COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Reference: General Agreement on Trade in Services and Australia-United States Free Trade Agreement

THURSDAY, 8 MAY 2003

MELBOURNE

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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Thursday, 8 May 2003

Members: Senator Cook *(Chair)*, Senator Sandy Macdonald *(Deputy Chair)*, Senators Hogg, Johnston, Marshall and Ridgeway

Participating members: Senators Abetz, Boswell, Brandis, Carr, Chapman, Collins, Coonan, Denman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Knowles, Lees, Lightfoot, Mackay, Mason, McGauran, Murphy, Nettle, Payne, Santoro, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Cook, Harris, Hogg, Sandy Macdonald, Johnston, Marshall and Ridgeway

Terms of reference for the inquiry:

To inquire into and report on:

1. The relevant issues involved in the negotiation of the General Agreement on Trade in Services (GATS) in the Doha Development Round of the World Trade Organisation, including but not limited to:
   a) the economic, regional, social, cultural, environmental and policy impact of services trade liberalisation
   b) Australia's goals and strategy for the negotiations, including the formulation of and response to requests, the transparency of the process and government accountability
   c) The GATS negotiations in the context of the 'development' objectives of the Doha Round
   d) The impact of the GATS on the provision of, and access to, public services provided by government, such as health, education and water
   e) The impact of the GATS on the ability of all levels of government to regulate services and own public assets
2. The issues for Australia in the negotiation of a Free Trade Agreement with the United States of America including but not limited to:
   a) the economic, regional, social, cultural, environmental and policy impact of such an agreement
   b) Australia's goals and strategy for negotiations including the formulation of our mandate, the transparency of the process and government accountability
   c) The impact on the Doha Development Round

WITNESSES

Committee met at 9.39 a.m.

CHAIR—I declare open this meeting of the Senate Foreign Affairs, Defence and Trade References Committee. Today the committee commences its public hearings into the General Agreement on Trade in Services and the proposed Australia-United States Free Trade Agreement. The terms of reference set by the Senate are available from the secretariat staff, and copies have been placed near the entrance to the room.

Today's hearing is open to the public. This could change if the committee decides to take any evidence in private. Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege. It is important for witnesses to be aware that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. If at any stage a witness wishes to give part of their evidence in camera, they should make that request to me as chairman and the committee will consider that request. Should a witness expect to present evidence to the committee that reflects adversely on a person, the witness should give consideration to that evidence being given in camera. I mention that because the committee is obliged to draw to the attention of a person any evidence which, in the committee's view, reflects adversely on that person, and to offer that person an opportunity to respond. Witnesses will be invited to make a brief opening statement to the committee before the committee embarks on its questions.

[9.41 a.m.]

PURCELL, Mr Marc, Executive Officer, Catholic Commission for Justice, Development and Peace (Melbourne)

CHAIR—Welcome, Mr Purcell. You have lodged with us a written submission and we have it before us. Please take the opportunity now to address it and we will then follow with questions.

Mr Purcell—Thank you, Mr Chairman, and thank you, honourable senators, for holding an inquiry into this very important area of public policy, which is going to shape not just Australia's economic future but also its socioeconomic future. We welcome your efforts to gather information to bring some transparency and better understanding to the processes surrounding GATS and the free trade agreement with America. Before I proceed any further, I have circulated an additional submission which is primarily recommendations which the secretariat staff have today—which they are passing around now—and a number of documents relevant to our submission which I believe will assist you with your deliberations. Should I read the documents in or can I just table them?

CHAIR—You can table them. We will admit them. Can we have agreement that we have received this document and it is available for publication? There being no objection, it is agreed.

Mr Purcell—The Catholic Church is concerned about the process of globalisation in relation to how it affects the weakest in society and, indeed, the world communities. The pope takes a keen interest in the processes of globalisation. By this we do not mean so much today the processes of information technology revolution, which is inexorable, but the economic aspects of it, which are primarily policies and debates in public policy which should be publicly discussed and aired, and assessed as to whether they best benefit all sections of society.

The church's view of globalisation is, in fact, that it is essentially an amoral force—it can be good, it can be bad—but it is being driven along and we need to shape it by including concerns for the most vulnerable in our society. In particular, the church is very concerned to link human rights with the development of economic policy. There are some statements from the pope in our submission along those lines. Primarily, we want to give a proper balance between human rights and the objectives of trade liberalisation and examine the effects of trade liberalisation on individuals and ensure that it takes into account the rights of all individuals in our society, particularly vulnerable citizens and groups.

We want to emphasise the responsibility of the state in the process of liberalisation, not only as a negotiator of trade law but also as the implementer, promoter and respecter of human rights. Of course, Australia has a long tradition of being an implementer, promoter and developer of international human rights. The additional submission, which I would like to focus our attention on today, makes four recommendations. I will read those recommendations. The first recommendation is:

The Australian Government undertake a full and public social economic evaluation of the impacts of trade liberalisation since the Uruguay Round in 1994 and a specific evaluation of job losses in different sectors allegedly as a result of GATT and WTO.

I think we are all familiar with the claimed benefits to different sectors of the economy for trade liberalisation, but it is indisputable that certain sectors of our society have suffered as well, notably in manufacturing and agriculture over the past decade, and there has been no comprehensive assessment of job losses and the socioeconomic impacts on our society.

I have tabled one document to show you that this is possible, from the American Economic Policy Institute. It is called 'Fast track to lost jobs', which examines the effects of NAFTA and the WTO in the American economy. I am not passing any judgment on it being 100 per cent accurate, but am demonstrating that such assessments are possible and desirable.

Secondly, we have concerns about the scope of GATS on public services, not in all of the areas that have been offered up for negotiation under the current GATS by the Australian government at the moment—although in some areas, particularly education, we do have serious concerns. We believe there is a lack of clarity around article I:3(b) and (c)—that services exercised under governmental authority are exercised not on a commercial basis nor in competition. That lack of clarity is supported in our additional submission by statements from the WTO secretariat, which highlight this ambiguity where areas that are receiving public subsidies but are also operating on a private basis, such as the hospital sector, can be opened up for competition. We would like the committee to consider a recommendation that the Australian government seeks clarity and authoritative interpretation of article I:3(b) under the GATS through the WTO ministerial council and ministerial conference.

Thirdly, we want the government to make an assessment of the impact of GATS on public services at a Commonwealth, state and local level in areas of education, health and social services, and clarification made that no services are covered unintentionally, because while this ambiguity exists there is a possibility that this could occur either under the current round of negotiations or in future rounds. I think you would all agree that transparency and a better public understanding of the implications of these agreements is essential.

Finally, recommendation 4 pertains to the proposed US free trade agreement. We do have grave concerns about this agreement in relation to some of the trade barriers alleged by the US trade representative in Australia and that some of these might be up for negotiation, notably the Pharmaceutical Benefits Scheme, but if the agreement must go ahead, then we are very interested in the inclusion of core labour standards under the US President's fast-track trading authority and we recommend that the government include core labour and environmental standards in a free trade agreement along the lines of the US-Chile Free Trade Agreement—I have tabled chapters 18 and 19 from the US-Chile Free Trade Agreement—and also the committee to look at the North American Association of Labour Councils, which is an auxiliary body of NAFTA which is set up to monitor, implement and also, in some cases, put sanctions under core labour standards.

Finally, there are two further pieces of documentation which I am tabling. One is a congress report on the NAFTA labour side agreements, which is a very helpful document. The other is a

document from the British Columbian former state government which analysed the impacts of GATS on public services under article I:3, which is also a very useful document.

CHAIR—Thank you, Mr Purcell. I have a great deal of respect for the Catholic Commission for Justice, Development and Peace, and that respect is grounded in a belief that you have been an organisation of conscience that says sometimes unpopular but necessary things to focus on basic human rights considerations. What I want to ask you, though, is in relation to the executive summary of your submission and goes to the issue of the general criteria for globalisation and the issues of human rights in the context of globalisation.

This is a subject that has not really been debated as fully in this country as it might be. My approach to it is probably based more on the views of the 1998 Nobel prize winner in economics Amartya Sen when he argues that to have, if you like, all the principles of human rights laid down is a necessary precondition to human rights but it does not guarantee that any of those principles are observed, and there needs to be an economic capacity to provide people with economic freedom to be able to exercise those rights.

An example I can give you is that I know of a number of countries in our region in which democratic elections occur, but there are countries where there are impoverished people who sell their vote to local war lords. They know that those people will exercise the vote that they have sold against their interests, but they sell it because it is a tradeable good and, if they did not, they would die tomorrow because they could not eat. As a consequence, you do not get democracy; you get the use of economic power to distort the democratic process. That is one example.

In the case of the worst forms of child labour, according to a World Bank survey in Pakistan, the parents of kids that work in these terrible factories as child labour would vastly prefer that they did not—and these are among the most impoverished people in the world—and they would have a clear understanding that it would be far better if their kids had access to education, to give them a chance in life to move out of their poverty status. But because they are so impoverished they send their kids out to work at a tender age; otherwise they would not survive at all. They are caught in those circumstances

The dimension I am coming to is that, if you can deliver economic growth which provides a greater sense of economic wellbeing, you can make the human rights that we proclaim real by giving people some economic autonomy to take up and exercise those rights. Without taking both sides of the picture, the argument is sterile. The World Trade Organisation is committed to global economic growth through opening markets and the World Trade Organisation would say for agricultural producing countries—say, Pakistan or any country in Africa we care to think of—that if the markets for agricultural products of the affluent West, in Europe, the United States or Japan, were open enabling those impoverished countries to sell effectively what they can produce in agriculture rather than disbarring their access to those markets, then there would be an opportunity for those impoverished countries to engage in trade and grow their economy to provide some economic wellbeing to their people. While those markets are closed and those poor countries cannot sell to the rich countries, and those rich countries are delivering aid, the rich countries are salving their consciences while not addressing the problem. That is, essentially, the argument. Would you care to say whether you agree with that argument or not, or make any reflections or observations on it?

Mr Purcell—I am familiar with the debates you are raising. Let me make one thing clear first. In relation to the proposed free trade agreement with America—

CHAIR—I am not addressing that at this stage.

Mr Purcell—It is relevant. I am familiar with developing countries being resistant to the imposition of labour laws or labour standards from developed countries, on the basis that that would, in effect, have an exclusionary effect on some of their products in developed countries.

CHAIR—The argument is that the real purpose of insisting on those standards is not in any expectation that those standards would be meaningful, but as a way to distort the use of those standards for trade protection purposes. That is the argument. For example, steelworkers in Pittsburgh might say that they will not accept any steel imported, say, from Pakistan—it could be South Korea—because it will lose jobs in Pittsburgh, but it means that all those people in the exporting country will have no jobs at all. That is the trade-off. If you have the power and can use a so-called high principle, you can distort that high principle for a nefarious purpose. That is the argument.

Mr Purcell—I do not think it is an either/or situation. With regard to labour standards, human rights standards or environmental standards between Australia and America in relation to the free trade agreement, the stable door is open and the horse has bolted. There are labour standards included in free trade agreements from America and I see no impediment to doing that between two developed economies.

With regard to the arguments that you have raised, it is an irony that we have a 50-year development of human rights standards and, more recently, environmental standards internationally, yet the mechanisms for enforcement are essentially voluntary and the form of punishment is admonishment. We are all familiar with UN human rights committees admonishing Australia in different areas. Let us contrast that with the development of the international trading system where the dispute settlement understandings in the WTO or in bilateral agreements actually have teeth. We see that there needs to be a complementarity and a system accompanying the development of the WTO which considers core labour standards and environmental standards.

I am aware of the argument that this will slow down the negotiation process but, as I say, there is a trend there already in bilateral agreements with America. I think it is doable, it is possible, and it is desirable from the Australian community's point of view, because clearly socioeconomic impacts of trading agreements do affect some sections of the community adversely, and that pertains to their economic and social human rights. It is important that you, as senators, respecting the full gamut of Australia's national interests, also include human rights and environmental rights in consideration of these trading agreements. There is a possibility of setting up some adjunct discussions on human rights and environmental trading standards within GATS, for example. My view about the impacts on developing countries is that it is often said that we are a member of the Cairns group and therefore we have a commonality of interest with those states. Many of them are developing countries.

The Catholic Church believes in the principle of subsidarity, which means listening to the voices of the weakest and the poor. My observations from working in Africa and Asia are that

many people are subsistence farmers and, in fact, they are adversely affected by cash cropping and the very industries which would probably benefit overall from trade liberalisation. We are not opponents of trade liberalisation per se—we do see the benefits—but it can adversely affect many millions of people because their governments represent them. Often, as you point out, those governments can be dictatorial and not take into consideration the interests of the mass of the people who are the poor in their society but merely the wealthiest agricultural producers and bigwigs in their society.

CHAIR—I have already given a rambling introduction, but let me be succinct now. Do you accept the argument that human rights are not just about declaring rights or legislating principles; it is also about the economic capacity to be able to make those rights meaningful?

Mr Purcell—I do.

CHAIR—Your model is the US-Chile Free Trade Agreement as far as any potential Australia-US free trade agreement is concerned, insofar as the labour standards provisions of that agreement apply.

Mr Purcell—These agreements are not perfect from a purist's point of view on human rights or labour standards. Neither the Chile agreement nor the NAFTA Labour Council fully defend the full gamut of labour rights. For example, if you turn to the second last page of my additional submission, you will see there are 11 core labour standards but only three of them—protection of children and young persons; minimum employment standards pertaining to minimum wages; and prevention of occupational injuries and illnesses—have a capacity under NAFTA to have some sorts of sanctions if they are violated. Enforcement mechanisms for the other nine mechanisms is essentially discussion. Nevertheless, this is significant. It is an improvement on the absence of consideration of human rights and labour standards. The Chile agreement and NAFTA have positives which we would support, and we urge you to take heed of them.

CHAIR—You may not know this, because we have not released the submission yet, but the ACTU have put a submission to us which, from their perspective, identifies what they regard as weaknesses in both the Singaporean and Chilean agreements. In their submission, as I recall, they ask for us to recommend to the parliament that those provisions be tightened and strengthened. This is an odd debate coming from the US—from me—and here is my question. The US has adopted three of the core labour standards and Australia has adopted something like 57 ILO conventions and all but one of the core labour standard conventions. The US are asking us to observe the core labour standards when they have not adopted them themselves. Do you have any comment to make about whether—given the economic power of the US in terms of its relationship in negotiating with Australia—Australia is seriously in a position to insist that the US observe the standards in any meaningful way that they are telling us that we have to observe? Do you have any comment on whether that relationship, given the size, the strength and advocacy of the two economies, would mean that American protectionist interests would be determining the interpretation of what those standards mean to suit their purpose, rather than establishing rights and entitlements for Australian workers?

Mr Purcell—That is a good question. The understanding under the Chile agreement and the NAFTA Labour Council is that it is the local national laws which will prevail and there is a commitment on both parties to respect and implement those.

CHAIR—It is more than that. It is the local national laws that are recognised, but the parties sign up to a commitment to work towards implementing a best endeavours commitment—not a binding one—for the labour core standards and there is a review mechanism which, from time to time, reviews progress towards that goal. Presumably, if that goal is being treated flirtatiously or insincerely then there is a mechanism to say, 'You risk losing this agreement.' There is, if you like, a coercive power at the end of it in the event of default.

Mr Purcell—Yes.

CHAIR—Do you have a worry about the way that coercive power could be used? Is it really to maximise American gain against Australian interests rather than establish real rights for Australian workers?

Mr Purcell—There is a concern there. For example, chapter 11 of NAFTA, which allows natural persons—so private corporations—to bring challenges, is having a regulatory chill on new environmental and local labour laws in Canada as a result of litigation that is starting to emerge there. I urge you to explore this further with Liberty this afternoon. There is concern about private American companies challenging Australia under its local regulations and saying, under the expropriation argument, that profits are being lost as a result of local regulation—it can be in all different areas, not just labour areas—and, therefore, seeking compensation for that. In fact, that has occurred in a number of cases between America and Canada, so it is of real concern.

The power imbalance you mentioned goes to the heart of it. We have little negotiating coin really with America. Obviously there are big benefits in agricultural areas that we might make if we get into the American markets but what we possibly are going to have to give up in terms of acceding to these dispute resolution mechanisms—and also in what the US trade representatives are wanting in terms of pharmaceutical benefits, local content in media and so on—is of real concern to the wide Australian community. I suggest that the benefits may not be worth it.

Senator MARSHALL—On the issue of dispute resolution, you have indicated you believe that extraterritorial tribunals have the ability to undermine our sovereign rights as a nation to make decisions on our own behalf. Do you have any specific examples you can point to which would identify your concerns?

Mr Purcell—I am not a lawyer so I would defer to Liberty's submission, which makes a detailed analysis of some of those cases. I can table a document entitled *Private rights. public problems: a guide to NAFTA's controversial chapter on investor rights,* which details some of those legal cases.

Senator HOGG—I have a question on the first recommendation that you have made to us, which reads:

The Australian Government undertake a full and public social economic evaluation of the impacts of trade liberalisation—

and I have no problem with that—

since the Uruguay Round in 1994 and a specific evaluation of job losses in different sectors allegedly as a result of GATT and WTO.

There would be some who would argue that if GATT and the WTO were not there, if there was not trade liberalisation, then the job losses would have been far greater in number than what occurred with the liberalisation that has taken place. Are you taking that into consideration? One of the problems I have with all of the debate that surrounds this area is that people will tell you about the job losses if it takes place; people will not tell you about the job losses if it does not take place. I would like to know both. Do you have a view as to whether we should in some way modify that recommendation to look at the whole impact?

Mr Purcell—It is fair enough to look at job losses and job gains, and I think your question pertains to economic modelling. With a lawyer, if you do not like the advice, you get a different lawyer, and probably with economic modelling you would do the same thing. The submission from Alan Oxley, on benefits of GATS, contrasts with the ACIL submission, on the possible negative effects of a free trade agreement. It is probably an area where you are not going to get a conclusive answer. However, the important thing is that there has not been any comprehensive analysis of the socioeconomic costs and benefits of trade liberalisation over the past decade. There have been many studies on particular sectors, but it is important that we do understand what the gains are and what the losses are, to the best of our ability. That is probably a very large piece of research which would be multidisciplinary. I suggest that it is urgent because these agreements are being negotiated now. In some senses, we could be flying blind because they are our best guesses as to what benefits we might be going to get. The ambiguity around some of the articles in GATS means that we still might be opening up ourselves to problems in the future in terms of disputes, dispute resolutions and compensations.

Senator HOGG—The other question I have is in relation to the nature of the organisation itself. Is this simply a Victorian based organisation or is this the national organisation?

Mr Purcell—No. We are part of the archdiocese of Melbourne.

Senator HOGG—Is there a broader national view? I presume there is a National Justice, Development and Peace—

Mr Purcell—With the Catholic Church perhaps being an agent of globalisation itself there is a broader Catholic and church view which I have cited in the introduction to our submission, which is the Vatican and the pope's views. There is the Australian Catholic Social Justice Council, which is a national body, but I am not aware if they have put in a submission or not. I would defer to the secretariat.

Senator HARRIS—Mr Purcell, in your submission on page 14 you make reference to the EU wanting to access postal services and state:

... Australia Post services would be treated as goods and open to foreign competition, threatening subsidised services to rural areas, and public ownership.

The request from the EC goes much further than that. It states:

Australia has not undertaken commitments in postal and courier services. The EC requests Australia to commit this sector as follows, based on the EC proposal for the revised classification for postal and courier services.

They then list those. My question to you is related to the section where you refer to threatening subsidised services in rural areas. Could you expand on your concerns in that area for the committee?

Mr Purcell—It goes to the ambiguity within the GATS articles themselves around subsidies. It may be, depending on the skills of our negotiators and the disposition of the government, that these areas will not be opened up for negotiation in response to the EU request. However, the WTO secretariat has issued a background paper which highlights that in scheduled sectors, subsidies—and any similar economic benefits conferred on one group—will be subject to national treatment obligations.

If there is an aspect of a public service or a universally provided public good, such as post in rural areas, and some of that is tendered out through agents—postal agents and so on—that could be potentially opened up to competition. I am not commenting on whether there is another argument about how desirable that is. People will make arguments that it is more efficient and if a foreign company wants to come in and do that, well and good. But, again, there is a lack of clarity and there is uncertainty about the implications of these articles and the unintended consequences, or the unknown consequences, in regard to public services and the provision of universal public goods, such as postal services, water and education.

Education is another good example. Australia has put forward private secondary and tertiary education for negotiation. As you would be aware, Bond University and Notre Dame University in WA receive public subsidies. What are the implications here if a foreign university comes in and says, 'Under national treatment we also want a slice of the pie, thank you. We want access to those subsidies'? Again, depending on the disposition of the government of the day, we might say 'Great. It's good to have Harvard here.' If it is the University of Rome from the backblocks of Missouri or something though, maybe we will not be so keen about that. Again, there are the implications on the public purse overall. These consequences need to be thought through. I am sure the NTEU will have a lot more to say about that particular aspect.

Senator HARRIS—Another issue you raised on page 17 relates to the possible abolition of the Pharmaceutical Benefits Scheme. In your submission you state:

An assurance from American negotiators that they would not be "coming after" government subsidised medicine in the public interest is not a guarantee.

Do you have any instances globally where that has occurred?

Mr Purcell—All they have said is that they have gone away with a better understanding of Australia's concerns about the Pharmaceutical Benefits Scheme. Again, if we sign up to an agreement which has a chapter 11 type dispute resolution mechanism, there is nothing to stop an American pharmaceutical company coming in and challenging it anyway. As you all know, the government does not necessarily have power once you accede to these agreements. The power is handed over to the dispute resolution mechanism, so pharmaceutical benefits could be up for dispute. We would have grave concerns about that and the provision of universally available

cheap medications to the Australian community, particularly given the context of the current debates around Medicare.

