committee Member

Australian Dairy Industry Council Inc.

Mr Allan Burgess, Chairman

Australian Dairy Products Federation

Mr Paul Kerr, President

Australian Services Roundtable

Ms Jane Drake-Brockman, Executive Director

Business Council of Australia

Ms Melinda Cilento, Chief Economist

Ms Freya Marsden, Director Polciy

CPA Australia

Mrs (Margaret) Ann Johns, Director Education

Mr Ian Peek

Cybersource Pty Ltd

Mr Steven D'aprano, Operations Manager

Mr Con Zymaris, Chief Executive Officer

Dairy Australia

Mr Robert Pettit, Manager, Americas and Caribbean, International Trade Development Group

Friends of the Earth

Ms Liz Turner, Trade Campaigner, Reclaim Globalisation Collective

Holden Ltd

Ms Alison Terry, Executive Director, Corporate Affairs

Swinburne University of Technology

Mr Derek Whitehead, Director, Information Resources and University Copyright Officer

Ms Robin Wright, Swinburne Legal

Wednesday, 21 April 2004 – Hobart

Ford Motor Company of Australia

Mr Russell Scoular, Government Affairs Manager

Tasmanian Apple and Pear Growers Association

Mr Mark Salter, President

Thursday, 22 April 2004 – Adelaide

Doctors for the Environment Australia

Professor David Shearman, Honorary Secretary

Individual

Mr Andrew Stoler

Winemakers Federation of Australia

Mr Stephen Strachan, Chief Executive

Friday, 23 April 2004 – Perth

Individuals

Dr Christopher Pudney

Alcoa World Alumina Australia

Ms Meg McDonald, General Manager, Corporate Affairs

Department of Agriculture

Mr Henry Steingiesser, Executive Director, Trade and Development

Department of Consumer and Employment Protection

Mr Sean Reid, Principal Labour Relations Adviser, Labour Relations Division

Department of Culture and the Arts

Mr Ellis Griffiths, Director, Planning and Policy

Department of Health

Mr Murray Patterson, Chief Pharmacist

Department of Industry and Resources

Ms Karen Hall, Acting Director, State Development Strategies

Department of Racing, Gaming and Liquor

Mr Barry Sargeant, Director General

Department of the Premier and Cabinet WA

Mrs Petrice Judge, Executive Director, Office of Federal Affairs

Ms Ruth Young, Principal Policy Officer

Scientists for Labor

Dr Geoff Pain, Founder

Stop MAI (WA) Coalition

Mr Brian Jenkins, Honorary Secretary

Western Australian Legislative Council

Ms Diane Margetts MLC, Member

Wednesday, 5 May 2004 – Brisbane**Cane Growers Council of Australia**

Mr Ian Ballantyne, Chief Executive Officer

Doctors Reform Society

Dr Tracy Schrader, National Vice-President

Peanut Company of Australia

Mr Robert Hansen, Managing Director

Queensland Sugar Ltd

Mr Warren Males, General Manager, Trade and International Affairs

Mr Ian White, Managing Director

WTO Watch Queensland

Ms Theodora Templeton, Publications Secretary

Thursday, 6 May 2004 – Sydney**Individuals**

Mr Michael Baume

Australian Conservation Foundation

Mr Wayne Smith, National Liaison Officer

Australian Consumers' Association

Ms Nicola Ballenden, Senior Health Policy Officer

Australian Performing Right Association Ltd / Australasian Mechanical Copyright Owners Society

Mr Scot Morris, Director of International Relations

Australian Red Cross Blood Service

Dr Brenton Wylie, National Blood Products Manager

Australian Services Union

Mr Gregory McLean, Assistant National Secretary

Federation of Australian Scientific & Technological Societies

Mr Bradley Smith, Executive Director

Tuna Boat Owners Association

Mr Brian Jeffriess, President

Friday, 14 May 2004 – Canberra**Attorney-General's Department**

Mr Christopher Creswell, Consultant, Copyright Law Branch

Ms Gabrielle Mackay, Principal Legal Officer, Copyright Law Branch

Australian Pork Limited

Mr Patrick Donaldson, Senior Policy Analyst

Ms Kathleen Plowman, General Manager Policy

Centre for International Economics

Mr John Humphreys, Research Economist

Dr Andrew Stoeckel, Executive Director

Department of Agriculture, Fisheries and Forestry

Ms Virginia Greville, Special International Agriculture Adviser

Department of Communications, Information Technology and the Arts

Mr James Cameron, Chief General Manager, Broadcasting

Mr Simon Cordina, Acting General Manager, Intellectual Property Branch

Mr Peter Young, General Manager, Film and Digital Content Branch

Department of Employment and Workplace Relations

Mr Scott Matheson, Assistant Secretary, Economic and Labour Market Analysis Branch

Department of Foreign Affairs and Trade

Mr Nick Brown, Assistant Secretary, Trade Analysis Branch

Mr Richard Bush, Assistant Secretary, Lead Negotiator on Rules of Origin and Government Procurement

Mr Doug Chester, Deputy Secretary

Dr Milton Church, Lead Negotiator, Services and Investment, Office of Trade Negotiations