Senator HARRIS—Due to time constraints you may need to take a few of these questions on notice. You have raised the issue of Telstra. The EC request states:

> Foreign equity in Telstra has been limited to 35% of the first third of company stock offered to the public (about 11.7% of the total equity) with a limit of 5% of the one third (about 1.7% of total equity) available to individual or associated group foreign investors.

The EC's request is to remove those limits. The second request in relation to telecommunication is that currently the chairman and director of Optus must be Australian citizens, other than those directors appointed by the two major foreign investors. The EC request again is to remove those restrictions. Do you see problems in relation to, firstly, removing the limits on the control of the stock and, secondly, the requirement for the chairman and the director to be Australian citizens?

Mr Purcell—I am not going to pass a comment on that particular aspect. As you know, public ownership of Telstra is a matter of public debate within Australia. There are arguments for and against. As a result of this process, we are seeing the introduction of very powerful players into that debate. Again, it comes back to power in negotiating these agreements. We have limited negotiating coin, where generally we have to operate in tandem with our partners in the Cairns group to get a desirable outcome for Australia. When it comes to areas around public ownership of telecommunications, universities, health or whatever, there is the introduction of powerful new players into these public debates. There are consequences for the Australian community and what ability has the Australian community to say, 'No, we don't want this to happen,' or ask, 'Is this good for the Australian community?' We may be at risk, in our desire to get benefits out of these trade agreements, of throwing the baby out with the bathwater and selling away some very desirable things in public services.

Senator HARRIS—Finally, you made a comment earlier about the dispute resolution process. In the agreement itself, article 24 talks about the Council for Trade in Services and, under paragraph 3, it says that the chairman of the council shall be elected by the members, but there does not appear within the document itself any process for the election of the members of the Council for Trade in Services. Taking the significance of that group—and it becomes one and the same as the dispute tribunal—does your association have any concerns relating to the lack of process as to how that group is elected?

Mr Purcell—We have three concerns and, perhaps, one recommendation. One is that tribunals of this nature are not tenured independent judges, so that there is no guarantee that they will be insulated from conflicts of interest. That is a matter that should be looked at by the WTO secretariat, and the appropriate mechanisms within that. Secondly, it comes back to human rights, environmental and other socioeconomic considerations. As you know, the WTO and these bilateral agreements work on a precautionary principle, 'When in doubt, trade wins out.' There is a natural tendency to exclude socioeconomic concerns on the part of the members on these dispute resolution bodies, so we do have a concern about that.

Finally, there is a lack of transparency about what occurs within these bodies from the top down; from the quads meeting in the green room in Seattle and excluding developing countries

to the actual dispute resolution processes. Perhaps, as in the case with NAFTA, it might be desirable that a capacity is made within the DSUs for simple society players to come as observers to learn more about it. I realise there would be resistance to being parties, although that would be a very desirable thing, given the Australian community's stake in a lot of these cases, but at least as observers they would bring a better public awareness of the nature of these agreements. I think that is what we are all grappling with—the highly technical nature; how to explain that clearly; its implications to the public; and to be assured that the socioeconomic impacts are not adversely affecting too many of our people in Australia.

CHAIR—I have one final question. Has the Catholic Church, through your agency internationally, made representations to governments in Europe, the United States and Japan—where, I imagine, there would be less effect, because of the representation of the church— that they should open their markets to developing countries so that those developing countries can sell their goods into the developed world?

Mr Purcell—I will take it on notice. What I do know is that the Catholic Church is gravely concerned about a number of problems. Of course, the Catholic Church is one of the participants in the Jubilee Drop the Debt campaign, so it is very concerned about the impact of debt, the restrictions on market access to the poor from developed countries and also about the decline in aid. Australia is now one of the lowest in the OECD over the last decade. It is appalling. Secondly, we are interested in other ideas in relation to raising revenue for the poor of the world, and I think it would be a mistake to put your eggs in one basket and say that aid is the solution or better trade access is the solution.

Personally, I am a proponent of a tax on capital financial flows—a very small tax to raise revenue, because that is the largest source of global wealth now—which could be redirected to alleviating global poverty. The main message of the church is not to focus exclusively on one area but to have a holistic approach to socioeconomic needs. I will get back to you on the representations issue.

CHAIR—I appreciate that. While aid obviously performs a very important role from a human point of view, independence comes with being able to build your own economy. Being able to sell your goods into a strong market and not be dependent on handouts from others is pretty fundamental to the self-esteem of nations and of people within nations and of building an economy that can have the intrinsic economic strength to deal with the poverty problems itself and, because rich countries have trade barriers against poor countries, I will be very interested to know what the Catholic Church is proposing to do to the rich countries to encourage them to be more open to goods in their markets from poor countries.

Mr Purcell—This applies, of course, to Australia; 70 per cent of the milk imports of southern Africa come from Australia. Although there has been no assessment done, that could have quite a devastating effect on local dairy producers in Africa.

CHAIR—Thank you very much, Mr Purcell.

[10.29 a.m.]

ALLPORT, Dr Carolyn, President, National Tertiary Education Union

MURPHY, Mr Ted, National Assistant, National Tertiary Education Union

GALLAGHER, Dr Pauline, Assistant Secretary, Commonwealth Commonwealth Scientific and Industrial Research Organisation Staff Association, Community and Public Sector Union, Public Sector Union Group

WATERS, Mr Alistair John, Project Officer, National Secretariat, Community and Public Sector Union, Public Sector Union Group

CHAIR—Welcome. It may be that you were all in the room when I read my opening statement. I do not intend to read it again. Essentially, the procedure is that we will invite you to speak to the written submissions you have lodged with us and then open both your written and oral submissions for questions from the committee. The batting order on your side of the table is entirely between you. It is the committee's desire that, since we have a written submission from you, you make your oral presentation succinct so we have a bit more time to pursue issues within it.

Mr Murphy—I will speak briefly to the submission. You have a submission that deals with both tertiary education issues in the context of the proposed US free trade agreement negotiations and with the negotiations on the General Agreement on Trade in Services. I will concentrate more in my oral presentation on the USFTA, and that is a reflection of the announcement by Minister Vaile that there will be no public education offer made under the General Agreement on Trade in Services and the omission of tertiary education and public education generally from the initial offer that Australia has already tabled.

I will make some comments on outstanding tertiary education issues in the GATS context, however. The first comment is that an initial offer can be succeeded by further offers, and there is an assessment that initial offers from Australia and a range of other countries in the services negotiations are more modest than would otherwise have been the case because of the deadlock in agricultural negotiations, so there is some possibility of further offers being made in the services sector. However, the minister's statement says that public education will not be a part of that offer and we take comfort in that statement.

There are two tertiary education issues which are still relevant in the GATS context. One is the extent to which any offer is made on the separate WTO classification of research and development services, because that includes research grants to universities. That is classified separately from the education services classification. The second is the implication of the Australia government proposal in March 2001 to the Council for Trade in Services for the adoption of a least trade restrictive test that would apply to domestic regulation or, more precisely, licensing requirements, qualification requirements and technical standards. That encompasses universities, because accreditation of universities is a licensing requirement as we

understand that Australian proposal, because there is a working party on domestic regulation within the WTO looking at this new discipline which is mandated in the text of the 1994 GATS.

As we understand the Australian proposal, it would envisage if adopted within the WTO that another country would be able to lodge a dispute with a WTO panel against an Australian licensing requirement, technical standard or qualification requirement on one of two grounds or possibly on both grounds—either that the requirement was not adopted to meet a legitimate policy objective or, even if it is conceded that the requirement was introduced to meet a legitimate policy objective, the dispute could be lodged on the grounds that in the opinion of the aggrieved country another regulation could have been adopted by the Australian government which would have achieved the policy objective with less restrictive impact on trade in services than the one that the Australian government actually adopted.

We have a concern about that because of accreditation requirements and because there are significant differences between OECD countries for accreditation of universities. Some, like Australia, have a high standard of accreditation, which puts an emphasis upon an institution offering a broad range of courses across a range of disciplines and being teaching and research institutions. Other OECD countries allow teaching-only universities and allow so-called boutique universities that do not offer a broad range of courses. So we would be concerned about that proposal, if adopted by the Council for Trade in Services, for its impact on the university sector.

With respect to the US free trade agreement, our concern there is that the US has been highlighting gains that it has made in adult education and training services in its negotiations with Singapore and Chile. We made no commitments with respect to adult education in our 1994 GATS negotiations, but there is an expectation and probably a likelihood that we will exceed our GATS commitments in the context of the bilateral negotiations with the United States.

We have certainly exceeded our GATS commitments in the Singapore-Australia Free Trade Agreement which has recently been signed, including in the education services area. We see the FTA negotiations as probably riskier from a tertiary education point of view, both because of US interests in trade and education services and because of the nature of bilateral negotiations exceeding the base that is established in GATS.

We note, with great concern, that in the Singapore-Australia Free Trade Agreement—which, according to Stephen Deady, the chief negotiator for both the Singapore and the US agreement for Australia, is a template for bilateral agreements for Australia and the Asia-Pacific region—a reservation or an exception was taken out for public education, public training, public transport, income security, insurance and public utilities generally, but only to the extent that those entities are established as social services to meet a public purpose. We believe that that introduces a significant element of ambiguity about what activities the public universities, public training institutions and all the other entities that I have just mentioned are covered by the exception and what are not.

To be fair, however, you would have to look at the interaction between that broad reservation and any specific reservations taken in education, transport, health, et cetera—and health is also on the list. That is the other concern we have about that formulation being carried over into the US free trade agreement, because in the context of GATS the 1994 commitments gave

commitments for higher education and secondary education and only for private higher education services and only for private secondary education services, whereas we believe that that ring fencing, if you like, has been eroded in the Singapore context, and we are concerned that it would follow on to the US negotiations.

I will also make the point that, with respect to the US negotiations, the US starts these negotiations from the standpoint of having already given education services commitments in the 1994 GATS, whereas Singapore started the negotiations with Australia, with us having given some commitments but Singapore having given none, so we believe that there is greater scope for commitments to be given in the US context. The rest of it is largely set down in the submission. That is the overview.

CHAIR—Thank you, Mr Murphy.

Mr Waters—Thanks for the opportunity to appear before the committee. The fundamental thrust of our submission goes to the issue of national control over public policy as that varies from time to time. Australia needs to maintain a capacity to conduct public administration, both at regional and federal levels. As it is determined to be in Australia's public interest, as that varies from time to time, one of the very significant concerns that we have, both with regard to the GATS process and also with regard to the American free trade agreement, is that there can be significant restrictions imposed on the capacity for the current government to change public policy, or for future governments to change public policy, from current settings. We raise an example in our submission.

Other areas that have some relevance include IT outsourcing. It seems to us, in terms of both the GATS process and also the free trade agreement process, that there is a single direction in which countries are able to move in a public policy sense, which is away from public control to private sector competitive processes. The EU—and we mention this in our submission—is quite explicit about where elements of public services are opened up to competition and the global trade rules that should apply.

Our concern is, when there is a change in public policy, such as decisions on IT outsourcing, that that should be retained in-house; that under the rules of GATS that creates the capacity for the dispute mechanism to be invoked by another party. Certainly with the capacity under NAFTA for individual companies or natural persons to take disputes to those trade bodies, there would appear to us to be an even greater threat of those sorts of public policy decisions being challenged under a free trade agreement framework.

The US objectives in the free trade agreement focus quite strongly on regulatory and public policy matters, including matters relating to quarantine arrangements and government procurement. Again, locking in positions on those issues so that Australia's overriding interest in the protection and health of life, plants and animals, in the case of quarantine, would be a significant concern to our members, as professionals working in quarantine.

There is a significant lack of detail at the moment in terms of the sorts of regulatory changes that the Americans might be seeking under the free trade agreement process. We are very concerned about the time frame that is being advanced, which is moving very rapidly—at least on some of the recent comments last week—to a conclusion of a free trade agreement between

Australia and the United States, for there to be full public discussion about the consequences of regulatory changes that the government may commit to in making those treaties. Without having the details, it is difficult for us to comment, but we do raise our very significant concern that there has to be a capacity for consideration and discussion before there are any binding consequences on Australian control of public policy.

In relation to the free trade agreement, we are concerned by the very limited nature of the commitment that the government has given to the public services in Australia statement of objectives. In relation to trade in services, the government's objectives document produced on 3 March refers only to ensuring that the outcome of the negotiations does not limit the ability of government to provide public services such as health, education, law enforcement and social services. We see that as a very narrow definition of public services. Given that the phrase referring specifically to health, education, law enforcement and social services is used on more than one occasion, it seems to be quite a deliberate narrowing of what is included as public services in the consideration of the Australian side in those negotiations. On the other hand, we do note that in terms of our members in health and education we can take some comfort from that particular objective.

A similar objective, also under the trade in services section, talks about appropriate regulation support measures to achieve objectives for cultural and social policy, objectives in areas such as audiovisual media. CPSU appreciates this statement with regard to the audiovisual services and the number of statements that the minister has made on those services. However, the statements are qualified and remain qualified, to the extent that they clearly encompass the possibility for substantial change to the existing national and regional character of such services. CPSU has represented members working in commercial TV on professional concerns with the maintenance of the regional character of television services, in partnership with regional communities. Similarly, our members in the ABC are very alive to the important role that the national broadcaster plays in the cultural life of the nation and any changes that diminish Australian cultural content would be a very significant concern.

The terms of the US and Australian free trade agreement objectives, which are the public documents that we have seen to date, are expressed in the most broad terms. In terms of almost all of our areas of coverage, it would appear to us that there are possible consequences that could flow, particularly given the lack of clarity on the regulatory change. The government statements, again, seem to speak in terms of existing public policy settings and it is vital in this process that there can be change. We are all aware of examples where governments have, in good faith, gone down a particular public policy path and then, for good national interest reasons, chosen to change that path. Both with the free trade agreement and GATS, the mechanisms are established that create the capacity to lock in those public policy paths and restrict the capacity to change those.

I have mentioned IT, with the government moving to a purchaser-provider model for the provision of services right across the APS and public sector areas. When you look at the definitions that are provided in GATS, and my understanding of the definitions in some of the other free trade agreements, the question of what constitutes a public service and what constitutes a purchased service becomes a very significant question indeed in terms of the wording that exists in those treaties, particularly in relation to the dispute mechanisms that apply under those treaties.

There is clearly a capacity for member states to argue, in terms of GATS, that Australian public services and services provided in the public good do not fall within the treaty definitions of public services. Certainly, in terms of areas that our members have identified, there is concern in relation to Centrelink, which we think is a core public service. Depending on the definitions of particular payments, it could be argued that some payments are not excluded from GATS and could be subject to competition. Payments that some members have suggested may fall into that category include the crisis payment and the 'unreasonable to live at home' youth allowance.

We do not comment on the likelihood of the success of those arguments, should they be raised by another member or by a company. However, it highlights the need to get maximum clarity up-front to protect the right of the national government to determine itself what are public services and what are not—what are excluded from these treaties—is absolutely critical. In terms of the purchaser-provider model, possibly one of the most complex examples of how that operates in the public sector is the CSIRO. The EU, in its claims against Australia, seeks to lift barriers on the natural and interdisciplinary sciences for private funding and certainly, within the terms of the broad US objectives, opening up to competition funding for CSIRO research and research carried out by other Australian public sector research institutions is quite possible and quite capable of being included within those objectives.

The CSIRO currently receives about 30 per cent of its funding from external sources. Some of the funding directly from government comes in a variety of ways. The funding situation for the CSIRO is really quite complex, and that complexity is certainly in the way it is defined. There is a clear capacity for the CSIRO's work to be challenged, if some of these areas are opened up. While the minister has made a number of statements with regard to particular areas that Australia has clear objectives to not negotiate away, research and development is not one of those that has been mentioned. There are no offers that Australia has made in the offer process for GATS on research and development, but similarly there have been no clear statements from the Australian government seeking to protect research and development.

The dispute resolution processes, as I have indicated, are of considerable concern to us. Certainly, mechanisms that allow individual companies to move into dispute with nation states, such as the example of the UPS and the Canadian Postal Service coming out of the NAFTA areas, add very significant uncertainty to the protection of the public services under any of these treaties.

CHAIR—I do not want to unnecessarily curtail your oral presentation.

Mr Waters—I will be fifteen seconds. In conclusion, the use of external treaties on trade to lock in public policy positions that affect a broad range of measures for the Australian public that go well beyond those trade measures is not in our view in the long-term public interest and is something that needs to be resisted. Thank you.

CHAIR—Thank you. I hope I did not force you to a more rapid and less representative conclusion than you otherwise would have given. I have a couple of general questions. The first one is in considering how we approach the writing of our report and the isolation of each of the key issues that has been presented and our ability to reason through those items. What occurs to me is—and I have not discussed this with the rest of the committee; none of us has directed our mind to the report at this stage—that the ACTU has lodged a quite large and comprehensive

submission. I make the assumption, but I want to test it with you, that that represents, if you like, the union view and that as unions you are elaborating in your particular sector on that view. If I am wrong about that, when we call DFAT and ask them to reply to these points—and I am not seeking to drive a wedge here; I am just trying to organisationally get this thing sorted out in our heads—if there are differences between what you and the ACTU are putting, we need to know that so that we can weigh and pursue those items more directly. Can I ask you this broad question: do you support the ACTU's submission? Are you elaborating from your sector, or are there any particular things that you think the ACTU's submission is deficient in?

Mr Waters—We do support the ACTU's submission and explicitly do so in our submission. However, I have not read or seen the ACTU's submission, so to the extent that we are elaborating on issues directly relevant on our sector, it may be that some of those are not as fully developed in the ACTU's submission as we like. I say that because I have not read it.

CHAIR—If you have not seen it, it is an unfair question to you, but we are publishing it and releasing it today. I imagine, in any case, you have access to it without us formally releasing it, but at some point, what I want to do is put the package of concerns together so that we can talk to the Department of Foreign Affairs and Trade about those concerns and, where possible, get answers to them. Did you have something to say, Dr Allport?

Dr Allport—We support the ACTU's submission, but because the submission is from the ACTU and covers all industries, obviously it cannot pick up on the very specific issues that might attach to a particular industry—in our case, higher education. Our submission, which we have written for the consideration of this committee, speaks also to the opportunity we have to not utilise the trade route for our internationalisation and our participation in a global economy. Also, our submission picks up on the US offer within the GATS framework. The US has suggested that it wishes to open up some more specific areas in the other category in higher education and, most importantly, in educational testing. The US is very dominant in educational testing and there are many issues about cultural diversity that attach to that. The ACTU's submission cannot pick up on those types of issues which are very specific to a sector, and I will happily take questions on either of those issues as part of the committee's hearing today.

CHAIR—Yes, I understand that. We initially wanted the ACTU appearing and then the unions following, but for organisational reasons that has not been possible. I am trying to conceptualise this. From the answers, it seems to me that I am right to assume that the ACTU is a sort of overarching head submission, that you are directing us to the particularities of your sector and that when we turn to those issues we should have regard to what you say.

Dr Allport—Yes.

CHAIR—The second thing is about the process of trade negotiation. Have you put these views to DFAT and are you satisfied that you have been given an appropriate hearing and that your views have been weighed seriously and responded to?

Mr Murphy—We have put these views to DFAT, by way of written submissions when DFAT has called for submissions, such as on the preparation of Australia's initial offer, and in meetings conducted under the auspices of the ACTU with DFAT. We are satisfied, to the extent that the initial offer does not contain any further moves in the public education area. As for other matters

that have been canvassed with DFAT, we do not believe that there has been a response. In fact, I have not seen any response, nor has the ACTU received any response—I can vouch for that—on the question of the least trade restrictive test. On the initial offer we are familiar with the response, because that has been released. On the broader issues that have been raised in the WTO context with respect to domestic regulation, there has been no response to date.

Mr Waters—Our discussions with DFAT have not occurred as yet. We are working on going through a process with DFAT, but have not at this point.

CHAIR—I am sure all senators at this table have firm views about what constitutes good public policy, which is why we have sought and been elected to the Senate. One of the overarching concerns in this inquiry is: is the process of public consultation that has been undertaken here adequate and does it serve the national interest? That may be an argument that is different from what we see as ideal public policy. It may be that we agree on what proper public consultation procedures are, while reserving the right to disagree on the content of what the outcomes might be. How open the government is to views and how it responds to interested organisations is a matter, I think, that deserves to be looked at specifically. Do you have any comment on that?

Mr Murphy—I do, in the following order. Prior to the preparation of Australia's initial offer, Australia lodged a series of negotiating communications with the WTO which was territory staking. It included the least trade restrictive test, but also staked territory with respect to professional services, business services, education services, financial services, et cetera. Because I am involved with the ACTU's submissions and processes on bilateral and multilateral free trade agreements, I am in a position to advise that our union was not consulted on any of those negotiating communications as they affected education services, the financial sector union was not consulted on the proposals that went through on financial services, and nobody was consulted in the trade union movement on the least trade restrictive test. That is the first part of the answer.

The second answer I will make is that, on the preparation of Australia's initial offer, there was that opportunity to lodge submissions and that was welcome. The difficulty one has, however, is that, unless the initial offer is released in draft form for public consultation, you are not in a position to say, 'We believe that there is a series of problems, either for particular service sectors or interpretive problems about how those proposals will actually work, given WTO law.' I think that is the basic defect with respect to the initial offer—that it was not released in draft form. With respect to bilateral negotiations, the ACTU had one meeting with our negotiators or DFAT's negotiators, and that was at the beginning of the SAFTA process. There were no further consultations. We would hope that the ACTU's submission, which I am familiar with, contains recommendations for a regular schedule of consultations on the USFTA to improve that process.

CHAIR—Mr Waters, do you have any comment?

Mr Waters—Yes. In terms of preparing our initial submission, I would have to say that working through the public information available on the DFAT web site—which for many people is going to be the critical source of information and contact on these issues—was very difficult. Documents such as the US trade representative's letter to Congress was referred to on the DFAT site, but at the time of writing the submission was not available on the site. It was

available on the committee's site. Assistance in accessing the core documents was very much appreciated in terms of the work that the committee did.

We have done some checking of the CSIRO which, along with other science institutions, is directly affected. As to requests that have been made by the EU in the GATS process, as far as we are aware there has been no contact with those science organisations directly, and certainly there has been no contact proactively from DFAT to talk with our organisation about any concerns that we might have.

CHAIR—All I will do is mark this spot. I am not sure what the answer to the issue is, but how governments relate to their communities on trade deals—what degree of consultation and transparency there is—is, I think, an issue here and has been an issue in international trade and globalisation debate since at least 1999 and the Seattle conference.

On the American side, we know what their process is. It requires a bill to be enacted by Congress to create an act of the Congress to confer power on the President, which sets down the negotiating mandate in broad terms and requires the trade representative, who is the trade minister, to lodge a letter with the Congress in the case of a specific negotiation as to what his mandate will be. The Trade Promotion Act has a congressional oversight committee to monitor the negotiations and, at the end of the day, presuming that the outcome conforms with the limitations placed on it, an up and down vote by the Congress as to whether it is accepted. That is the American approach.

Our approach under our Constitution enables the executive to conclude an international agreement, although under our Constitution any consequential legislation that arises from an international agreement concluded by the executive, of course, has to be passed by the parliament. The check and balance comes at that point, rather than at the point of concluding an agreement. That is the distinctive difference between our two systems. It is possible to see a scenario—one has not emerged yet, thank God—where a parliament might decline to enact legislation arising from an international agreement a government has constitutionally committed the nation to. I think that conundrum is at the bottom of the consideration about what degree of consultation and national consensus there might be—I do not suggest uniformity of decision, but what degree of overarching national consensus by way of approval there might be—in completing an agreement.

If you have any comments on that general concept at some stage, please make them. Mr Murphy, I think you made a remark that the Singapore free trade agreement exceeded the GATS commitments, and I think that is true. It did. Were you consulted on those changes before they were made?

Mr Murphy—No, we were not.

CHAIR—I do not think, as a consequence of those changes, there is necessarily any consequential legislation coming to the parliament.

Mr Murphy—Not to my knowledge, no.

CHAIR—Are you intending to make a submission to the parliamentary Treaties Committee, which is the mechanism to scrutinise the agreement, expressing a view about the change in the GATS commitments in the case of the Singapore free trade agreement?

Mr Murphy—That view was expressed in the ACTU's submission on SAFTA, which has been lodged. I am in a position of writing different submissions under different hats, Senator.

CHAIR—I appreciate that. I want to come to what is probably a provocative question, but it is bound to be asked and I thought I might as well ask it. What at base we are talking about here is probably an issue of philosophical difference in our committee. What is the legitimate role of the public sector versus the private sector? How do you make the public sector efficient in the delivery of its services? Issues of that nature are fairly much ideological views that people might have.

It is a fair observation to say that there is a convergence of those views, but not acceptance or uniformity of those views. Governments strive to make the taxpayer's dollar go further and determine what things get outsourced or privatised and so forth, and there are elements of argument constantly about what the right level of that might be and whether anyone did the right thing. As far as the education union is concerned, do you cover employees in public sector education providers as well as employees in private sector education providers?

Mr Murphy—Yes, and we have members at both Bond University and Notre Dame University.

CHAIR—That gives rise to this question: does it matter to you whether, in the national interest, the education provision comes from the public sector or the private sector if the quality of education and accessibility to that education is maintained? I think it is a different kettle of fish for the Public Sector Union, because it obviously has a particular interest in what is the direct regulation of the public sector and how large the public sector might be, but if you straddle both I would be interested in hearing any comment you might make. Someone is bound to ask us, so we might as well deal with it up-front now.

Dr Allport—I will begin, but I am sure my colleague will have something to add. As an education union which represents employees who work in higher education, irrespective of whether they work in a private or a public institution, we also have a broad commitment to ensuring quality of education and accessibility. The union has a general commitment both to social justice and to the opportunity that education can provide to increase economic wealth, as well as social cohesion and social adaptability.

We represent members in public and private institutions, but on top of that we believe that we have a particular responsibility to ensure that across the nation, wherever you live, you are able to access education through primarily a public responsibility that exists for both federal and state governments. That does not mean we would say that people should only go to public institutions. Of course, that is not what happens in education at any level in this country, but I believe that education is a core responsibility of government at all levels and, as a trade union committed to education and education quality, we continue to protect what we think that responsibility is.

I think it is very important not to make overly false distinctions on the notion that government has a very narrow responsibility in the public sector, because I think government, when it has done well by community more generally, has always had a broad view of what the public sector is and what public responsibility is. What I fear for higher education and what I think the trade agreements have the capacity to drive is an increasing privatisation and a fall in the responsibility held by government to ensure that it sustains a public role. For the union, we do not see any inconsistencies in the way we protect all members' interests. That is my first go.

Mr Murphy—I have a somewhat different take. I think the question implies that you can square a circle. What I am saying to you, Senator, is that you can certainly, in some sense, ensure quality private education as well as quality public tertiary education, using quality assurance mechanisms. That is not in doubt. But then you have to distinguish what you mean by 'quality'.

You can talk about procedures for accrediting courses or for institutions. But will you, in a private institution, get the quality dividend that arises from having a library which, because of the public institutional framework and culture, has developed and maintained and expanded as a library to assist broad-ranging research both by academic staff and by the external community, and which is a repository for a range of publications et cetera and research journals that do not really necessarily pertain—many of them do not pertain—to the courses themselves but to that research role, and to the notion that the university is a repository of knowledge? I doubt that you would get a private institution doing that.

I should add that there is a range of other, what I would call, community service obligations that public universities perform. If look at the Northern Territory University, at the symphony orchestra in the Northern Territory, it is actually in connection with the university. If you look at New England you will find that UNE is responsible for the local museum and gallery. There are a range of community service functions and activities of public universities which I do not believe the private sector is likely to undertake.

The other point I wanted to make was about the question of accessibility. Accessibility implies that the courses are not offered on a commercial basis and that the students are not charged high fees. Again, the institutional context is very different. A public institution—unless it is under pressure from government, which our public universities have been for a number of years, to become more commercial and entrepreneurial—does not have a focus on revenue raising through commercial activities in the form of charging students high fees. I think the private sector tends to have that focus. My final point is that I do not believe in the Australian context you should assume that the American tradition of philanthropic well-endowed private universities can be transplanted.

Mr Waters—While I do not deny the interest you mentioned, Senator, we do have a very significant membership in both the private and public sectors, particularly in areas in the private sector of IT and telecommunications. The issues for our members go beyond their industrial position and conditions. They also go, in terms of public sector members, to their professional role of providing public policy advice and implementing public policy which is enacted through legislation.

Tests such as the least trade restrictive test go very substantially to that in a vast range of areas and pieces of legislation right across the board. The issue with IT and, from recollection, one of

the government's objectives with IT outsourcing of government IT, was to foster the Australian IT industry. We have seen a very substantial move away from fostering the Australian IT industry. We have an IT industry that has seen very substantial increases in control from international, multinational corporations, rather then there being development of Australia's IT capability and capacity. The issues for us also go beyond the narrow self interest.

Senator MARSHALL—Mr Waters, in your submission you have raised a number of issues in relation to the research and development sector and, in particular, in relation to CSIRO. Can you explain to me why it is important in the Australian community interest that research and development is conducted in Australia?

Mr Waters—Perhaps Dr Gallagher could answer that.

Dr Gallagher—I can speak from the CSIRO context. The question you are asking is a pretty big one. It has many facets. It ultimately boils down to the quality of life you aspire to in the society in Australia. Research and development does many things in communities. If you have cosmology, for instance, that can be done anywhere in the world. If you have astronomy of the southern skies it needs to be done in an area that is away from interfering light in an open place and faces the southern skies, of course. Australia is quite an important area to do that. But by having those people actually working and living in communities in Australia, they are feeding into the community.

I can give some more examples. If you are working on influenza, it does not matter where that is done, but the people who are doing that contribute to the communities they live in. If you are working on something like blue-green algae in the Murray-Darling catchment, then you need to work in that area and build relationships with the people living in that area and know what it is like on an ongoing basis, to be able to deliver good research, but you also feed that research back to the community.

If you look at CSIRO's objectives under its act, it has a major role with public education and it has a major role with delivery of research outcomes to the community as well as to industry. There are some very good examples of the value of this, in that CSIRO has laboratories dotted all around the country. There is a whole bunch of them in western New South Wales—Narrabri, Parkes, Griffith—which are major contributors to those rural communities: Albury, regional areas and even Geelong. They are important players there because of the information and the input they provide to those communities.

Take Narrabri, for example. CSIRO is quite a significant employer there. In fact, the cotton research unit centre is one of the major employers in Narrabri. But the people who work there are involved in all the community groups around and there are regular stories in the local newspapers about the research that is being done and the impact on the industry. There are many long-term relationships. That research is also done in an area which is at the heart of cotton production, so there is a lot of interaction with the growers there.

That is a specific case in point, but if you look at the overall issue of R&D providers generally and what they are doing in contributing to the community, if you take that away you end up with a loss of capacity in the community to take up the outcomes of research, a loss of capacity that

feeds into the education system as well. Generally it is a downgrading of the society that you live in which is a consequence of that.

Senator MARSHALL—Given that answer, what do you see as the potential consequences of the application of global trade rules with respect to research and development in Australia?

Dr Gallagher—A lot depends on how it is done. There does need to be quite extensive consultation. There are quite definite differences between what is happening in Australia in R&D and what is happening in places like the US, Japan and the EU. Ted has already referred to the way that the universities get their funding. The research environment in, say, the US is very robust. It is very big. Government invest a lot of money. Over three per cent of their GDP goes into R&D.

Australia has around 1.5 per cent of a much smaller economy being invested in R&D. The nature of the research that is done here is very spread, relative to what Australia needs. It is a continent. It needs a lot of R&D in environment, as well as local industries, and the CSIRO experience is to try and meet a fair amount of that, in partnership with various other bodies, but there is not that robustness in hard times.

If I can go back to the Narrabri example: Narrabri is suffering from drought. Cotton production has dropped away. Apart from CSIRO appropriations, the cotton research centre is funded through the Cotton R&D Corporation. I think that is their current name. Their funding has just been cut and they are currently managing a cut in those R&D funds. They are losing scientists. If they did not have that underlying base of CSIRO or government appropriations to maintain them, then that laboratory, which is so important to that centre, would just go. If they had to compete fully for their funds with overseas companies, they might do very well in the first instance, but there are no guarantees of how they would go in the longer term, and they are not in a position to weather huge ups and downs on top of what they already experience with the Australian conditions.

Senator MARSHALL—Recently we have had a wheat virus outbreak. How was that managed and potentially what are the consequences if those research and development institutions in Australia are not able to meet those sorts of challenges?

Dr Gallagher—That is quite an interesting example, because a lot of research was wiped out in containing what was identified as an outbreak. It was also a good example of a multidisciplinary effort coming to bear from people with long-term knowledge of the wheat growing conditions. The climate this year in Canberra was pretty horrible, as most of you will probably know—unusually hot and dry—and it stressed the wheat. Our scientists picked up that there was an infectious agent there. They sent the samples over to the US for diagnosis and got back a negative result. They were sure that there was something there and then had to, first of all, work out whether the result was properly negative or not, and then go and identify. In the meantime, of course, the outbreak was getting bigger and there were requirements on them, therefore, to quarantine where they had identified the outbreak and clear it out. If there was not continued support for the infrastructure and there was not a capacity for sustaining some of the research—there are going to be some losses from that—then all that research into wheat would be under threat, and I don't know how that fits with industry considerations in Australia.

Senator MARSHALL—Mr Waters, your submission focuses on the need for public policy to be able to be changed. Are you aware whether the Office of Trade Negotiation or the minister are considering including such language as part of their negotiations?

Mr Waters—The only statement we have seen from the minister in relation to GATS was a statement made in relation to discussions we understand are occurring between members in relation to article 1:3. I think the position that the minister indicated there was one of not wanting to see any changing of the wording that would lead to there being ambiguity about public services. I do not have his press release in front of me and I do not want to put words into the mouth of the minister. Perhaps that was my interpretation of what he was quoted as saying. It does not appear from the public information that the Office of Trade Negotiation is focusing on a need for greater clarity of protection for public services in the GATS process. As I indicated earlier, in terms of the stated Australian objectives in the US free trade process, there is a very constrained approach to public services being named public services—health, education, law enforcement.

Senator JOHNSTON—I want to follow up on something that Senator Cook asked of you. I am interested in the theme of your submissions generally. If it could be demonstrated that, through the inclusion of tertiary education and public agency service provision into a GATS or an Australian-US free trade agreement, there would be significantly improved quality of outcomes in terms of service delivery, accessibility and cost efficiency—and that is obviously a very moot point for this committee in terms of how you demonstrate it—would your submissions be any different?

Mr Waters—The difficulty with these things is whether it can or cannot be demonstrated. We have already seen, in terms of the US free trade process, two consultants' reports that produced very significantly different measures of what the outcomes may be from an economic point of view.

Senator JOHNSTON—That is really not the question. Let us take it as read that it can be, so that the area of expertise that your members take part in can be substantially enhanced and improved through these trade processes. Are your submissions going to be any different on that basis?

Mr Waters—In terms of our members, we do not have in-principle objections to trade liberalisation. The objections come from the specifics and go to the details. There is not some in-principle objection to trade or to the opening up of trade.

Senator JOHNSTON—You are saying that public service provision should not be part of GATS or an American free trade. You want to be quarantined, as does tertiary education. I accept that, and I see a lot of reason why you would say that. But if it could be shown that the beneficiaries of what you do actually were beneficiaries in a greater sense, would you be telling me that your attitude is not negative but more positive?

Mr Waters—We are always interested in benefits. You mentioned a number of outcomes. One was price, one was quality.

Senator JOHNSTON—And accessibility.

Mr Waters—Those are all very important outcomes and they tend to be the outcomes that are talked about in terms of a range of different processes, particularly when you are looking at public services being moved into the private sector. Our experience of the measurement that can occur up-front comes back to price and, in terms of both quality and accessibility, you are left in situations where you are making judgments on the basis of contending views about what they are going to be down the track. Where there has been research that has been done after the event—and there is quite a bit of research now beginning to come out of Britain in terms of public-private partnerships and what has happened with hospitals—where the commitments going in were about price, accessibility and quality of services and the outcomes, when they are being measured five and 10 years down the track—and those are outsourcing arrangements or private ownership arrangements that last for 30 years and, in some case, 60 years—they have not measured up to the expectations that were set out by the bidders when the tenders were being put in. That has often been the experience, I think, with outsourcing in the Australian context as well, although I am not aware of any particular reports, other than possibly the ANAO report, with IT outsourcing.

Senator RIDGEWAY—Mr Murphy, I wanted to first come to an issue you raised about the lack of discussion that you have had with DFAT and particularly draw your attention to the DFAT discussion paper, which says that GATS does not force governments to privatise or open up public services to competition and that public services will not be targeted. Yet in your submission, particularly in relation to the Singapore-Australia Free Trade Agreement, you have made two points. One is that it far exceeds the GATS requirements and, in relation to the market access commitments, that it may preclude the government from being able to regulate. How do you rationalise those two arguments or propositions that have been put forward?

Mr Murphy—I take issue with DFAT's assessment of the character of GATS, in the sense that it is not a matter of forcing one to privatise, if that is what they are saying. I do not think anybody is arguing that GATS forces you to privatise. That will depend upon what commitments you schedule under market access and national treatment. Unless you take out a limitation on your market access commitment, one of the market access obligations is that you cannot establish a government monopoly or maintain a government monopoly. If you give a market access commitment in any particular service area and do not take out an exception for any existing monopoly, effectively you have offered your area up for privatisation.

The best way of illustrating that is that in 1994 Australia gave commitments with respect to insurance services under market access, but had to take out a reservation that went as follows—'except for state workers compensation and third party motor insurance monopolies or restricted licensing requirements'. Unless we had taken out that limitation on our market access commitment, insurance services—by virtue of being included under the GATS by the Australian government at the time—would have opened up the question of existing state workers compensation, third party monopolies or restrictive licensing requirements.

I think DFAT are overstating the case when they talk about GATS and regulation, to some degree. What I am saying to you about SAFTA is that what has happened is that areas under GATS that were treated by the Australian government in 1994 as areas for which only a private services commitment should be given, there has been a movement away from that under SAFTA by talking about public utilities et cetera, to the extent to which they are social services established for a public purpose. That begs the question: what is it about public utilities, public

education, public transport and public training that is not going to be covered by the reservation? Health is also in that list.

If within a public hospital you have a private clinic or a commercial clinic—it may not even be a private clinic—is that not covered by the reservation? In the case of universities, if you charge full up-front fees to Australian undergraduate students and to overseas students, as we are doing to some degree now—and, if the reports on Crossroads are any indication, what we are likely to do in the future—is that outside the scope of the reservation? That is my concern about what has been done in the Singapore context.

I think the Singapore agreement reinforces the point that has been made in both submissions—and in the ACTU submission—that you cannot rely upon services in the exercise of governmental authority because of its definition. The reason why the Singapore agreement reinforces it is that both Singapore and Australia have taken out additional reservations that say, 'In the event that we privatise after this agreement, we should be able to lodge new reservations to protect the privatised entity.' That is one additional reservation.

The second is that services in the exercise of governmental authority include services devolved by government to the private sector. You would not take that reservation out if you had a clear view about what that GATS clause actually meant. The third reservation which has been taken out is that, if a service in the exercise of governmental authority ceases to be a service in the exercise of governmental authority, either party has the scope to take out an additional reservation. All of that suggests to me a very backdoor acknowledgment of massive ambiguity about article 1:3 of GATS, yet that article was reproduced in the text of SAFTA.

What I am saying and what I think the union movement is saying generally is that, if we are going to exclude public services or services in the exercise of governmental authority—which does not foreclose the domestic debate about whether you privatise or commercialise—it simply means that that is a matter for Australian parliaments to decide and for Australian parliaments to reverse if there is a change of government. The issue is whether you lock these things into an international treaty which circumscribes democratic governments in this country.

If it is the intention to protect those public services in trade treaties—and everyone, including DFAT and the WTO, says that is the intention of article 1:3 of GATS—we need a clear unambiguous carve-out of public services, both in the GATS context and in any bilaterals we negotiate.

Senator RIDGEWAY—That raises another issue for me that has not come up as yet, and that is the question of the most favoured nation principle. The question for me, if you could clarify it, is this: if we already have an agreement that has been put in place—a free trade agreement with Singapore—what are the implications of that in terms of the standards that have been set? Granting that you have already said that it far exceeds standards required under GATS, what are the implications in the current round of talks in relation to a free trade agreement with the United States on the range of services that may be included under SAFTA?

Mr Murphy—They are not legal implications, because there is an article in GATS that permits countries to conclude bilateral free trade agreements, and it is pursuant to that article that CER, the EU, NAFTA and everybody else gets away with it, including Singapore. The key thing

about Singapore is that it is not a matter of the most favoured nation principle of GATS requiring that the Singapore outcome flows onto the US negotiations.

It is a matter of (1) the Americans looking, understandably, at what we did in Singapore and saying, 'Where you have liberalised in Singapore and it is in areas where America has competitive or comparative advantage, we will come to the table saying liberalise also in the USFTA,' and (2) Australia's chief negotiator for both is on record as saying SAFTA is the template for further bilaterals in the Asia-Pacific region. That is a clear signal in connection with not only the USFTA, but also the Australian-Thailand negotiations, which is the other bilateral which is under way. I think it is more a political process than a technical legal one under GATS.

CHAIR—That does not necessarily mean word for word, does it?

Mr Murphy—No, I am not saying that at all. We looked at what Singapore and New Zealand negotiated and that formed, in part, our views. In some areas, we exceeded the liberalisation of Singapore and New Zealand, and I am sure Singapore came to the table saying, 'We have a deal with your CER partner in these terms and we would expect that to happen.' I am not saying necessarily word for word, that is not my argument, but I am saying that these are relevant precedents in negotiation.

Senator JOHNSTON—You are saying they are clarified and better defined.

Mr Murphy—I am saying, with respect to public services, that the existing GATS-style definition and exception is ambiguous. Even WTO secretariat papers on service sectors acknowledge that. The environment services paper that was prepared by the WTO secretariat in 1998 said, 'We don't know what "on a commercial basis" actually means, how far it goes and how far it doesn't go.' I am saying that it is so ambiguous that there needs to be a new exemption—a clear exemption—negotiated in a bilateral and multilateral context. That will take time. It is not easy, but what we cannot rely upon is that exception. What I am taking issue with is that every time unions say, 'We think there are problems,' we get this sort of response back from government or from the department that says, 'No, service is in the exercise of governmental authority; it is there to protect you,' as if that is a non-problematic definition—and it is highly problematic.

CHAIR—You are saying a little bit more than that I think.

Mr Murphy—Sure.

CHAIR—You are saying that because the chief negotiator says it is a template we are, in fact, revealing our negotiating hand to some extent to future negotiating partners on a bilateral basis and potentially on a multilateral basis as well.

Mr Murphy—Yes, I think that is fair.

CHAIR—We are flagging that this is an area in which we are opening the door and are ready to play.

Mr Murphy—Yes.

CHAIR—The nature of what we might agree is still to be decided, but we are identifying an area of where we are likely to be cooperative in negotiations.

Mr Murphy—Yes, I am saying that.

CHAIR—You raise, therefore, the expectations of all your other negotiating partners.