Mr Stephen Deady, Chief Negotiator AUSFTA, Office of Trade Negotiations

Mr Bruce Gosper, First Assistant Secretary

Ms Toni Harmer, Lead Negotiator, Intellectual Property

Mr Alistair Maclean, Assistant Secretary, NZ and PNG Branch

Mr Andrew Martin, Negotiator, Agriculture

Mr Remo Moretta, Lead Negotiator, Non-Agricultural Market Access, Standards, Technical Regulations, Textiles, Trades, Remedies

Mr Philip Sparkes, Deputy Chief Negotiator, Office of Trade Negotiations

Mr Rajan Venkataraman, Negotiator, Services and Investment, Office of Trade Negotiations

Department of Health and Ageing

Dr Ruth Lopert, Medical Adviser, Pharmaceutical Benefits Branch

Ms Carolyn Smith, Assistant Secretary, Targeted Prevention Programs

Department of Industry, Tourism and Resources

Mr Ken Miley, General Manager, Trade and International

Department of the Treasury

Mr Chris Legg, General Manager, Foreign Investment Policy Division

Dr Martin Parkinson, Executive Director, Macroeconomic Group

IP Australia

Dr Peter Tucker, General Manager, Business Development and Strategy Group



Appendix C – Exhibits

- 1 Interactive Entertainment Association of Australia
Anthony Fordham, 'Pick a Box - Games & Consoles' in *The Australian*,
30 March 2004
- 1.1 Interactive Entertainment Association of Australia
The Allen Consulting Group, *Counterfeiting of Toys, Business Software,
and Computer and Video Games*, Report to the Australian Toy
Association, the Business Software Association of Australia and the
Interactive Entertainment Association of Australia, November 2003
- 2 The Australia Institute
Dr Buddhima Lokuge, Dr Thomas Alured Faunce, Richard Denniss,
*A backdoor to higher medicine prices? Intellectual property and the Australia-
US Free Trade Agreement*, November 2003
- 2.1 The Australia Institute
Dr K Lokuge and Richard Denniss, *Trading in Our Health System? The
impact of the Australia-US Free Trade Agreement on the Pharmaceutical
Benefits Scheme*, Discussion Paper Number 55, May 2003
- 2.2 The Australia Institute
*Comparing Drug Prices in Australia and the USA: The implications of the
US-Australia Free Trade Agreement*, 25 July 2003
- 3 Generic Medicines Industry Association Pty Ltd
'The *Patented Medicines (Notice of Compliance) Regulations*: A Submission
to the House of Commons Standing Committee on Industry, Science
and Technology By the Canadian Generic Pharmaceutical Association',
3 June 2003

- 4 Australasian Performing Rights Association (APRA) and Australasian Mechanical Copyright Owners Society (AMCOS)
The Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, Report Commissioned by the Motion Picture Association and supported by: Australasian Performing Right Association; Copyright Agency Limited; and Screenrights, July 2003
- 5 Winemakers' Federation of Australia
Powerpoint presentation, 1 March 2004
- 6 Xamax Consultancy Pty Ltd
Roger Clarke, *The Economic and Cultural Impacts of the Free Trade Agreement Provisions relating to Copyright and Patent Law*, www.anu.edu.au/people/Roger.Clarke/II/FTA17.html viewed at 29 April 2004
- 7 Cybersource Pty Ltd
Notes for presentation
- 8 Australian Fair Trade and Investment Network (AFTINET)
Ten Devils in the Detail: Summary of the text of the Australia US Free Trade Agreement (USFTA), April 2004
- 9 Media, Entertainment and Arts Alliance
Australian Film Commission, *Flexible Vision: A snapshot of emerging audiovisual technologies and services, and options for supporting Australian content*, 1st edition November 2003
- 10 Australia Interactive Media Industry Association
Australia's Digital Content Future and the FTA: The view from Australian Interactive Media Industry Association, PowerPoint presentation
Commonwealth of Australia, 'Access to Markets for Australia's Creative Digital Industry, Section 9: Two Scenarios: Australia in 2010', 12 December 2003
- 11 Australian Services Roundtable
Australian Services Roundtable newsletters, media releases and *Australian Financial Review* article
- 12 Xamax Consultancy Pty Ltd
Roger Clarke, *The Economics of Innovation in the Information Industries*, www.anu.edu.au/people/Roger.Clarke/EC/EcInnInfInd.html, viewed at 5 February 2004

- 13 Dr Tracy Schrader
Dr Tracy Schrader, *Future of the Pharmaceutical Benefit Scheme in the Global Market*, September 2003
- 14 Mr Michael Baume
Mr Michael Baume, *Australian Financial Review* articles, November 2003, March and May 2004
- 15 Senate Finance Committee
'Senate Finance Committee', 9 March 2004
- 16 Australian Services Union
Australian Services Union letters, May 2004
- 17 Confidential
- 17.1 Confidential
- 18 Media, Entertainment and Arts Alliance
Submission by Media, Entertainment and Arts Alliance to Senate Select Committee Regarding Australia – United States Free Trade Agreement, April 2004
- 19 Dr Ken Harvey
Professor Peter Drahos, *Editorial*,
www.bmj.bmjournals.com/cgi/content/full/328/7451/1271?etoc,
29 May
- 20 Dr Ken Harvey
Article commissioned by the Medical Journal of Australia,

Ken Harvey, Thomas Faunce, Buddhi Lokuge and Peter Drahos, *For Debate: Will the Australia-United States Free Trade Agreement undermine the Pharmaceutical Benefits Scheme?*