Mr Murphy—Yes.

CHAIR—It is just a process of negotiation, of flagging particular areas.

Mr Murphy—The reference can be found in the testimony of Stephen Deady to the Joint Standing Committee on Treaties on 24 March this year about the template model.

Senator RIDGEWAY—As a follow-up to that, getting back to the question of process and what you identify as ambiguity, is there merit, for example, given the terms of reference of this committee, in looking at the idea of developing a set of progress indicators or national benchmarks to be able to evaluate our progress in pursuing greater trade liberalisation as one way of being able to define the national interest, given the questions about education, and looking at it being more than just an economic bottom line, as well as being able to measure whether certain standards are being achieved along the way? I do not know whether that has merit, but I wonder if you have a comment about that.

Mr Murphy—I believe it would have merit. But I would add, as a matter of process recommendations, that I believe the department should be put under an onus to prepare what I call social and regulatory impact assessments of proposed commitments under either bilateral or multilateral free trade agreements. At the moment they are not under an onus to do that.

In connection with the material that has been tabled by the department and the Joint Standing Committee on Treaties over the Singapore agreement, there is what they call a national interest analysis, but there is no outline of how, in the department's view, this will or will not affect the range of service sectors in Australia that are covered by the commitments that have been given. In addition to the committee talking about benchmarks—which I think would be appropriate—I am saying that I would build that into your process on the part of the department.

I note, for example, that public service departments under the current government, if they are proposing changes, are required to prepare a regulatory impact statement for the Office of Regulation Review. That focuses on the compliance cost of regulation. I am arguing that you need a regulatory impact assessment not on the cost of regulation but on the consequences of deregulation, so that it is possible—for the public and the Joint Standing Committee on Treaties, the parliament and for non-government organisations that have an interest in this—to engage on a transparent basis with what commitments we are negotiating.

Senator JOHNSTON—Consequences in terms of what?

Mr Murphy—Let me go to the example I gave earlier of the strange SAFTA reservation. Public transport, public education, public training, health, income, insurance, to the extent that they are social services established for a public purpose, are all covered by that reservation.

Public utilities is there as well, so it would include energy, water and power. They are fair issues to be raised in an impact assessment, which is why I talked about social and regulatory impact statement. But, when I was talking about regulatory impact, I was saying, what existing regulatory measures of state, federal and local governments are now struck down or modified by the commitments that are included?

Senator HARRIS—Mr Murphy, you made a comment earlier on that 'unless the initial offer is released in draft form for public consultation, you are not in a position to comment'. I assume you are referring to the economic community's request to Australia. Australia's draft response to that has actually been made public. To my knowledge there is in excess of another eight requests that have been made on Australia by other countries that we have no knowledge about whatsoever. What is your union's position in relation to those?

Mr Murphy—It is fair to say that, when the department circulated the material calling for submissions on the preparation of Australia's initial offer, it provided in the discussion paper a list of requests—separate, so you could not work out who was making which request—and a list of countries. Subsequently documents were leaked which are claimed to be—and no-one has disputed it, including the European Commission—the final request to Australia from the European Commission. There were a number of requests in that document that were not contained in the department's list. It would, in my view, be helpful if the full requests are made available.

The department's view is that the relevant governments will not make them available, so I understand that. I was really saying earlier that, before we make an offer back, the draft offer should be released for public scrutiny and consultation, including by parliamentary bodies. What happened was that we were asked for our view on the preparation of Australia's initial offer. We put in our submissions to the department, which is fair enough, and the next thing you see is Australia's initial offer.

The government will say, quite rightly, that the initial offer can be withdrawn or modified. But I will say that once you put an initial offer like that out in the public domain, including within the WTO, it is a clear indication to other WTO countries that you are prepared to liberalise in these areas and with the likelihood that you will follow through that indication with committing those areas. Therefore, from the standpoint of the capacity of parliament or the public to say, 'We think that is an appropriate area for liberalising and that is not,' or, 'There are some issues here in the wording of your liberalisation commitment that you may not have taken into account,' the draft offer should be made available before it is released or communicated to the WTO as an official initial offer.

Senator HARRIS—To take that one step further, under the annex on article 2 exemptions—and this is the treaty itself—under the review process it says at paragraph 3:

The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.

It then goes on further to say at paragraph 4:

The Council for Trade in Services in a review shall:

(a) examine whether the conditions which created the need for the exemption still prevail; and

(b) determine the date of any further review.

The treaty covers 150 sections of which Australia has currently exempted 60, education being one of them. I would appreciate your comment in relation to this section on review where the Council for Trade in Services under the treaty has the power to determine the date of any further reviews.

Mr Murphy—The clause you are referring to is the clause that pertains to exemptions under the most favoured nation treatment—which is article 2 of GATS—and does not refer to exemptions or reservations tabled under the market access or national treatment schedule of commitments that Australia made, or any other country makes. You are right in that the reference is to paragraph 1 of article 2, but article 2 is most favoured nation; it does not include education or other areas. What it does include—if you are unfamiliar with the commitments or reservations we took out under MFN—is audiovisual services which we took out under MFN exemptions.

We took out a reservation or an exemption under audiovisual services generally, under co-productions. We said co-productions with certain countries are a most favoured nation exemption. We also took out a most favoured nation exemption with respect to listing on the Australian Stock Exchange, saying that we will only allow companies to list if the country that really owns them—or the subsidiaries of foreign companies—gives us reciprocal rights of listing on their stock exchange. That is the review being referred to.

I am unfamiliar with any review actually happening, but it is not a process of review of the commitments we gave under market access or national treatment. We would have welcomed a process of review of market access and national treatment commitments, but the only clause in GATS which deals with that is the compensation provisions that you would be required to make if you tried to modify or withdraw from your market access or national treatment commitments.

Senator HARRIS—To both Mr Waters and Mr Murphy, your comments on article 5 go to labour markets integration agreements. You state:

This agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

Could I have comments from both of you in relation to the union's position. As I read this—maybe I am reading it incorrectly—between members of GATS this is clearly saying yes, you can have agreements for establishing integrated labour markets provided you exempt those citizens from the requirements of residency and work permits.

Mr Murphy—For example, the arrangement we have with New Zealand under CER, where a New Zealander can move to Australia and work in Australia, means that they do not need a residency or a work permit to do that. The limitation there is designed to say that unless you go the whole hog, as we did under CER—and as the EU has done to some degree in terms of the rights to work or practise a profession within western Europe—then we will not allow you to use

this exception under that article. It is consistent with other exception provisions which basically say you have to meet a certain standard of liberalisation of your bilateral or regional agreement in order to rely upon it as an exception under the GATS. That is the context in which that was negotiated.

Mr Waters—I am not going to try to compete with Ted in his understanding of the treaty itself. As to issues relating to movement of people to perform work, clearly there are some advantages in there being some freedom. Regarding the CSIRO and science types of agencies, clearly there are benefits in people being able to move freely and carry out that sort of research. On the other hand, we would be concerned about some arrangements. We are particularly concerned about recent reports in the *Herald Sun* regarding IT workers working in Australia and being paid $800 a month. They are coming into Australia to do work for an Indian company contracting work from Telstra. We consider that to be a completely unacceptable arrangement.

CHAIR—Are you able to put your other questions on notice?

Senator HARRIS—Yes. I want to stay very briefly with Mr Waters on a final comment. The section of the agreement that you are talking about is the annex on the movement of natural persons. Could I just briefly ask for your comments in relation to paragraph 4 of that, and I will read it out for you:

The agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory ...

It is that wording. Can you expand on any concerns that the unions would have in relation to a natural person or their temporary stay. The way I read the agreement, it is clearly saying that any agreement shall not prevent a member from applying measures to regulate the entry of persons, and it does not define what a temporary stay is. I have not been able to find in the agreement any definition of temporary stay.

Mr Waters—We obviously have a very significant body of members involved in the department of immigration and implementing Australia's immigration rules. I understood that one of the general exemptions from GATS was for immigration controls. There are obviously circumstances where it makes sense for natural persons to be travelling internationally and performing work. From our organisation's perspective, our concern would go to the terms and conditions of employment under which people do that work when they are in Australia, and that those be fair terms and conditions of employment in line with the relevant agreements, awards and conditions. The other issue is that it should not be used to bring in workers in a way that reduces standards or skill levels that are determined under Australian requirements and regulations.

Mr Murphy—If I can comment on that. Under 1994 GATS we gave commitments under movement of people or natural persons, or mode 4, with respect to business, specialist, executive-type categories, but we specified a temporary stay requirement of up to two years as a limit on their ability to move and provide the service.

There is another area that would come under this. The Australian government used to but no longer, to my knowledge, use labour market testing for decisions about admitting, either on a

temporary or on a broader basis, certain categories of skilled employees into the Australian economy. That would be another example.

Senator HARRIS—If you would not mind taking one question on notice.

CHAIR—We are running out of time; we are over time, in fact, by 15 minutes. These are general questions and they are quite reasonable questions for two unions. The next group of witnesses are unions as well, and we have the ACTU later, so you will not lose the opportunity to obtain a union view on a general question like that if we move quickly now. So please do it, but let's get on.

Senator HARRIS—If both of the unions would take this on notice, thank you, Chair. In relation to the termination of agreements, under paragraph 4—and I am just picking up on a comment that Mr Waters made earlier on—it says:

In principle, such exemptions should not exceed a period of 10 years.

There is a limit as to how long an exemption can stay there.

In any event, they shall be subject to negotiations in subsequent trade liberalizing rounds.

That picks up the point that Mr Waters was making earlier. If you could take that on notice and provide the committee with some general comments. Thank you, Chair.

Mr Waters—Chair, in relation to my last answer, I think I said 'skills', and I wanted to clarify that I should have said 'skills and qualifications'.

CHAIR—Thank you all for making yourselves available. We may have a number of questions that we would like to foreshadow to you on notice. If we do that, would you be in a position to answer them? I take that as an affirmative. Thank you very much.

[12.01 p.m.]

HUBBARD, Mr Leigh, Secretary, Victorian Trades Hall Council

MORAN, Mr Jarrod, Policy Officer, Victorian Trades Hall Council

COCHRANE, Mr Darrell, Secretary, Australian Services Union, Victorian Authorities and Services Branch

CHAIR—Order! Welcome, Mr Hubbard, Mr Moran and Mr Cochrane.

Mr Hubbard—Thank you very much for the opportunity to come and speak this morning. Having heard the previous speakers, you have probably reached the high point of union knowledge in relation to the technical details of GATS and trade agreements, but I think we have come to put a Victorian perspective and we welcome the opportunity. We have put in a submission so I will not go on for very long, because I know you are running over time and clearly there will be time for questions.

Our concerns run to a number of matters. One is that, firstly, in general terms, trade liberalisation has been occurring for a long time in relation to goods and, increasingly in relation to services. We are concerned about the continuing trade liberalisation and the pressure that goes on during these trade negotiation rounds, without any appropriate assessment of the impacts of that, including at the state and regional level. That is the first thing. We have seen quite major impacts since the eighties in relation to changes in industries and so on and we certainly would not want to see trade negotiations go forward which exacerbate those problems.

There are a number of issues in relation to GATS. We have identified a number of the things in our submission that we perceive as problems in relation to it. One is that it is a continuing round, and there is no pause; there is no real time for civil society involvement in the deliberations. We would, secondly, say that the negotiations are often in secrecy in many respects. They are done by bureaucrats and negotiators and, unlike even the US, parliament has very little involvement—even the Senate committees, in relation to initiating the negotiations and setting the parameters—and, thirdly, accepting or rejecting the actual outcome of those negotiations. That leaves aside, of course, the involvement of civil society participants in those discussions.

The other thing is that, at a local level—and this does not just affect national governments, but state and local governments as well—we have a real concern that what might be the high point of ideology now, in relation to trade liberalisation, in some areas may be reversed; things like private involvement in workers compensation insurance, which has waxed and waned over the last 20 or 30 years. If at some point that was said to be something that was said to be subject to the limitation on our offer, it is very hard, as I understand it, to reverse that, without compensation and without a great deal of difficulty, and that would be something that would be a real issue later on.

Another thing I should talk about is our position, which is outlined in our submission, in relation to the labour rights and labour standards. We firmly believe, as with other unions and the

ACTU, that core labour rights and standards ought to be part of trade negotiations and the actual agreements that come out of those negotiations. In fact, the one thing out of the proposed US-Australia Free Trade Agreement that we do support is obviously the US insistence that Australia meet its international obligations in that regard. But certainly that is a real issue for the labour movement.

They are the main things. There are obviously specific areas of concern in relation to both GATS and the proposed US free trade agreement, including investment and what we would regard as public service issues like the Pharmaceutical Benefits Scheme, quarantine standards, local content and purchasing and other issues, which we firmly believe should not be part of the negotiations.

In relation to the US-Australia free trade agreement, having had a look at the ACIL report and the debate around the economic benefit of such an agreement, given the difference in size of the two economies and the lack of the likelihood of US agricultural interests being overcome in terms of their resistance to letting Australian primary products in, it is hard to see that the supposed benefits of such an agreement really stack up. While I do not agree necessarily with the conclusions of the ACIL report in relation to unilateral lowering of tariffs and trade barriers, I must say it seemed to me to put the case that it is questionable, at the very best, as to whether there is good logic for a US-Australia free trade agreement. I will leave my comments there and answer questions.

Mr Cochrane—I should indicate at the outset that my branch has endorsed the Trades Hall Council's submission. Our submission only goes to put, I guess, the local flavour of the membership that I cover to it. We did so in some confusion about how will it affect our members. It is reasonably unclear, when you visit the web site to try and work it through, as to what services are and are not affected. We did have a copy of a document that spelt out the request side of it, and that certainly had potential implications for the majority of our members. For that reason, we felt quite strongly about at least making this committee aware of our concerns. My understanding of it at present is that it may affect local government, because of waste management. Would that be a correct assumption?

CHAIR—It has that potential.

Mr Cochrane—Will it also affect water and sewerage authorities?

CHAIR—Again, the answer is it has that potential. In the leaked EU request of Australia, there was reference to water and water services. I am not sure that that goes to waste water management and sewage treatment, but it may. I think the fairest answer I can give you is that it has the potential, if the proposition is responded to in the affirmative. That is a government decision.

Mr Cochrane—In Victorian local government throughout the nineties, they were confronted with a much harsher competitive environment than any other industry sector in the country, in my view, because there were very strict legislative requirements that went far beyond national competition policy imposed on them. That led to some 21,000 plus workers leaving the industry, through a combination of restructuring of local government, as well as outsourcing of services through compulsory competitive tendering.

Our concern is that any proposed extension of GATS that would affect local government has severe implications in Victoria, because we have now moved out of that stringent competitive environment. It has been influenced by the fact that we have had a change of government, of course, but we still have a competitive environment which is known as 'best value'. Best value has an extremely strong community focus, which we support as a union, mainly because it allows the councillors of any council to consider aspects such as the effect on their local communities when they make decisions insofar as considering a tender. On numerous occasions, that has led to in-house services being maintained. In some cases, it has been a local contractor employing local people that has been awarded a contract.

We have concerns that any expansion into local government would have a detrimental effect on the ability of that legislation—which, of course, is state legislation—to have any effect. That is one of the grave concerns we have. This submission came out of a direction from my committee of management, which is made up of delegates from all over the state. They had a very strong view about this. The message that our members continue to send to us as a union is that they are sick to death of being affected by all these various things that are continuously looked at and which supposedly lead to economic benefits for this country. We are not convinced that they do.

I am pleased to say I have delegates and officials involved at the moment in negotiations for a return of services in-house. They are sick to death of the number of contractors employed on contracts, because it has failed dismally, and want to return to services in-house. Some of them have gone broke in the meantime and left employers with costs. They are confronted with a variety of competitive environments. Competitive tendering is best value. Outsourcing is still alive in some cases, but there are also PPPs—public-private partnerships—and the boot schemes in water and sewerage and all sorts of things are happening around them.

The majority of members that I represent are at the lower income level. They are people who are earning $40,000 or $45,000 a year. They usually have a couple of kids. All they want to do is go to work, do their job and come home. They do not like their jobs being constantly threatened by a variety of options that are around. I was basically directed to make this submission and send the message that the average worker is a little bit tired of being under threat, whether from GATS or any other option that is around, be it state or federally based. I have sent a similar message to the Premier of Victoria, because we are concerned about some of the issues that confront us in Victoria, but I am here to send that same message to this committee.

CHAIR—I'm sure we've received it, Mr Cochrane.

Senator HOGG—I think the point you raised, Mr Cochrane, is a very important one. I got the message, as we all did, that your members are change wary. It seems like change for change's sake, but there is another side to that and that is the management of change. Change can be good. I do not know if you covered the management of change in your submission and the way it is handled by all levels of government throughout Australia, if there is to be change. Do you have a view on that?

Mr Cochrane—We have seen constant change in many of the sectors that my union covers. It has often been good; devolution of responsibility back down to the workface. I think there has been a bit of that out of the competitive environment we have been confronted with. This is a

union issue. In most cases the employers want to do it, but they do not want to pay any more, even though they are increasing the responsibility for people at a lower level and sometimes doing away with positions and they might be restructuring at the top end in other ways. But, yes, there can be benefits. I have seen benefits. I am not an absolute critic of local government restructure. We went from 210 councils down to 78. I think they went too far, but the proof is coming out. There have been some changes of recent times in relation to that issue, but I think there will be more. There are those changes that can be good, but how far do you go?

Senator HOGG—My point is how well is change managed? Is it managed well or is it managed poorly? Could it be managed better? Are the transitional arrangements in place which enable change to be managed properly?

It seems to me—and my background, for your information, is a trade union one as well—that many changes have been thrust upon people and you had to lump it or like it, rather than there being a change management program put in place so that, if change was to take place, it could take place in an environment where people could accept the change and make it work positively for all parties involved. That, to me, does not seem to have happened over a long period of time with a lot of change, whether it is GATS, WTO, free trade agreements, or whatever you might like to have.

Mr Hubbard—To come back to liberalisation, the textile, clothing and footwear industry is a classic example of lowering your tariffs and massive restructuring in an industry. It is still going on. That was one industry where there were a few programs put in place for the retraining of workers and older workers where there was some assistance, but I cannot think of many others—and even that was inadequate. There is very little.

People talk a lot about the benefits and that is why we came here today. I do not come with a lot of detail. In relation to the US-Australia free trade agreement, I understand textile, clothing and footwear is one of the key issues the Americans will be pursuing in that agreement, in terms of elimination of tariffs or whatever. Our concern would be that we have already got tariffs of probably a third or a quarter, in terms of clothing, to what they were 20 years ago. We had massive restructuring that caused a lot of problems in the community for particularly older workers and people from non-English speaking backgrounds. There was very little assistance in that. Yet here we are contemplating and perhaps negotiating an agreement that would give American companies access. Again, local content: Nike, through Saipan—where do these things come from?

Most people in the community are asking from a worker's perspective and a consumer's perspective, what benefit is it? If you go into a store in Melbourne and you buy a shirt made in China it costs you $80 to $100. The supposed benefit of that change—of the loss of protection—is not all that apparent to most consumers. When you think of the social consequences of that—the loss of full-time jobs, the move of our economy into casual and precarious employment, which has happened particularly in the last decade—I would agree with my colleague here that most people are getting sick of the change for change's sake and they want some assessment of it.

If one of the things that comes out of this Senate inquiry is about what framework parliament puts in place for properly assessing—before you enter further rounds of negotiations and what

has gone before—that would be one good thing. I know there was a previous Joint Committee on Treaties which proposed such things but nothing has ever come of it. Maybe we are not hopeful that it will occur in the future.

CHAIR—I want to ask a couple of quick questions. Some of my questions I would have asked the ACTU. I assume you support the ACTU submission but you are giving a state view of the issues which apply at state level. I know state councils jealously guard their rights in this structure. One of the questions on the Australia-US free trade agreement which occurs to me is: given the US side is insisting that the Australian side agree on the inclusion of labour standards—and there is a provision in the US-Chile and the US-Singapore FTAs which are by and large roughly the same—which set out what the labour standards commitments are, their best efforts are not binding; the ACTU is arguing for a stronger binding arrangement.

I want to put this hard question to you. The ACTU's submission raises a number of other issues, like the Pharmaceutical Benefits Scheme, cultural protection of art, movies, et cetera, film and television, recording and a range of other issues about tariffs—notably in the car and textile, clothing and footwear industries—and argue a particular view about each one of those which I fully comprehend and understand. If an outcome was tabled which did not address any of those industry concerns but gave you exactly what you wanted on labour standards—the curate's egg outcome—would you accept it?

Mr Hubbard—What you are saying is that if labour standards were included—

CHAIR—If the labour standards were there in full—

Mr Hubbard—Yes, but all of those other issues were not?

CHAIR—but all the other industry things were not, because this is a final, one offer, final package and the US Congress will vote on this yes or no.

Mr Hubbard—You mean if reduction of tariffs for auto and those were all in the agreement—that we got the labour standards?

CHAIR—If you got in the agreement things you did not want on the industry policies, but you got things you did want on labour standards, if they put that type of package to you, is it acceptable?

Mr Hubbard—It is a difficult question. Immediately I suppose my answer would be no. Most of what is put in the agreements is enabling and so on. It is there to promote collective bargaining and so on and it is good, but there have been real problems with the enforcement of it. It is important and essential that it be part of it, but I think the trade unions have a broader agenda than just that. We have workers' jobs and community aspects to consider also as part of that. I do not think we are about to trade one off against the other. My answer would be that, while we might be pleased that we got labour standards in, if the rest of it was to the detriment of both the work force and/or communities, then my view would be initially that we would oppose such an agreement.

CHAIR—Yes, thank you. That is fine. The other question I have regarding labour standards is the debate about whether the labour standards, as a matter of principle, are distorted as a protectionist device and not used for the principle for which they are intended. Given the power and economic strength of the United States vis-a-vis Australia in these negotiations and that the labour standards demand is coming from the US side, not the Australian side, the US has adopted three ILO conventions. It has not adopted the core labour standards. We have adopted 57 and all but one core labour standard convention. How plausible is it that the US insistence on labour standards is credible? Is it possible to foresee that the labour standards might simply be a blind for a new form of protectionism?

Mr Hubbard—It is possible and, given what goes on in the US in terms of industrial relations at times, you would have to wonder how committed they are, in fact, to some of those ILO conventions.

CHAIR—Are they asking us to do something they are not prepared to do themselves? Let me give you a quick example: there are two million people in prison in the United States and several of the prisons are privatised. The way prisons pay for themselves is that prison labour makes products. It is argued that two-thirds of the jeans sold overseas, exported from the United States, are made by prison labour. If that is true—and I have not checked it because I have no way of knowing, but that is the assertion that is made—therefore, the prisons can pay for themselves because they are trading entities. But prisoners receive virtually no wages or remuneration and it is an incarceration society.

Is there not an argument to say that the labour standards about forced labour should be applied to the United States? Can Australia break off the trade agreement if the United States is not adhering to the standards it is expecting us to look up to? Do we invite ourselves into that type of debate in which effectively there are no choices? It is not a matter of what the black letter of the agreement says; it is a matter of the relationship between the economies and the power one has vis-a-vis the other?

Mr Hubbard—I suppose that is true. What the union movement has wanted to do with labour standards is get them on the agenda, get them into trade agreements, because we think the ILO—if you set it off to the side—is never considered in a credible manner.

Most of the labour standards that are being sought are enabling; they are about the right to collectively bargain, organise prohibitions on bonded labour or forced labour, child labour and those sorts of things. We see them as a first step. At least if you had some enforceable mechanism, some tribunal, some court—just as investors under some of these agreements have the right to go to court, to take governments to court for expropriation or unfair dealings—why shouldn't other countries or unions be able to take governments to court over breaches of those labour standards? At least it would start to raise a voice for workers within the whole framework of trade agreements.

I do not see these as protectionist. I see these as fundamental human rights for workers all around the world. They will express themselves in different ways. That is part of the mistake. When we talk about core labour standards, we are not trying to impose the same standard on every country. We understand that how it works itself out in different countries will be different, but it is enabling at least those basic human rights to be observed.

CHAIR—Let me conclude with one final question, and it is a concrete example. The US steel industry lobbied the US government and it imposed restrictions on the imports of foreign steel because workers in what are referred to as the 'rust belt states' were being laid off by the steel mills and foreign steel was replacing domestically produced steel in the United States.

The principal sources of that foreign steel were China, Japan and, most notably, Korea. The Korean government—the Chinese government, too, and in another way this happened in Japan equally—put considerable investment into their steel making capacity, with new technology, more efficiencies and so forth. Part of the reasoning for the US imposition was that steel was being produced at prices below what the US steel companies could produce it at, and that was partly because of the investment in efficiencies and technology, but also because the wages of workers in China and in Korea—but not in Japan I think—were lower and there was a wage dividend that went to the price.

Part of the argument went, 'Therefore, because their wages are lower, we will take protective action against their product,' and this is disguised as an argument that we are supporting wage increases in those other countries—the wage parity argument. The problem I have with that argument is that some steel workers in Australia are also affected, because Australia was targeted as well. It has now negotiated a carve-out for itself and it is not as affected as before. Nonetheless, jobs were lost in Australia. Jobs were lost in Senator Hogg's state, in Senator Harris's state, in Senator Johnston's state, and in my state too, because Australia is an exporter of iron ore and coal and our biggest export markets are China, Korea and Japan. If you cut back on the exports of steel to those countries, you cut back on the jobs of Australian workers in the supply economies.

As I say, part of the justification was, allegedly, low wages, but there was also, on the American side, not anything like a commitment to investment and efficiencies and technology in the private sector. Albeit it was partly government financed in Korea, and certainly in China, there was that commitment in those countries. You get into this labour standards argument—US workers' wages compared to Korean workers' wages—the knock-on implication being job loss in supply countries. I put that up as a real life example. I wonder if you have any comment on it.

Mr Hubbard—A couple, and Darrell has a comment as well. This is not a new argument; it has been around for decades. The reason we had protection in the first place was to protect and nurture industries that we thought were important to us. In my view, there is the issue of the reduction of tariffs, which are now on average 3.8 per cent.

CHAIR—I think it is 3.7 per cent, actually.

Mr Hubbard—Generally, that has meant lots of job losses. My view would be that under the GATS arrangements you have a right to protect industries that are threatened, and I think Australia has gone much further much quicker. Our argument would be that there was some advantage in lowering tariffs to expose some industries who had bad management and poor investment, to shock them and try to get them to be more competitive and so on. That is a good thing, but how far you take that is another matter. You have to weigh up all of those things, and what criteria you use have to be established in weighing up those things. But I would have thought that in Australia we do not want a low-wage, low-skill economy and low-wage, low-skill

jobs; that we have an interest in maintaining and elaborately transforming manufactures and so on—the vehicle industry, the ship building industry, all kinds of things.

We simply cannot compete exactly. The community has to have a debate about, 'Well, if we're going to keep those industries, how much do we subsidise them?' I would have thought that is a similar debate to that which may happen in uglier ways—for example, the farm lobby or the steel industry in the US—but we have to have a debate about it. While we support in many respects the idea of more trade and better trade because it advantages us in some way, I do not think there is any shame in also having a vision for what we want as a country, where we want to go in terms of industries and society. I do not have a problem with the US and other countries making the assessment that they want to keep an industry; that it is under threat; that they want to protect it for a certain amount of time. I do not think 'protection' is a dirty word.

CHAIR—Even if it means job loss in Australia?

Mr Hubbard—We have had hundreds of thousands of job losses in Australia because of the lowering of tariffs. Obviously, there are balances. What sort of a society do we want? Do we want to be simply a society that rides on the sheep's back or has a quarry? That is one thing. Or do you want other kinds of industries? That is another. That is part of the problem with the current debate. There is no broader vision. Governments have walked away from industry policy, full stop. They have left it to the market, and that has been a problem.

CHAIR—I am sure this is a long debate. I just wanted to ventilate these things and get them out there, because this is what the debate is about. One other quick final question from me, given that you are from a state, is: Australia is a federation of states in its constitutional personality, which means that the tax raising power mostly is Commonwealth but the delivery of water, health, education, policing and regional development basically are state services. Have you had a chance to discuss with your state government—whose services in water supply, in health and in delivery of education services will be affected if the GATS agreement signs onto those things—their attitude to the GATS proposals?

Mr Hubbard—I have not. I have seen a letter from the Victorian government to the federal government about the initial offer. It is a very short document. I have not had a chance to discuss it further with them. We would be very concerned, particularly in Victoria, because of, as Darrell described, the liberalisation of many things in the community. Education in Victoria—even its vocational education system, even the public side of it—is run as a business. When you talk about private education or private training, how are TAFE and other areas affected? I think 25 to 30 per cent of TAFE income in Victoria is derived from fee-for-service. They are out there competing with private companies, so are they in or out? The previous group of unions raised questions about definitions of a public service and problems with clause 1:3. I am very concerned in Victoria, because Victoria under the Kennett government led the way in liberalisation of services, so what GATS means for us is, I think, a confused picture in terms of many things like health, water, electricity, where there was a lot of privatisation and a lot of contracting out and so on— probably much more than in other states.

CHAIR—I am a member of a parliamentary chamber, which is a states' house, in which, in theory at least, the views of states are reflected. I think the practice is that the view of party policies are reflected. But here is the interesting conundrum that I think we will have to turn our

mind to in the course of this inquiry: exclusively, the treaty making power resides with the executive of the federal parliament under the foreign affairs power in the Constitution, and in GATS what we are looking at is the executive wing of federal government being able to commit the nation to service competition, which is the province of the states under our Constitution.

I am not a strident advocate for states' rights. This goes against the chamber I am in, but I am not. I do not mind arguing that argument where it occurs, but I also think there is, of course, under the Constitution an important and decisive role for the states. Leave aside whether I think that is ideal for the nation, but that is what it is and states' rights is used as a strong argument on a lot of issues.

It is possible, given the political complexion of Australia—where there are nine elected governments; one at national level is conservative and the other eight at state or territory level are Labor—that, by using the executive treaty making power, you can impose on the states a national political philosophy. The argument as to what extent states are involved in making decisions about these matters and how important the state view is weighed by the federal government—whether they have veto power or not to commitments under the foreign affairs power—is an important argument. I wondered, since you are here from a state point of view, whether you had a view about it.

Mr Hubbard—We would agree with that. I think there has been a lack of debate in the community about these things and I suspect there is a lack of debate within the state government about these things, apart from maybe in most states a general agreement to further trade liberalisation. I note the Victorian government letter to the Commonwealth from February called for state representatives to be included in negotiations. I do not know whether that has occurred—whether the state representatives are included—but certainly I think the states ought to be integrally involved.

CHAIR—The states be consulted with?

Mr Hubbard—Yes, but they should be part of the negotiations, because many of these things, as you say, involve things that are delivered by the states. Many people, at both local and state government level, have no idea of how fundamentally some of the decisions by national governments—by the executive arm—affect other tiers of government. I would welcome any recommendations by this committee that would further incorporate state and local governments—not just state government, but local government—into that process.

CHAIR—I apologise for using you, Mr Hubbard, to get this issue out, but I think it is very important to the efficacy of this inquiry to get the serious underlying issues out into the public so they can be properly debated. I am not saying there is any threat, but the potential does suggest itself.

Senator HARRIS—Mr Hubbard, you raised the issue of continuing trade liberalisation and labour standards. Under article 7 of the agreement, it says:

Where appropriate, recognition should be based on multilateral agreed criteria. In appropriate cases, members shall work in cooperation with relevant intergovernmental and non-governmental organisations towards the establishment and

adoption of common international standards and criteria for recognition and common international standards for the practice of relevant service trades and professions.

Do you believe that that will ultimately bring in the lowest common international denominator in relation to benefits? I will give an example. Australia has four weeks of annual leave. We have sick pay, 17½ per cent holiday loading and contribute towards superannuation. Does your union have any concerns in relation to that particular section of article 7? Where it says it will work towards common international standards, do you think you would see a lowering of workers' rights within Australia if that was brought in?

Mr Hubbard—That is a good question. I am not sure. I do not have the clause in front of me and I have not really given it consideration, but obviously what the labour movement is calling for in relation to these agreements is basic human rights about bargaining and so on. The question is, if you are going to have fair trade, how do you assess that who you are trading with has something that approximates perhaps what you would regard as either social provisions, labour provisions or environmental provisions and so on?

Part of our concern is that major multinationals simply shop around. They invest in a country where they know there are low standards. It is not benign. It is not like here is a struggling government and they give workers an opportunity. These are multinationals who, once those workers are organised, will move on to the next place. Our view of the world is we want to raise everybody's living standards. To do that, firstly, they need the fundamental rights to organise and to bargain and to do all of those things but, secondly, we ought to be working towards decent civilised standards, whether it is in relation to leave or working time or a range of other things.

I am not sure how that clause would work but I think clearly we are a million miles away from even getting fundamental labour standards in trade agreements, let alone some basis of assessing what reasonable conditions might be. Although I do note there are a number of Asian countries now with a higher standard of living or higher per capita income than Australia, so we should not regard ourselves as being too much in the developed world these days. We are in the second rank.

Senator RIDGEWAY—A question on notice perhaps for Mr Cochrane. In your submission you talk about the work of local government and the concept that was introduced back in the nineties about best value. You are probably aware that some of the views that have been expressed in other submissions talk about the only way to move forward in terms of service delivery or provision is looking at the least trade-restrictive option.

Given that you have been going through a process over the last decade of looking at what are the best value options, are you able to provide some anecdotal evidence to the committee that we could look at in terms of contract arrangements at the local government level—what services have been dealt with through that new concept that was instituted—and where you could see that might be affected by what GATS or a free trade agreement might ultimately present as a potential problem in the future?

CHAIR—You can take that on notice, if you feel that you cannot do justice to the answer right now, Mr Cochrane.

Mr Cochrane—Originally, we had compulsory competitive tendering, where councils were compelled initially to tender up to 50 per cent of their total expenditure every year as a minimum. It was then phased back, but we had a situation which was quite volatile and probably extreme compared to any other sector in the country at that time. When best value was introduced, as I said earlier, what it did was bring back a community focus.

To give you an example, what happens in quite a number of municipal councils now in relation to considering best value options is that it is not just the elected councillors. Many councils have a local community group that may have an interest in that particular sector as a subcommittee and councillors sit on that as well. They are seeking a broader view than just the elected councillors. I think that generally the local communities tend to be wanting to lean more towards a local flavour, as I said earlier. What I am finding is that still some services go external, to multinational contractors. A prime example is the City of Greater Geelong, which has just tendered its contract for garbage services in that municipality. It is the largest municipality—geographically and population-wise—in Victoria. Brambles have won that. So it does still happen, but they went through a process that involved some community people.

One of the things about the local community, from my experience—what I am seeing happening out there and through talking to some of them—is that they do not want the international flavour. They want to be able to deal with it at a local level. That is their preference, in most cases. In Brambles' case, they have a well-established Australian base, particularly in waste management, so it is understandable from that perspective. GATS totally contradicts the best value model.

That issue raised earlier about the relationship between states and federal governments is an important issue. What do we do here with best value? Do we throw it out the window and say to the community, 'Sorry, we introduced this but you can no longer have it because it might be under the detriment of GATS in the future'? I would hate to see that. The local community deserve a say.

Senator RIDGEWAY—Thank you for that.

CHAIR—Thank you all. Thank you very much, Mr Moran—although we did not get to talk to you—Mr Hubbard and Mr Cochrane. We will now adjourn.

Proceedings suspended from 12.46 p.m. to 1.37 p.m.

KINLEY, Professor David, Director, Castan Centre for Human Rights Law

McBETH, Mr Adam, Postgraduate Research Fellow, Castan Centre for Human Rights Law

CHAIR—We will now resume our hearing with the Castan Centre for Human Right Law from Monash University. The procedure is, as no doubt you know, we invite you to address your written submission briefly and then take questions from the committee. Without any further unnecessary introduction, the floor is yours.

Prof. Kinley—Thank you very much to the committee for inviting us to give evidence and, indeed, for accepting our written submission. What we will seek to do in less than 10 minutes is provide a very brief background as to why we are interested in this area and then to stress three particular features that are within the submissions. They are not different from what is in the submission; we just wish to stress them orally.

The Castan Centre has two relevant major projects which it is pursuing at the moment that yield an interest in this area. One is an Australian Research Council grant on corporations and human rights, a three-year project; the other is a Fulbright-sponsored research enterprise into international financial institutions and their relationship with human rights. Both of these include analyses of the roles—past, present and future—of the WTO. It is on that basis, and not least the fact that Mr McBeth on my right is doing a PhD in this area, that we feel we would like to put it together and submit it to you.

The first of the three features of the submission that we would like to emphasise is that there is an accepted body of literature, jurisprudence understanding, that international human rights obligations have primacy on states vis-a-vis any other international law obligations including therefore, of course, those obligations that are put on states by GATS. This is established not only as a matter of international customary law but, indeed, many core human rights are jus cogens or peremptory norms that are a trump card within customary international law. But, in any case, they are binding on all states.

In addition to this customary international law dimension there is also section 103 of the UN Charter which provides that where there is any conflict between the international obligations that are placed on states under the charter and those obligations placed on states under any other international instrument, then the charter's obligations are to have precedence. And one of the key precepts upon which the UN Charter is based under articles 1, 55 and 56 is the pursuit of international peace and security through respect for human rights.

The second feature we would like to emphasise is the common command that exists under all international human rights treaties that states must ensure to all within their jurisdiction that the rights therein are applied to all who live and operate within their jurisdiction. The words differ from international instrument to international instrument, but they all have the same obligation.

What this obligation means in practice is the following, in three parts: first of all, that states must themselves refrain from infringing human rights—that is perhaps the clearest and most

obvious. Secondly, they must ensure that other non-state bodies do not infringe human rights. Thirdly, and perhaps most relevantly to this committee, states are also required positively to take action to deliver or provide access to the delivery of the human rights within their covenants. In particular that means economic, social and cultural rights like health, food, housing, access to education, and health and safety at work, but it does also include classic civil and political rights such as privacy and non-discrimination, fairness in decision making and all that sort of thing.

This is not simply a theoretical, conceptual or just an academic point. There is a growing body of international human rights jurisprudence within a number of international courts that holds states to be directly and vicariously liable for the human rights infringing actions of those within its jurisdiction. The states become liable not for what they have done but for what those within their jurisdiction have done—in other words, corporations. This can apply to corporations or private entities whether those private entities have taken over previously state-run services or they have always been private.

The third point we would like to stress is that a particularly appropriate way in the present context of this GATS inquiry by which states could meet these twin obligations—the primacy of international rights law within international law and the specific duties that are placed on states by international human rights law—and a good way in which to promote this is to advocate that the GATS be amended to include a general human rights exception clause. Thereby the state—in this case we are advocating Australia—would be able to give direct effect to the securing of the object of human rights protection within the context of the free market provision of essential services.

I would like to stress that last point and put it another way because we would like to make it clear that we do see it as that way around. As we state in recommendation 4 of our written submission, the pursuit of free market service provision is not an end in itself, but rather merely a means—and one sincerely hopes and believes that it can be an effective and efficient means—to the end of providing better health services, better water services, better power, better welfare, better housing, better education. All of those are undeniably based on universal human rights. Thank you very much.

CHAIR—I want to begin by saying thank you very much for your submission. It was appreciated. We do place a great deal of weight on it. It seems to me though that in what you have just presented there is an assumption that freeing up trade is somehow antagonistic to or endangers the prospects for full-flown human rights in a country. I do not know if that is the impression you wish to give, but it seems from what you are saying that opening up of trade should be somehow limited lest there be some intrusion on rights. Is that right?

Prof. Kinley—Alas, it is a failure of my last point. It must be my inarticulate way of presenting it.

CHAIR—I am sure that is not true; it is probably my inarticulate way of hearing it.

Prof. Kinley—Maybe it is somewhere in between. We sincerely believe that the purpose of free market provision must be pursued if it is efficient, effective and respecting of human rights. If it can be those, then absolutely you would want to pursue it. There is no doubt that there can be instances where unquestionably it is better—efficiently, effectively and, indeed, in terms of

service provision, which we are saying is based on human rights. The bell that we are sounding—and perhaps it has appeared overemphasised—is that one must not allow that pursuit of the free market ideology to be such that human rights does take a back place. It must always be in the forefront. But insofar as it can be satisfied, by all means most certainly pursue privatisation, pursue free market provision of services.

CHAIR—I will give you a brief view of what is on my mind and what are some of the arguments this committee will have to contend with from a human rights point of view. I have been, for example, to Indonesia and looked at the environmental laws of Indonesia. In my experience, if you look at the laws, the laws look fine. If you look at the practice, the practice is nowhere near the law. The ability to police the law and enforce it, to make it conform with good environmental practice, is corrupted by poverty and the ability to corrupt local officials as a consequence. Does Indonesia have, in terms of forestry—which was the area I was looking at—what I would regard as good forestry law? My answer would be yes. In reality, does Indonesia follow good forestry practice? The answer in my view would be no, absolutely not.

Also, let us look at democracy. I know a number of Asian countries where everyone, as a basic right, gets a vote in what is billed as a free election. But in some parts of these countries, local war lords buy votes off poverty-stricken people, who know, when they sell their vote, that the vote will be used against their interests, but they do have to eat tonight and their vote is a tradable good, so they sell it to get some income in order to eat and survive to the next day. Consequentially comes the question: is there real democracy here? Despite all the statutory rights and obligations on the legislative books, my conclusion is no, there is not.

Let us go to another area—international labour rights. The United States has adopted three of the core labour conventions. China has adopted, as I recall, all of them. I have some misgivings about the rights of unions and workers in the United States, but they do have the right to form unions and they do have the right to collectively bargain. I have concerns about the rights of workers and unions in China. They do not have the right, other than out of state controlled unions, to form free trade unions, nor do they have the right to bargain freely. But the conventions are all adopted. In Australia we have adopted 57 of them, so the rights are there. Under our Constitution there are heads of power for legislation, but the rights in terms of what labour standards are not adopted by the United States. The observation by the US of a number of those rights in fact does occur, although—I would make it my private submission—not adequately, in my view. But they are there.

So we come to this fundamental problem that seems to me to be always the case: you can have rights, but they are meaningless if you cannot exercise them and if you do not have an economic ability to be able to exercise them, and that is without going to economic rights—the right to have three square meals a day, to have a roof over your head, to have an education, and so forth.

When, for example, one of the least developed countries in the world wants to sell its agricultural goods to Europe—one of the most developed regions of the world—it cannot, because the Europeans say, 'That affects the rights of our farmers to earn a decent income, so you will remain unable to penetrate our market, but we will give you some aid.' The right for that country to grow its own economy and to provide for its citizens if it disperses—and I recognise this point—its income more equitably to some sort of economic dimension is

proscribed because the rights of European farmers are put above the rights of starving Africans or Asians.

The purpose of the World Trade Organisation, as set out in its charter, is to improve world economic growth by opening markets and enabling countries to grow by trade. There is an argument as to whether that is the right course of action, pursued the right way, in order to get economic growth. That is a debate that people have. But in this country, successive governments have signed up to those objectives. Because we volunteer to be a member of this organisation, we have exercised our policy to say that we embrace the organisation's goals. The goal is, effectively, to try and open up global trade in order that countries can share in economic growth, so that in this 'north/south, poor countries versus rich countries' situation there is some equalisation of at least economic opportunity.

This brings me to something my colleagues here have all heard me say before. Their eyes are going to roll back in their heads when I say it again! The 1998 Nobel Prize winner in economics, Dr Amartya Kumar Sen, who is now at Cambridge University, has argued the case, I think quite persuasively, that unless you have access to some independent income which enables you to exercise those rights, then no matter how many rights are on the statute books, you do not actually have them in fact, and you cannot separate legal rights from the economic ability to exercise them and make them real.

It seems to me that that is a big question in this debate, because it brings this issue right into the foreground. If we look at rights of, for example, some Australian companies or workers, it may be that, by insisting on their rights above all others, we are denying rights for people in developing countries—or they are, if you want to put it in the European, American or Japanese context. If we want to keep people in a situation in which we provide aid, within our capacity to do so and at variable times, but they never have the independence to be able to grow their own economy, then we are keeping them away from their entitlements and rights.

That is one of the big debates that we have, consciously or unconsciously, embraced in this inquiry and it is one of the underpinning philosophies of trade debate: the importance of economic growth in conferring living standards on people. I have to acknowledge straight off that there is a whole argument about whether growth is dispersed equitably and fairly and whether people genuinely benefit, whether the interplay of power elites or powerful nations as opposed to weaker nations means that this is theory and not practice as well, and there is a very healthy debate about all of that, and the ability of small developing countries to bargain equally and fairly with large, sophisticated economies—all those things are there. But it seems that at the core in the rights debate it comes back to the point that it is all very fine, but unless you have some income and some independence it does not mean very much.

I just want to run that past you. I may not have articulated it very competently or well, but I hope at least the idea of what I am trying to hit on is clear, and I invite, in the context of your submission, some comment.

Prof. Kinley—There are a number of things I would like to pick up on. First of all, Amartya Sen's most influential recent work has been *Development as Freedom*, of which no doubt you are aware.

CHAIR—Yes.

Prof. Kinley—His argument is not only that of course you need an economic basis in order to be able to exercise your rights, but that you need your rights in order to be able to obtain an economic basis.

CHAIR—Exactly.

Prof. Kinley—The whole point for him is that development means freedom. It is not the Chinese argument—which I know you are not arguing—of, 'Look, we can't deal with human rights now. Let's economically develop. Rights can just sit back for a while.' Indeed, the UN's whole focus on international human rights in the last 15 years, as you may well know, has been on what they consider to be the indivisibility, the interdependence, of rights, economic and social on the one hand—economic growth—civil and political on the other. I think Sen as an economist is arguing precisely that.

CHAIR—What you are saying about Sen is dead right. He is saying you have to have the rights, but you have to have the economic capacity to exercise those rights, and maybe I have fallen foul of the mirror image of what I am trying to get at in this submission by emphasising the economic side and not proclaiming the importance of the rights. What I am wanting to draw you on is: in this submission it seems to me that it emphasises the rights but not how you obtain the economic capacity to exercise those rights.

Prof. Kinley—An impression is an actuality and if that is your impression then I think that that was a failing on our part. Our view is to sound a warning that, if you pursue the notion of economic growth for its own sake and do not take into account the human rights implications of it, then not only will you be doing damage to the human rights but ultimately, we would say, you are doing damage to the very purpose of economic growth in the first place.

If we have given you the impression that what we are saying is, 'Economic growth is not a good thing. Human rights must be pursued,' then that is not the correct view we wish to project. On that, you do say that the WTO of course has its raison d'etre articulated in the form of pursuit of economic growth, but both in its ontological form—in other words, what is that for?—and within international law that is not the end of the game.

CHAIR—No.

Prof. Kinley—Economic growth is, of course, only for a reason. What is the reason? It is to try and create a better society for all.

CHAIR—The jargon is that it is a necessary but not sufficient condition.

Prof. Kinley—Which then does lead to one of the most startling statistical undermining factors of the continued pursuit without these caveats—without sounding the bell of human rights—of economic growth, because there is now a whole raft of statistics which show, particularly over the life of the WTO, but stretching right back to the beginning of the GATT, where the disparity between the rich and the poor nations, the north and south, has grown with free trade rather than diminished. What is more, even in absolute terms, yes, some countries have

grown but not as much as other countries have grown. But in even absolute terms some countries have gone backwards, particularly in Africa.

That means the idea of pursuing economic growth has not worked in the sense that you have managed to increase the pie, but it has not been distributed in a way which has helped those who are most cravenly in need. All we are saying is that distribution—we are not doubting the pursuit—is the most important thing and it must be done in a way that does lift people up by their bootstraps.

CHAIR—On that very point—because it is quite a fundamental point—firstly, I think the case you have put of whether or not 'free trade' has worked since the formation of the GATT—I am taking you to say not since the formation of the WTO, but that is a technical thing—goes to how comprehensive that framework has been and which countries have been in and which countries have been out and how sophisticated the measures have been. I think there is a case to argue as far as the least developed countries are concerned—there are 22 of them—but for any of the others it becomes a much more doubtful proposition. Part of the problem surely is that free trade is a political slogan that bounces around. We have an American president who is conservative, using free trade as a slogan politically while in fact presiding over a distortion of trade flows. If that version of it is to be regarded as free trade, I am out of the debate. That is not my view of what the case is. Europe espouses great social principle among itself but uses the combined force of its union in a predatory way against other countries.

If we want to go to that we can see some of their arguments in the GATS bids they have made against Australia. They have a huge competitive advantage and they are wanting to insist that we open our borders so they can take that from us, in a crude sort of way. Yet they close their borders where they do not have a competitive advantage on textiles and on agriculture and they close them to poor countries that do. In my view, if that is what free trade is supposed to be, I am out of the race. That is not what my view of it is. You have to actually open the borders and give those countries a chance.

What we are measuring, or how we are defining free trade, becomes an important element of this debate. I think it is one of those elastic concepts that accords with which voice you are talking in and whether you are talking politically, economically or socially, and the definition means something else in each of those characteristics. But, equally, there are a number of studies, particularly by the World Bank, which point to countries benefiting considerably by being able to have economies of scale and grow that way.

The other big problem is that change equals dislocation and dislocation means that some win and some lose. A lot of the theory talks about how good it is to win, but pays very little attention to what the cost of losing is and what social policies need to be in place to take care of people who are less competitive in a more competitive environment and transfer them into occupations or jobs that will be more rewarding for them than the jobs that are being lost. All I am saying is that I do not necessarily accept on its face, Professor—with no offence to you—that the refereeing of this concept of free trade is a done deal and well understood and conclusive.

It means it goes to what you mean by it. What is the efficacy of the refereeing? How do you measure it in a range of things like that? While there is an arguable case for LDCs, the jury is

pretty well persuaded almost everywhere else. The problem is that a number of countries that prominently espouse free trade do not practise it.

Prof. Kinley—I think you will find me in furious agreement with you on that point of the referee being one that is by no means impartial, in the sense that there are things that are allowed to go through. The classic is agriculture in Europe. Biggest of all are the historical barriers that have been used by the developed nations which are now being denied all developing nations, LDCs or otherwise.

But I would like to pick up the point you made, which is one often made, about those folk who wish to raise the issue of human rights as being an important and relevant part of trade, which I must say thus far has not been the case. There are moves now, it would appear, just recently in the Human Rights Commission in Geneva where there have been reports of many of the special rapporteurs governing many of the key economic, social and cultural rights—health and housing—having made approaches to the WTO and the WTO has been more receptive of the idea of at least discussing it. So the rapprochement, one hopes, is coming.

But still there is a perception that because there can be instances in which the pursuit of human rights, particularly by the West—and, indeed, you gave examples of this—not only disadvantages those in the developing countries but, in fact, ultimately you can make a very strong argument to say that they undermine their human rights; not just their economic rights but their human rights. The examples that you give I am certainly familiar with—in Vietnam, Indonesia, China and Burma—where we have had contact and deal with people who say, 'One of the problems with the idea of having human rights clauses is that if the corporation is not able to meet them and the standards are set somewhat Western like'—and therefore they won't meet them—'we'll lose employment because that industry will have to leave. That, surely, has an even graver effect on our ability to be able to live a good life than having you telling us what you think our human rights should be.'

But, having said that, it does not mean, because that example does occur, that therefore we think, 'Human rights is too hard. We'll just throw it in the too-hard basket.' We have to say, 'Right, let's work at this. Let's try and educate the West in its advocacy of human rights.' That means a dialogue between the developing nations. This will take time, but that is surely the way in which to try and inculcate in both sides notions of what human rights do mean. Human rights must be a part of the greater economic growth agenda of the WTO.

Mr McBeth—To address your initial question, Mr Chair—that we were assuming in our submission an antagonism between trade liberalisation and human rights per se—I do not think that is the case. Mr Chair, you hit the nail right on the head in nominating agriculture and agricultural barriers.

CHAIR—Textiles, clothing and footwear is another one.

Mr McBeth—Indeed.

CHAIR—Agriculture has a resonance in Australia but one should not forget the other area where developing countries usually have an edge and that is in the textiles field.

Mr McBeth—That is absolutely true. That is, in fact, to some extent or in certain cases, going the other way. But in the case of agriculture, if primary producing, developing countries—and LDCs—are to achieve the realisation of their economic, social and cultural rights—their human rights to the right to food, to a decent standard of living and so on—it is a necessary precondition that some of these barriers, particularly in the EU and the US, are removed. If that is the case, absolutely, we are all for it. We are not against trade liberalisation per se.

CHAIR—It is not in this submission, but is that what you are saying to us?

Mr McBeth—It is, and it is in the submission. The second paragraph says that we make no comment on the desirability of trade liberalisation per se.

CHAIR—I am sorry, I have done you a grave disservice.

Prof. Kinley—Still, you raised a very interesting point, so I do not know whether it is a disservice.

CHAIR—What has always been my concern is to ensure that there is an economic dimension here. But let's get away from the self-criticism and analysis and get on with your presentation, Mr McBeth.

Mr McBeth—That was the point that I was trying to make. If trade liberalisation is necessary for the realisation of human rights—and in some cases we recognise that it is—then we are all for it. What we are saying is that when one goes about trade liberalisation one must remember that the underlying purpose for that must always be the realisation of human rights, and the manner in which one regulates and negotiates trade liberalisation must be done in those terms and with that in mind.

Senator HARRIS—Professor, you have raised an aspect of GATS that I do not believe has been brought out into the public arena, and that is the possibility of impact of Australia's requests on other nations. You have raised a major issue here. We are so busy looking at GATS focused on the other member countries placing requests on us, to the total exclusion of looking at the moral and social responsibilities of the requests our government is raising on others. That is a very important issue. For the committee, could you expand on the possible infringements that you would see from Australia's requests to other countries. I know there is an inherent difficulty that we do not know what they are. Taking it from that point, the issue I am raising is: from society's point of view, how do we address the human rights impact we could make on other countries when we do not know what the content of those requests is?

Mr McBeth—The immediate answer is that we cannot address them directly because we do not know what the requests are that Australia is making of other countries, just as we do not know what the requests are that other countries are making of us.

Senator HARRIS—With the exception of one, we do.

Mr McBeth—With the exception of the one that was leaked. Yes, that is right.

CHAIR—What was leaked was allegedly a draft, not the final document.

Mr McBeth—What it does raise, Senator Harris, is, first, the obvious question of transparency of these negotiations, aside from the theory of human rights. To stick to the human rights aspect, all we can do, not knowing the types of offers and requests that are being made, is to ensure that Australia keeps its own legal human rights obligations in mind when it is making the requests. Look at, for instance, the area of social services, which is where our submission focuses—the sorts of social services like health and water utilities; in some instances services that you would not call social services, like prison management; those sorts of issues that are absolutely fundamental to the realisation of human rights. If Australia is making requests of other countries in these sectors, that could well be preventing these other countries from realising their own human rights obligations, in the same way that those sorts of commitments in Australia would prevent Australia realising its legal human rights obligations.

Again, we do not really know whether a commitment under GATS does curtail the states' regulatory capacity because we do not know what some of the terms that are contained within the GATS mean. They are yet to be defined by the Council for Trade in Services and they are yet to come before the dispute settlement body. Until either of those things happens, we do not know; we can only assume. All we can articulate at this point is a principle for negotiations that applies to the GATS and to every other aspect of international economic negotiations, and that is that human rights obligations under international law always assume primacy and must always be kept in mind and used as the benchmark against which our economic negotiations should be measured.

CHAIR—It seems that your arguments and submission are persuasive. There are no further questions from the committee. That might enable me a moment or two to pursue some of the other elements of the issue. You recommend that, in the course of the current GATS negotiations, 'Australia refrain from requesting specific commitments in service sectors that are particularly sensitive for human rights.' Can you say what you think those sectors are?

Mr McBeth—They are, firstly, the sectors that I named in answer to Senator Harris's question—specifically health and water being the two biggest, but also others. Education and prisons are others that I can think of. There are all sorts of services that have peripheral impact. Everything, right down to garbage collection, obviously has an impact on disease control and health. A very large number of services have some peripheral contact on human rights, but specifically those that are classified as environmental—the environmental services sector—which are largely water, sewerage, health and the like. Perhaps not education, in terms of what Australia should refrain from, but it is one where, if we are negotiating in that sector, we should certainly keep our human rights obligations in mind.

Something else to remember on this point is the often quoted argument that government services are exempted from the GATS. If we look at the way those particular services are provided in Australia, it is our submission that none of them are exempt. Prisons are provided by commercial providers, health is provided by commercial providers, education and so on are as well and therefore do not fit within the government service exemption under the GATS.

CHAIR—This is not an argument I am necessarily signing up to, but one of the arguments put to us is that some of these services may be able to be delivered by the private sector at lower cost to the taxpayer, and efficiently, so that the services are rendered to the level the community want.

Can you say something to that proposition and for what specific reasons you think that some of these services should not be conceded in the GATS negotiations.

Prof. Kinley—You have set the parameters of the example, which is, of course, fair. How else can one discuss these things? In that circumstance it would be fine, provided of course—say it is prison services—that the service that is provided by the G4 group or whatever is done in a way that does not violate the rights of the individuals they are keeping in prison. In the United Kingdom in particular there have been some examples of where that has been considered not to be the case and the accusations have been on the basis that they are cutting cost corners in order to make a buck.

In those circumstances it becomes not only a legitimate human rights concern but also a legitimate concern of the state's guiding hand, which is nearly always still on such things as prison services. It is simply not a good way in which you would want the service to be provided. Those would be the circumstances where I think you would have to step in. If it is efficiently done—and unquestionably it can be—and cheaper, and unquestionably it can be, then by all means pursue it, as long as human rights are not abused.

CHAIR—That is the test, isn't it? It has to be done efficiently, it has to be done equitably and to the level that is required.

Prof. Kinley—I think so. It is, on that level, as simple as that.

Senator JOHNSTON—Just arising from that, when you say it is ambiguous as to whether there is a public exclusion of public services, do you say that wearing a hat from the law faculty or do you say that as members of the Castan Centre for Human Rights? I am wanting to know whether that is a legal perspective rather more than a human rights perspective. I take it you are both lawyers.

Prof. Kinley—Yes, we are. It is legal.

Senator JOHNSTON—You have actually formed a legal view that the wording in these documents is ambiguous and open to misconstruction?

Prof. Kinley—There is not a legal document that is not.

Mr McBeth—Senator Johnston, is your question specifically relating to the definition of 'government services'?

Senator JOHNSTON—Yes. A number of submitters have said, in line with what you have said, that the exclusions and the protections that DFAT want to put, in answer to the risks of having public services included in these formats or rules, are ambiguous and do not achieve their overt purpose.

Mr McBeth—I do not think they are ambiguous. The definition does say anything which is provided on a commercial basis or in competition with one or more other service providers is excluded from the exclusion. Where you draw the line is whether simply charging a fee for a service is on a `commercial basis,' or whether you have to be making a profit, or whatever.

Competition with one or more service providers is pretty clear. For instance, state schools are always in competition with private schools. They have to be excluded by any logical reading of it. To answer your question, there is obviously some debate about what a `commercial basis' means.

Senator JOHNSTON—But the efficacy of the safeguards nominated in the GATS agreement, for instance—

Mr McBeth—The way in which DFAT and the World Trade Organisation point to this exclusion is perhaps misleading. I do not think it is anywhere near as broad as they might have us believe.

CHAIR—My final question is about the process. One of the arguments put up about the process is that the negotiations between Australia and its counterparts in the GATS are confidential to those parties. The Australian government will argue, and with some justification, that it has done what it can publicly to make the community aware of the nature of those negotiations, but without going to the actual detail and breaching confidentiality arrangements it has with other countries. Do you have any views to offer about how the community interests might be safeguarded in a situation where that is the negotiating model, or whether the negotiating model itself is flawed from that point of view?

Prof. Kinley—It is a peculiar situation. It is one in which there is an absence of public scrutiny, which is not the case in other parts of the WTO. Our view is that, although this is the realpolitik, this is what we have to deal with. It is surely open to such abuse as Senator Harris points out. You can have deals done, points being made, qualifications and conditions being imposed without any real chance of them being exposed—occasionally but not enough— for it to be a very strong prophylactic effect. I know my colleague has a more sophisticated view than this.

Mr McBeth—We do strike a difficulty in that states are negotiating on the basis of give and take and sort of opt in in particular sectors in this agreement, which is not the case under any other agreement. It is a peculiar situation and they are obviously keen not to give away their competitive advantage in the negotiating process. Given the massive impact this has on human rights in the case of some sectors—particularly the ones we have talked about and maybe not so much, say, for financial sectors—one would have to say that there should be a great deal more openness about what is being negotiated than is currently the case. Whether that comes at this point or whether it comes sometime before it is put to the WTO body in Cancun in 2005 is a matter for people to debate. I do not really have a strong view on that. At some point in the process, before it is signed off, there clearly needs to be more openness than there has been to date.

CHAIR—It is not necessarily a human rights issue, although it has human rights implications. But it invites me to exploit your qualifications as lawyers before this committee and put the question to you in this way. Under the Australian Constitution the executive wing of government has the power to conclude treaties and to sign off on a trade agreement, whether it be the WTO or a bilateral agreement such as the Australia-US one. They do not have to obtain the approval of the parliament to do so; it is within their power to do so as the executive. The innovation that has been made by this government is to put a treaties committee in, which provides some

parliamentary scrutiny, although after the fact. The parliamentary scrutiny occurs after the treaty has been agreed but sometimes, not always, before the treaty is signed.

In the case of the Singapore agreement, I understand the agreement had been reached, was being rendered in law and handed to the Treaties Committee and that it was signed after the Treaties Committee had a look at it but had not completed its scrutiny. If the Treaties Committee, in scrutinising the agreement, says something where the government thinks, 'That's right, I should go back and renegotiate it,' it can do so, but the likelihood in practical terms of that occurring is very remote, to the extent that it is almost not a consideration. That is our constitutional structure.

Some of the things that have been negotiated in GATS are the prerogative, under our Constitution, of the states. The states do not have any say in terms of the executive at federal government level signing a treaty. It is possible for the executive to sign a treaty which goes against the wishes of the states who have the constitutional obligation to deliver that service. Does that mean we are looking at a defective constitution here and some more modern-day approach should be made to straightening it out?

Prof. Kinley—My goodness! We are a heavily governed nation, aren't we? The first leg of your question is a problem faced by all Commonwealth countries, so we are no different from the United Kingdom, Canada or New Zealand. I will come back to that in a moment. The second leg, though, is not one peculiar to all Commonwealth countries and the federalist aspect is a problem. Mr Chair, you may be aware that there was a very sizeable inquiry conducted by the Victorian parliament—I think it was a scrutiny of bills or regulations and ordinances committee in the mid-1990s—on federal-state relations. I remember giving evidence to that committee about this very question of how the states, which will in many cases be the shoulders upon which the obligation will rest, can have an input in the thing that is going to come and rest on their shoulders.

I am sure you are more aware than I am of times when there is consultation between the executive and its counterparts at the state level, canvassing their views and sometimes even bringing them along to the negotiations. It is clearly not a well-oiled machine, and that is a great difficulty. I do not know if I can provide any clear mechanical way to secure that, other than try and canvass the states' views earlier and more thoroughly.

The Treaties Committee is a very interesting innovation. There is not a committee like it in the United Kingdom and I am not aware of one in another Commonwealth country. The fact that it can have an input is not so much necessarily restricted to changing the terms upon which you will eventually sign up to the treaty, but through its NIAs—national impact assessments—it has an opportunity to say, 'When you've signed up or when you've ratified, these are the things that you'd better do in order to comply with the treaty you've just signed.' It does have that effect. Of course, you have already signed up to the thing. The NIA simply exposes the full consequences of what you have signed up to and, if you did not realise that at the time, it is a bit of a problem. It does have that purpose.

It is a difficulty, but ultimately it is up to our parliament to decide how it will implement that treaty obligation. As an international lawyer, I can say that we are bound by what we have signed and ratified at the international legal level but, as you well know, we are not bound at a domestic

level until such time as we have transformed it—through legislation usually—into our domestic law. There may be disadvantages in that, and sometimes in human rights those are very patent, but there can be advantages as well. Those advantages may be sheeted home to the notion of a democratic government, and its most democratic institution—the parliament—will be the final arbiter as to what extent we will implement our international obligations.

Certainly civilian lawyers look askance when you talk about the procedures by which a common law country deals with its international relations, because on the one hand you go out, sign up and ratify, but there is absolutely no obligation on the other hand that you implement it domestically. Of course, in the civilian code countries the one is the same. The ratification is a bill by the parliament or the assembly, so it is to be given direct effect at the domestic level. With 800 years of legal history, it is going to be pretty hard to overturn that quickly, but that is the situation we have now.

CHAIR—Is it possible for the federal government—by signing, under its foreign affairs power in the Constitution, an international agreement—to acquire a head of power in which it can override some of the state rights in the Constitution?

Prof. Kinley—I think that has been unquestionably the case since the Tasmanian dams case, yes.

CHAIR—That is exactly the point that I am coming to. It is possible, through these agreements, for the federal government to acquire a head of power in which it can require state governments to do certain things.

Prof. Kinley—Unquestionably.

CHAIR—That is one of the issues I think we have to put our minds to in this inquiry. I do not think, if you take both sides of politics, this is necessarily something that argues for one side against another, because as I recall during the period of Labor government at national level, conservative states and conservative parties complained that Labor was adopting international conventions—usually rights conventions or environmental conventions or whatever—that they were not prepared to cop. And now you make it the obverse that the foreign affairs power is being used to adopt conservative principles that Labor states are not prepared to cop. It seems to me that it depends on who is in power as to which way these things will be weighted, but there is no constitutional way of resolving it other than through the ballot box.

Prof. Kinley—That is true. The key to unlock the door, I suppose—51(xxix)—is the legislative power that falls in the hands of the federal parliament, so that if it wished to force through on the states what it is that it signed at the international level, it could do it. The reality, sitting in front of you—the members of this committee are obviously imbued with it—is that politics get in the way of that and the determination of whether the feds are actually going to sit on all the states and take the heat of deciding to follow a particular line and say, 'Right, we're legislating. It doesn't fall within the normal constitutional path, but it falls under 51(xxix).' Historically, the Commonwealth government has only mounted that horse in very few circumstances, because of all the political fallout that comes from it.

Senator JOHNSTON—That is the point. Those abuses of the foreign affairs power have been defined, limited, specific circumstances that have had very minimal application. What the chair, I take it, is alluding to is the potential for the legitimate use of the foreign affairs power, transported across to the broad spectrum of domestic services, to completely marginalise the states—

Prof. Kinley—It could.

Senator JOHNSTON—in a circumstance where our demographic is completely inhospitable to the normal standards, forms and protocols that we have seen right around the world with agreements such as this.

Prof. Kinley—It could. As I understand it, the great outcry in 1982—with cause—and the Tasmanian dams cases in the eighties was that this would open the door for precisely the Armageddon that you are referring to. The areas that were hitherto not able to be legislated on by the Commonwealth parliament could now be so. That was the terror but, of course, the occasions on which that huge mallet has been used have been relatively few. It is still done by negotiation, to seek from the states if they will yield up power. That is normally, as I understand it, the way it is done—'You yield up power and the Commonwealth will do it.' That is a negotiated settlement, rather than going in there. Particularly at the moment, where you have every state politically against you, it would be difficult, if not suicidal. The potential is there.

CHAIR—It would take a very confident government.

Prof. Kinley—A very confident one.

CHAIR—Thank you very much.

Proceedings suspended from 2.35 p.m. to 2.52 p.m.

OSBORNE, Ms Kristen, Trade Consultant, International Trade Strategies Pty Ltd

CHAIR—Welcome. Thank you very much for supplying us with a submission germane to the terms of reference of this inquiry. Would you care to address us briefly on your submission and then we will, if we may, ask you questions.

Ms Osborne—I would like to take this time to make several points arising from the submission. First of all, trade in services is important to the global economy. It is important to national economies. Most importantly, services have a strategic importance throughout all activities of the economy. Today competitive services are critical if national economies are to be competitive in the information age. GATS provides a means of reducing barriers to trade in services over time. The idea is to increase competition in the delivery of services, to increase competitiveness in the economy and to improve the quality of services provided.

Trade in services is important to Australia. Services are critical to the Australian economy in terms of jobs, income and exports. GATS is important to Australia to expand exports and to generate income. More importantly, it benefits the whole economy by allowing it to become more competitive. As I said, this is increasingly important in the information age.

Trade in services is also important for developing countries. Services are an important source of economic activity. More importantly, they have significance for the whole economy and are necessary for economic development. Liberalisation of services under GATS not only expands exports of services, but offers developing countries the only globally enforceable framework for growing their services trade and for assisting them to function competitively in the global economy. The case against GATS ignores these benefits.

Australia cannot expect to reap the benefits of expanding its own exports and services overseas and yet keep its domestic markets closed. It cannot have it both ways. Anti-GATS campaigners discount the benefits of the agreement to developing countries. They are more interested in their own view in Australia than the interests of people and developing country economies which benefit from the agreement. Australia has a moral obligation to participate in the liberalisation of services under GATS. Not doing so denies benefits to not only Australia but also developing countries.

Senator JOHNSTON—Ms Osborne, you stated very confidently that GATS brings benefits. I probably do agree with that, but I want to know how we measure whether it, in fact, does bring benefits. What is the best methodology and what is a sound basis for us to measure the benefits, if any, flowing from GATS? How do we model or analyse that? What do we look for, or to, in determining whether there will be benefits from a free trade agreement with the United States? I am inclined to be worried that we accept that there are benefits without asking: how do we know that and how reliable is our methodology in ascertaining that? What can you tell me about that?

Ms Osborne—Firstly, I will not address the question on the FTA. I am speaking specifically on GATS, so I will leave that aside.

Senator JOHNSTON—Sure—forget I said that.

Ms Osborne—With regard to economic means of measuring services itself, it can be quite problematic, especially when it comes to the statistics involved in international trade. Measuring services in that way is often quite complicated. A lot of statistics for measuring services are not calculated through the actual movement of services between countries, but also foreign affiliates in different countries comprise a major amount of international services trade which statistics often do not take into account. This makes economic modelling or measuring of trade in services problematic from the outset.

I would say the main indication of the benefits of services trade and of the GATS agreement is indicated by the fact that 75 per cent of the members of the WTO are developing countries who have adhered to this agreement and are members of this agreement. The majority of those countries are developing countries and also industrialised countries who obviously perceive benefits in the agreement or they would not be members of the organisation or the agreement.

Senator JOHNSTON—I suppose the question was wrong—and I apologise to you for it—because we need to define what 'benefits' are. Who benefits and what do we accept clearly as benefits? The 70 per cent of World Trade Organisation participants who want to get on board may want to do so for reasons that we would not consider beneficial. From an Australian perspective, what are benefits? What do we look at to say something is a benefit, and how do we measure them? You say it is problematic and I agree with you, but let us go back a further step and ask: what do you see as, and what would you expect that we would all agree are, the benefits flowing from a GATS position delivering a changed economic circumstance into Australia?

Ms Osborne—The importance of services to the Australian economy you can see in terms of the generation of income and employment; 80 per cent of employment in Australia is generated through the services sector. In terms of benefits of liberalisation of services and trade in services, an example would be Australian exports specifically in the tertiary education sector where exports of Australian services to foreign students who come to Australia to study are worth in excess of $4 billion. GATS facilitates an open market regime which breaks down barriers to allow not only the foreign students to come into Australia and study and to generate export income for us but, vice versa, allows Australian foreign students to go and study overseas, which generates income for other countries.

Senator JOHNSTON—You would say that in the case of tertiary education there would be an increase in our provision of services to the citizens of other countries onshore here in Australia?

Ms Osborne—That is one example, yes.

Senator JOHNSTON—We all say that is a benefit. All right.

CHAIR—Let me put this to you in my terms, if I may: Australia is not a country that travels on the sheep's back anymore and it is not a country that earns most of its income from the export of commodities. It is, in fact, a services economy, as most well-developed countries are these days. I think about 76 per cent of GDP is generated through the services sector, as opposed to the other sectors in the economy. As a services economy, the argument is that if we have access to other economies we can create a bigger market for the selling of our services into their economies and make more export revenue that way. But in doing so it requires us to open up part

of our economy to foreign competition too, which may mean that in those services sectors we become more efficient through competition and deliver a better service at a cheaper price to our consumers, thus enabling them to have more money to do other things with. That essentially is the argument.

With the services of the GATS proposals there is a set of agreements that we can choose from—and we do not have to embrace the lot as we can choose which ones we accept, which ones we reject, and how we qualify the ones we accept. The decision about what we accept in opening our services sector is a decision for the government; it is not something imposed on us by the WTO. I notice you are nodding. I take it you are agreeing with me?

Ms Osborne—Yes.

CHAIR—The focus of our debate today with all of the people who have appeared before us has been on public services and the provision of public services and the prospect of what competition, if any, under a set of GATS negotiations, public services will come into from the private sector and from foreign private sector providers. The basic point here is that there are a lot of other services in the economy—tourism, financial services and legal services, just to name a few—that the economy can be opened up for in the private sector that does not go to the public-private interface of service provision. By the end of our inquiry, I am sure someone is going to have a fair bit to say about competition in the private sector, but that is one of the big perceived areas of economic gain in these negotiations, I think. Is that what you are saying?

Ms Osborne—Yes.

CHAIR—One of the big criticisms of these negotiations, accepting all of the above, is that they are being conducted in secret. That is the allegation. Certainly, the government has said they observe confidentiality of negotiations between themselves and other governments, and they will not reveal what other governments are asking us to agree to. They will, in a limited way, reveal what we are saying we are asking other governments to agree with—that is, we cannot see the source documents, but the government will describe to us, in general terms, what the issues are so we are kept briefed about it.

What do you have to say about transparency and openness in this context? Accepting the argument about the economic gain, accepting the argument about the structure of the Australian economy and that the potential of these negotiations is a bigger windfall, do you have any misgivings or comments you wish to make about how open they can reasonably be so that Australians know what the nature of the negotiations is?

Ms Osborne—Firstly, a point should be made about the process of negotiations. It is the nature of the negotiations that they cannot always be advantageous to the negotiating countries to have publicly available every aspect of their negotiating position, because it can in some ways undermine what they are ultimately seeking to achieve. That may or may not be in the public interest, depending on what you think. There is that aspect of the negotiation process itself, which is unique to the WTO.

Secondly, in my opinion, there has been quite a sufficient amount of transparency on the part of the government in terms of the general information that you have mentioned. I am not sure

that making public the kind of information relevant to the negotiations would assist with transparency generally. A lot of the documents, especially in terms of the GATS schedules, are quite complex and would be incomprehensible to someone who is not familiar with the agreement. Due to the technical nature of the subject, that is often the case—for example, Australia releasing its access offer with the schedule, which is on the DFAT web site. I am not sure how helpful, in terms of transparency, releasing documents like that would be for people who want to know what the government is doing.

CHAIR—I have one question on transparency. We were talking a moment ago, before you came to the table, about the constitutional obligations of the states and the Commonwealth. The Commonwealth is negotiating this document. In my discussion with some of the states—not all of them, and I will not identify which ones—I am advised that they have not seen the source documents; that is, the cloak of confidentiality stops with the federal government in terms of the international negotiations with reciprocal governments and does not devolve to the state governments who deliver the services in the public sector that are under debate. What the states have before them by way of information is what the Commonwealth describes to them is, in broad terms, the nature of what foreign governments are asking for in the areas of state service delivery. This is where states have, if you like, the constitutional responsibility to deliver that service. You may or may not wish to comment on this, but I will ask the question. I am not talking about NGOs or anything; I am talking about governments with a constitutional responsibility. Is that an acceptable level of transparency?

Ms Osborne—Isn't that really a comment on transparency between governments generally, rather than specifically related to the GATS agreement? I do not see the relevance specifically to the GATS agreement. I would say that was more related to general considerations of transparency between state and federal governments.

CHAIR—You don't wish to comment on it?

Ms Osborne—I do not see the relevance of that specifically to the GATS agreement.

CHAIR—I think the relevance is that it is possible to conceive of a situation where the Commonwealth may decide to reach an agreement under GATS which the state government that has the constitutional responsibility for delivering that service is opposed to. Do you think there is some sort of obligation on the Commonwealth to keep the state informed of the nature of the negotiations, rather than interpret the nature of the negotiations for the benefit of the state?

Ms Osborne—I would think that the obligation on the government to inform the states would apply in the context of GATS as it would in any other international agreement or any other forum.

CHAIR—Because we are a services economy—and you made that point quite strikingly, and I agree with it—and about 80 per cent of Australian jobs are in the services sector, what happens in the services sector affects a hell of lot of Australians and may, in fact, affect their livelihood; the nature in which their jobs in the future would be competed for, who the companies might be and on what terms they will provide further competition to the companies that employ them and so forth. What obligation do you think there is on a government to keep the NGOs and

organisations that represent those individuals—in this case, unions as one group of organisations that do so—advised of the nature of these negotiations?

Ms Osborne—I think they should be advised on equivalent terms to any other group or business in the community. There should be no special information kept back from one group in the community as opposed to another.

CHAIR—Do you have a view about where the line is drawn in terms of confidentiality? As the government has agreed with other governments that there will be a confidential cloak over the discussions, do you have a view on to what extent community organisations with a vested interest should be able to peep under that cloak in the areas where their interest is vital?

Ms Osborne—Could you explain a little more the idea of the secrecy cloak?

CHAIR—The government informed the Senate estimates committee—our equivalent, the Foreign Affairs, Defence and Trade Legislative Committee, in estimates—last year that the negotiations on GATS are confidential between the governments of the various countries, for commercial-in-confidence reasons and for other reasons as well. That imposes on the Australian government an obligation not to disclose the inner workings of those negotiations, although the Australian government forthrightly says that it has an obligation to consult and to inform, as best it can, NGOs and other government authorities of what is going on.

It is not saying it does not have an obligation. It is saying it does, and it acts to deliver on that by publishing on its web site and so forth, as we have just discussed. What it does not do is enable access to the source documents—the actual requests that are delivered to it by other governments—by community groups or NGOs with a vested interest, such as unions looking at a particular sector. Do you have a view as to what the limits are—where the line is drawn—for that degree of openness?

Ms Osborne—In regard to the nature of the negotiations, the request documents released by countries tend to have quite a wide ambit. Usually the position, when you are submitting your initial request, is to ask countries to remove everything just as a wide ambit claim whether you are actually seeking all of those areas or not. In terms of releasing those source documents, they may not represent the final positions or intentions of what the government is seeking or represent an accurate picture to the community if they are released. In other words, as I said before, the source documents may not be that helpful in providing the level of transparency or the accurate picture of what is going on that the community might be seeking.

CHAIR—On the other hand, it can be said that there may be some irresponsible NGOs that would use source documents to distort or caricature a particular set of circumstances to suit their objectives. Equally, it may be said there are quite a lot of NGOs who would behave responsibly. Isn't it for them to decide, rather than for censorship of those documents to be imposed on them?

Ms Osborne—I do not have any comments with respect to censorship.

CHAIR—In your submission, you argue—and I have a great deal of sympathy for this argument—that liberalisation of trade in services will benefit developing countries because it will assist them to expand their exports and also become more competitive services sectors, and

that will help the reform of their domestic economies. The argument I am now moving to is the question of the infant industry argument—that we need some early protection in a developing country in order that their services sectors become robust enough to effectively compete with foreign services. Do you recognise that argument and, if so, how do you explain where the limits are?

Ms Osborne—GATS does not prevent countries from protecting certain industries.

CHAIR—I know.

Ms Osborne—Are you asking me generally to comment on what I think of the infant industry argument or how it relates to the GATS agreement?

CHAIR—I am asking you to generally comment on the infant industry argument. But since your submission argues the pro case, which I think is a very strong case, for the liberalisation of services, and while you are quite right in your answer that it does not make a requirement, in reading the submission it seems to me that you are saying that, nonetheless, it is a pretty damn strong argument and, therefore, they ought to have regard to it. So, interpreting your words, to what extent do you recognise the infant industry argument as a legitimate argument? You may just want to comment on the infant industry argument generally.

Ms Osborne—I do not quite see the relevance of the infant industry argument to the GATS agreement. Many governments do believe that the infant industry argument has a purpose for starting up certain industries, to foster industries in order to allow them to become competitive in the future. But I do not see any relevance to how that relates to my submission.

CHAIR—I will put it this way then. You have phrased your answer as follows: 'Many governments believe that protecting their industries so they can become inefficient and strong enough to compete is a view of some governments.' Does that have a place in the services trade or is that a view related to the industrials trade?

Ms Osborne—Obviously, if the industries you are talking about are in the services sector, it is related to services. That may be an issue that is taken at the domestic economy level, but it is not always going to feature in the context of an international trade agreement like the GATS.

CHAIR—I do not have any further questions of you.

Senator HOGG—I want to find out a little bit about your organisation, International Trade Strategies. What does it do and how will it benefit as a result of GATS coming into being?

Ms Osborne—International Trade Strategies is a private consultancy. It focuses on international trade law, trade policy, international environmental issues and it also runs a development program for the government on macroeconomic reform in Indonesia. Our principal interest in the GATS agreement is that it is an international trade agreement that we believe fosters competition and delivers benefits to countries.

Senator HOGG—In terms of the company itself, will GATS provide additional employment within International Trade Strategies Pty Ltd? If the GATS gets up with no alterations, no

modifications, delivers everything that those who are so much in favour of it say it will deliver, what will it deliver to your firm in particular, as an example, in terms of additional employment, additional revenue for Australia—or, if not just your company, companies you might deal on behalf of. I want to get some feel as to how it is going to be a positive benefit for Australia in that sense, because others are telling us that it is going to mean a loss of jobs, a loss of income for Australia and so on. There are diverse views but, if you can relate it to your company personally, I would appreciate that.

Ms Osborne—Firstly, under the GATS there are four modes of supply and four ways in which services are provided. What I will demonstrate is how liberalisation of services under each of those modes will benefit us directly.

Senator HOGG—Good.

Ms Osborne—The first mode is where services are provided traditionally across borders. An example of that would be where we could provide a service—for example, a report that we deliver over the Internet—to another consultancy firm or a government in another country. The second mode allows foreign nationals from one country to come to another country to consume their services.

Senator HOGG—Yes, I understand that.

Ms Osborne—An example of that would be perhaps where, if I wanted to undertake further study, I could go to another country—for example, the US—and study at an institution there and therefore enhance my skills and bring them back to the business. A third mode is where companies can go to a foreign country and set up foreign subsidiaries or a commercial presence. We have an office in Jakarta. If Indonesia had indicated liberalising in that area, we could set up a subsidiary of our company in Indonesia and operate out of there as International Trade Strategies.

The fourth mode of supply is where it allows natural persons from one country to go to another country temporarily and supply their services there. For example, that would allow someone like me or any of our other employees to travel somewhere like the EU to provide a consultancy service. We currently cannot do that because we are barred through barriers such as nationality requirements and so forth.

Senator HOGG—I accept all of that. Would you have a projection of the growth of your business as a result of this liberalisation taking place and how many additional people you believe the company would be able to employ, or is that in the too-hard basket? Am I asking you something which—

Ms Osborne—I am not in charge of operational matters and so forth, so I could not comment on that.

Senator HOGG—I will put it to you this way then: can you take that on notice and put it to the operational people and get back to us with an answer in writing? I am not after a long answer: just give us some idea of the impact of freeing up in the area of trade in services and how that will potentially impact on your business. I presume it would be a small business, in that

sense of the word. If small business is to prosper, then yours would be a reasonably good example as to how it will prosper in terms of employment and financial benefit to the nation. Can you identify for us the major obstacles that will be removed that are not being removed by current bilateral negotiations with other nations. I understand there are some obstacles.

Ms Osborne—The large percentage of the work we do is conducted overseas, is for overseas firms or involves overseas contracts, which therefore makes the GATS especially important to us, because freeing up barriers will enhance that area of our work and will therefore increase our revenue and profits and allow us to expand employment and so forth.

Senator HOGG—What I want you to do, without giving away commercial-in-confidence material, is to give us some general idea of how that will improve the profitability, the employment prospects within the firm and so on. That would be very helpful indeed.

Ms Osborne—Most of the barriers we face overseas are specifically barriers that are imposed due to nationality requirements, which is something that the GATS would address. It would be very much in our interests if barriers that prevented us—as they do now—from travelling to overseas markets to supply services in those markets were removed.

Senator RIDGEWAY—To follow on from Senator Hogg in trying to make some distinction between your submission, where you are talking about GATS, and Mr Alan Oxley's submission—and I understand he is speaking tomorrow about the free trade agreement—are you both representing the same organisation?

Ms Osborne—No. Mr Oxley will be representing AUSTA, which is the business coalition in favour of the US free trade agreement.

Senator RIDGEWAY—Looking at your submission, I can understand the promotion of the need for liberalisation in trade services, but does International Trade Strategies undertake research as well in terms of demonstrating that, where GATS has been put into operation, or things akin to it, it has produced results in terms of the growth of an economy and has also had successful outcomes in terms of social and environmental expectations and so on?

Might you be able to provide some of that evidence to the committee? As I read it at the moment, the argument is being made to support liberalisation for trade and services, but the evidence is not there in the submission to say, 'Well, this is what we're going to get as an outcome.' Having spoken to other people this morning from various union groups and the services sector, one of the things that was being suggested was the possibility of looking at social and regulatory impact statements being prepared as well. Do you have a view about that in the process of considering the issue of whether Australia ought to look at entering into GATS in a far greater way than it has in the past, and particularly in relation to what is happening at the moment in discussions with the US?

Ms Osborne—In regard to your first question about whether we have done previous work which has shown positive outcomes, we have done several reports for private clients which have revealed that, but I am prevented from mentioning those here. In terms of additional studies, additional work, on discussing social and regulatory aspects of trade agreements, I do not have

any objection at all to that sort of work. It is not something we have undertaken as yet but we would have no objection to anyone else undertaking it.

Senator RIDGEWAY—Have you had any direct involvement with, for instance, the federal government or DFAT and have those suggestions been put forward or have they been requested? It is, at least from my perspective, becoming apparent that there is quite a lot of ambiguity and confusion about, and certainly the absence of any framework in which to measure or evaluate, whether indeed you are going down the right path and that it is going to produce certain results.

Ms Osborne—Are you asking: have we been involved in any research reports with DFAT or have we undertaken work in that area?

Senator RIDGEWAY—That, and also whether you have put forward those views that you do not have problems with regulatory or social impact statements being prepared on these, because that does not feature as part of your submission. Is that a key proposal that you would put forward? I am asking whether DFAT have solicited those views or, if they have not, whether you have put those views forward yourself.

Ms Osborne—We have not advocated that any social or regulatory impact studies be done of the GATS. We have done previous reports for DFAT that have focused on the impact of international bilateral trade agreements, but they have focused more on the policy issues.

Senator RIDGEWAY—Do you think it is unfair, given that there is this ambiguity and confusion about what the possible results or consequences might be, that people out there from all walks of life—or other groups, whether they are represented through unions or non-government organisations—feel anxious about what the possible consequences might be if there is a lack of detail about the certainty that these are going to be the outcomes? Do you have a view on that? Should people just not be behaving in the way that they are and accepting the fait accompli that it will produce the benefits that you say?

Ms Osborne—I do not think they should accept the argument for benefits without accessing information, reading about the agreement and being informed, but at the same time I do not think they should automatically assume that there are not benefits, for those same reasons.

Senator RIDGEWAY—But you can appreciate that, with the lack of evidence, it becomes more difficult to make an informed decision?

Ms Osborne—I do not think there would be a huge lack of evidence.

Senator RIDGEWAY—The two most recent reports—the ACIL report is one of them—suggest that—

Ms Osborne—Are you talking about the free trade agreement?

Senator RIDGEWAY—Yes. Those things feeding into the whole process of looking at trade liberalisation in services and free trade agreements seem to suggest that Australia has much more to lose than to gain. That naturally would create an anxiety, I imagine, amongst many

Australians, but there is also, at least from my perspective, an insufficient amount of information out there to allow the community to be properly informed so as to deal with that anxiety.

Ms Osborne—Sure. In relation to the FTA studies—and I will not comment too much on that because Alan Oxley will address that tomorrow—but one of those studies showed that there would be overall gains to Australia. I am not familiar with the findings of the ACIL report, but the first study for DFAT revealed that there would be a gain of about $4 billion to Australia.

Senator MARSHALL—Article 1:3 of the GATS refers to public services as 'services supplied in the exercise of government authority' and states that these services are exempted from GATS disciplines. This commitment is qualified by the requirement that such services be provided neither on a commercial basis, nor in competition with one or more service suppliers. Submissions today have said, at the very least, that the qualifications negate the first part of article 1:3, to a level that makes it either ambiguous or, to the other extreme, absolutely worthless. In part 4 of your submission, you seem to dismiss these concerns. Would you like to comment on them? Do you really believe that the commitments that are being portrayed as strong commitments—and I think you agree with them, from reading your submission—are clear enough and unambiguous enough to satisfy people's concerns?

Ms Osborne—With regard to the wording of the GATS and the GATS terms as to what services are included and what are not, I would say that it is ambiguous, and it is common in trade agreements, as a result of being negotiated with over 100 parties, to have terms that are slightly ambiguous. That is nothing new in the area of international trade. What it exactly means legally is by no means clear. It has never been tested in the WTO. Governments certainly have their positions as to what they think it means.

Just commenting on that, I would say that so far it has not been a problem. There have not been any disputes over what this means in the GATS. No country has taken another country to the dispute settlement system in the WTO over concerns that government services were or were not included. At this stage, I do not think that the wording in the agreement as to what is included and what is not is a problem. The main reason for that is because governments under the agreement choose whether they want services to be subject to liberalisation commitments or not. They are not actually forced to include any type of service. In that context, I do not think it really matters at this point exactly what those terms mean, because governments can still keep out services if they choose to do so.

Senator MARSHALL—If we were to commit some public services into that area and domestically we changed our mind for one reason or another, would we have the ability then to take that out of the GATS situation?

Ms Osborne—Under WTO rules, if you make a commitment under the GATS and you bind it, you are legally bound to keep it in the agreement. But, having said that, there are provisions which do allow you to remove them from those commitments. However, there are certain specific rules that apply which say that you must pay the parties affected certain amounts of compensation. It is basically like any other international treaty—it is a legal agreement. When you enter into it and you make commitments, you expect to be bound by them.

Senator MARSHALL—So you would have to buy your way back out. In terms of clarification, it is one of the major concerns of many groups. I was interested in you saying that, because really it has not come up yet, it is probably not worth while worrying about it. I would have thought—and I just ask you to comment—given there is a high level of concern from a number of groups about the ambiguity of that matter, it is really important to clarify exactly what 1:3 means and how it is going to operate. If that was able to be done and if, in fact, it does do what DFAT represents to us that it does, a lot of the concerns may disappear from progressing down this path.

Ms Osborne—I will make a comment on the practicalities and how the WTO works in terms of clarifying certain provisions. Agreements do not matter so much unless there is a trade interest at stake, or there is something of importance between two countries. Unless a provision raises particular problems or a country fears its interests are being adversely affected by a particular provision in an agreement, it is not going to raise it; there is no issue. In a sense there is no interest for anyone in raising or clarifying particular points where they do not actually present a problem.

Senator HARRIS—Ms Osborne, in your submission and again in section 4 you say:

Some NGOs claim that GATS will require countries to privatize public services, including education, health and water supply.

Then you make the statement:

This is simply untrue.

Would you like to comment on the EC's request to Australia in relation to water? It says:

The EC requests Australia to commit the following subsectors, and schedule existing commitments accordingly, based on the EC proposal for the classification of environmental services:

A. Water for human use and wastewater management.

It goes on to say:

Water collection, purification and distribution services through mains, except steam and hot water.

EC Request: extend sectoral coverages to include the above services ...

We have a situation where the EC has made a request of Australia in relation to water. Would you like to comment on that?

Ms Osborne—I will just say that the EC has asked almost every country to open every sector of all services, so Australia is not specific in that regard. Water is not special in that regard either. The nature of the request is that you ask for a wide ambit and you ask countries to open everything and it is standard practice for most of the industrialised countries to say, 'We're putting in a request. We want you to open everything.' Australia, of course, is not obligated in any way to open that sector. It was to be expected that the EC would ask for all sectors to be

open. Australia does not have to open that sector and I do not believe Australia has, in its offer document, offered to open it either.

Senator HARRIS—I take your answer and agree that that is the case; we do not have to open that sector up. However, could you expand for us in relation to the section of the agreement which goes to the annex on article II exemptions. At the present moment Australia's water is an article II exemption. This section, referring to the termination of exemptions under paragraph 6, says:

In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.

The treaty itself clearly sets out that the principle of the agreement is that those exemptions only stay for 10 years. Would you like to comment on that?

Ms Osborne—It is normal for exemptions to have provisions like that. The aim of the GATS overall—before I get specifically to water—is to progressively liberalise over time. The idea is that you may exempt a huge amount of services now, but in the interests of liberalising the aim is to actually reduce the amount of those exemptions over time so that more services are included in the agreement, greater liberalisation can take place and a wider section of services in the economy can reap the benefits of the agreement.

Having said that, though, the fact that exemptions are to be renegotiated does not mean they are to be taken off the table. It does not mean they cannot be applied. Renegotiation of exemptions means as much putting them into the agreement as it does having them renegotiated again as exemptions. Even if they are not specified as exemptions, Australia again does not still have to open up its sectors. If it does not list them in its schedules as subject to liberalisation commitments then no liberalisation in those areas will take place.

Senator HARRIS—With the greatest of respect, Chair, the agreement itself lists water as one of the areas that the treaty will actually cover. When we read that section on terminations, it also has a section which refers to:

The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.

Very clearly, when a country does exempt a service at a particular time, they also have to put a termination date on that exemption.

Ms Osborne—Sure, but the structure of the GATS agreement is that even those areas not specifically exempted are not subject to the disciplines of the agreement unless they are specifically listed in the schedules. So, even if a certain area is not specifically exempted, it can still not have specific commitments apply to it if it is not listed in the schedules.

Senator HARRIS—Water is clearly listed in the schedules. That is the reason why the EC has made that request. I will leave that. So we have water, where the EC places a request on Australia and Australia then negotiates through that process. The EC then takes the issue to the

dispute panel. What are your thoughts in relation to there being absolutely no appeal on the decision of that dispute panel—it is binding?

Ms Osborne—Firstly, the EC cannot take Australia to the WTO panel unless Australia has made a commitment on water that it has breached under the agreement. In order for Australia to do that, it would first have to undertake commitments for water in the agreement, which I do not believe it has. I do not believe it has even put in its offer document. The first condition will be that Australia actively decide to list water and to commit to liberalise water. That has not happened yet, and the government has no intention of undertaking that.

Secondly, in order to be taken to the panel, it would have to breach that obligation, which would mean that it would have to undertake to provide foreign companies with a certain level of access and then discriminate against them or not provide them with that access. It would have to breach its own commitment. In doing so, it would then go to a dispute settlement panel in the WTO, if the parties chose to resolve it that way. In that case, the dispute settlement panel would look at Australia's obligations and the agreement to determine whether it had been breached and, if it had, Australia would be forced to bring that measure into conformity, which would mean it would have to comply with the initial commitments it set out and which it gave in the agreement itself.

The finding of the dispute settlement panel or the appellate body is final, but you can have a ruling only if you have undertaken a commitment that you have breached. If you have not undertaken any commitments in the first place, you cannot be taken to the WTO dispute settlement panel and you cannot in any way have that obligation enforced upon you. You have to undertake it in the first place and list it in your schedules before any country can force you to do it.

Senator HARRIS—What you are clearly saying to me a and telling the committee is that, in signing the agreement and knowing that that agreement covers 150 service areas and that water is part of the service areas that the treaty covers and that Australia has an exemption for water, bearing in mind the termination section that I have just read out to you, there is no way that the EC, having requested us to remove that, could take us before a dispute panel.

CHAIR—That is right.

Senator HARRIS—With the greatest of respect, Chair, in 2000 the Queensland government brought in the Queensland Water Act and established a corporate entity called SunWater, through which the water in Queensland is now distributed. I will take you back to the issue that is probably the main bone of contention in relation to this treaty, and that is paragraph 3 of article I that says, under C:

A service supplied in the exercise of government authority means any service which is supplied neither on a commercial basis nor in competition with one or more service providers.

Clearly, the Queensland government has set up a corporate entity to supply water. Therefore, if the EC has requested that we open up water, would they not have an argument to take us before the WTO?

CHAIR—They would not. The answer which Ms Osborne gave is correct.

Ms Osborne—If I could elaborate. Firstly, water services are an area that the agreement covers.

Senator HARRIS—That is correct.

Ms Osborne—That is what you are saying, and that is right, but countries are not obligated to do anything in regard to water. They are not obligated to open up any of their water sectors. They are not obligated to have any commitments whatsoever in regard to any of those services unless they list specific commitments in their schedules. Even though the agreement applies to those service areas, countries are only committed to things that they agree to be committed to, which they list in their schedules. That section of services is just one area that the agreement covers. There are financial services, banking services, legal services and so on. Water is one of those. There is a whole range of them, but you are not obligated to do anything under the agreement unless you commit to it in your schedules.

Areas can be exempted, but even if they are not you are still not committed to do anything unless you specifically say you will do things, like reduce barriers. Even if an area is not exempted, you still have no commitments under it if you do not list to undertake any. Even if an exemption does not apply to water, if Australia has not undertaken to commit to anything in the agreement, it is not committed to do anything under the agreement in regard to water, and I believe it has not agreed to do anything.

CHAIR—That is right. The fundamental thing is that the agreement exists, but it is only binding in terms of what you choose to opt into. When you opt into it, the circumstances about dispute settlement apply if you are in breach of your opting in commitment.

Senator RIDGEWAY—From the evidence given so far, I understood you to be saying that, where a trade agreement is entered into, it is binding upon the member states to the extent that they opt in. Going down to the next level, how do you deal with the regulation of multinational corporations where they have no fixed identifiable country of origin, particularly given the examples of Enron and WorldCom in the US? Given that even Corporations Law may well be subject to being criticised as impeding free trade, do you think there is a need for an international code of conduct to deal with multinational corporations and their possible rogue behaviour?

Ms Osborne—I will not comment on whether it is needed or not, but I will say that if there is to be any particular code of conduct it will fall outside the scope of the GATS agreement.

Senator RIDGEWAY—How does a country regulate the behaviour of a corporation then, if there is an agreement that is binding?

Ms Osborne—The GATS agreement is not about regulating the conduct of corporations; it is about trade in services and liberalising trade in services.

CHAIR—There is another element about competition policy and a range of other things—another sector of the negotiations—which is not directed to GATS, but it cuts across all industry, whether it is services, industrials or whatever. Thank you very much, Ms Osborne.

[3.51 p.m.]

KERR, Mr Michael, Legal Adviser, Australian Conservation Foundation

CHAIR—Welcome, Mr Kerr. You have lodged with us a written submission and we have it before us. Would you like to make an opening statement before we proceed to questions?

Mr Kerr—Thank you. I would like to thank the committee for the opportunity to make this submission today. You will have before you a copy of ACF's submission outlining its position with respect to the Australia-US free trade agreement. I wish to touch briefly on a few points raised in the submission and to point out to you that our submission does not make reference to the GATS; it only makes reference to the Australia-US free trade agreement. I would like to comment on the difficulty ACF had back in January 2003 when finalising our submission to find any meaningful information regarding the proposed content of the free trade agreement from Australian sources. It was only after locating a letter from US trade representative Robert Zoellick to Congress that we were able to draft a submission regarding the Australia-US free trade agreement. To rectify this problem we recommend that DFAT be advised to publish more meaningful information in a period of time which enables organisations such as ourselves to make a meaningful contribution to Senate processes such as this.

Senator HOGG—Did you go to DFAT at all?

Mr Kerr—No, and I did not ring DFAT. I went to the DFAT web site and found material. It was a discussion paper on the free trade agreement which was available in January. There was a paragraph outlining what the proposed content of the free trade agreement was.

Senator HOGG—You did not speak to any officer within DFAT itself?

Mr Kerr—No, I did not. Moving on to the proposed content of the FTA, ACF do not have a final position on whether the FTA would be good, bad or neither of those two. We are waiting on the final draft agreement before we comment specifically whether we are in favour of it or not. With that caveat in mind, I do wish to raise with you today several concerns we have in relation to the proposed free trade agreement. Our submission outlines six primary concerns that I will quickly touch on now and then I will go back to discuss three of those concerns in greater detail.

Our six primary concerns are: firstly, the potential for the free trade agreement to erode Australia's GMO food labelling laws and other technical regulations and standards; secondly, the potential for the FTA to erode Australia's quarantine laws; thirdly, the impact of proposed investment rules on Australian and US environmental laws; fourthly, the need for the Australian government to undertake a sustainability review of the proposed FTA; fifthly, the opportunity for the FTA to promote ecologically sustainable development and other positive environmental outcomes in Australia and the United States; and, sixthly, the public participation in trade and investment issues.

The first main issue I want to emphasise is our concern surrounding any proposed FTA investment rules. Although it is not yet entirely clear, it seems that both the US and Australian

governments are intent on establishing an investment regime similar to that espoused in chapter 11 of the North American Free Trade Agreement, commonly known as NAFTA. Chapter 11 of NAFTA has come under intense criticism, as you would be aware, for its unintended impact on environmental regulations and other environmental protection measures that have been legitimately enacted by governments party to NAFTA—namely Canada, Mexico and the United States.

For convenience, in the submission we have outlined the criticisms as falling under three main headings or themes and I will quickly go through them. Firstly, the investor provisions of chapter 11 have been used repeatedly to challenge the application of existing environmental laws or applications of existing laws that have negative economic impacts for the foreign investors. Secondly, the investor provisions of chapter 11 have given foreign private investors—for example, companies—unprecedented rights to challenge host governments on their compliance with the agreement. The unexpected aggressive use of these rights to challenge environmental policy measures has caught governments that are party to NAFTA off guard. Thirdly, the investor provisions of chapter 11 provide for a dispute resolution system that is devoid of the safeguards that exist in domestic courts, to ensure a proper balance between private rights and the public interest.

Taking into account the lessons that have been learnt from chapter 11 of NAFTA, ACF believes that negotiations of any investment regime in the Australia-US free trade agreement should be guided, at the very least, by the following three principles: firstly, the FTA must include safeguards which ensure that actions taken by governments to protect the environment are not, under any circumstances, challenged through the provisions of the FTA; secondly, foreign private investors should not be given the right to bring proceedings against governments for failure to comply with the FTA. Such rights should be reserved to the government parties—namely the US and Australian governments. Thirdly, any dispute settlement process must be transparent, publicly accessible and adequately reflect the judicial traditions of both the Australian and US legal systems. I am going to hand to the committee, if I could, a copy of a working paper entitled 'NAFTA's chapter 11 and the environment'. I think it would be a good resource for the committee to consider in determining how to avoid some of the shortfalls of chapter 11 of NAFTA.

The second main issue I wish to refer to is how remarkably underprepared the Australian government is currently to ensure that free trade agreements, including agreements that establish such trade, do not negatively impact on the environment—for example, unlike under US law, there is no legal requirement that the Commonwealth undertake a review of the environmental effects of free trade agreements. Furthermore, unlike under US law, there is no Australian law that sets out negotiating objectives relating to the environment for free trade agreements. To remedy this situation the Australian government should firstly introduce legislation that requires a review to be undertaken of the environmental effects of free trade agreements. This review should be undertaken through an environmental impact assessment statement under the provisions of the Environment Protection and Biodiversity Conservation Act and be signed off by the federal environment minister.

Australia should also introduce legislation that sets out negotiating objectives for free trade agreements relating to the environment. We have set out in our submission a range of objectives that should be included in such legislation. ACF realises that the introduction of such legislation

might not be possible before the signing of the Australia-US free trade agreement, but we would encourage the Australian government to undertake an environmental review in any event and set out clear environmental objectives in the meantime.

The third and last point I wish to address is the opportunity that this free trade agreement provides to promote ecologically sustainable development in both Australia and the United States. The ACF's submission points out the precedent that exists in other trade agreements, such as NAFTA, for environmental provisions to be included in free trade agreements. We have outlined a number of environmental issues that could be addressed by both countries in the FTA.

From an Australian perspective, the stand-out environmental issue that has to be addressed is land clearing. The 2001 *Australia state of the environment* report states that clearance of native vegetation remains the single most significant threat to biodiversity in Australia. The report estimates that during the year 2000 a staggering 564,800 hectares of native vegetation was cleared. In the year 2001, the following year, ACF estimates that in excess of 670,000 was cleared. Only four other nations in the world exceed this rate of clearing; this includes Brazil, Indonesia, Sudan and Zambia. Australia seems the odd one out amongst that lot.

The impact on Australia's biodiversity and lost agricultural production due to salinity, which is caused by land clearing, is now very well documented. Everyone in this country knows it is a problem. Even the federal government acknowledges it is a problem, so why don't we fix it? I note that the Australian government has recently stated that one of its primary objectives from the FTA is 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.

I would maintain that our land clearing practices directly violate Australia's international treaty obligations under the Convention on Biological Diversity. Therefore, if the federal government is to achieve its FTA objective, which is stated on the DFAT web site, it must meet its environmental objectives under the Convention on Biological Diversity. It must end land clearing—no ifs or buts about it. Thank you.

CHAIR—Thank you. In view of the shortness of time, I will put two things to you and put them together. I will make them as statements to invite a comment and I will try to be succinct about it. Firstly, no-one criticises the ACF for its interest in the environment. We would all be worried if it were not earnestly and actively interested in it and positively promoting environmental issues. In your submission you state that the primary objective of any free trade agreement between Australia and the United States should be ecologically sustainable development. Both Australia and the US are members of the WTO and any bilateral agreement between them takes place within the rules of the WTO. The WTO is about economic development and, in the process of seeking economic growth and development, having regard to environmental issues. In that context it is not possible, is it, to have the primary purpose of any such trade agreement to promote ESD? If that is your interest, why don't you seek an agreement between Australia and the United States on the environment that binds the Australian government on ESD, rather than piggyback on a trade negotiation whose primary objective under the rules—and you support the rules, I understand, from what you have said; an accountable rules based approach—is about trade and economic development, having regard to the environment?

Your submission also outlines what all trade and investment agreements must have, and you list a series of dot points. The last one states:

- Allow for the use of trade bans to enforce environmental agreements where appropriate.

In my political life I have given a lot of thought to trade bans. Trade bans impact on people in society least able to defend themselves typically and they pay the penalty for governments that take actions that offend the other parties that ban them for trade purposes. Isn't it a bit unfair that, if a government is derelict in observing its environmental obligations, people in society least able to defend themselves have to bear the impact of a trade ban? Isn't there some better way of doing it, if it is a matter of getting enforceability to agreements?

Mr Kerr—I will address the first point first. We see that there is a precedent for including environmental provisions in free trade agreements—namely, NAFTA. There is a complementary environmental—

CHAIR—It is alongside NAFTA, though, isn't it?

Mr Kerr—Yes, that is correct and it is referred to and by implication is part of NAFTA. There is a precedent and it would be unusual, given the concern of world citizens regarding the environmental impacts of trade agreements, not to include environmental provisions in such agreements.

CHAIR—As the primary purpose?

Mr Kerr—There can be a number of purposes. We are saying that ecologically sustainable development is development. We are not saying do not have development and do not have trade, but consider the ecological consequences in your trade and development laws and regulations.

On the point of WTO being purely a trade forum, that has been one of the criticisms that Australians and other global citizens have had of the WTO. We have been reassured time and time again that the WTO will not take precedence over other international treaties that Australia and other countries have signed. Australia has committed to the principle of ESD and we surely would not want to see this free trade agreement or the WTO trample on that undertaking that Australia has made. They would be some general comments to make. I am not saying the free trade agreement needs to be totally environmental. Please, what we are saying is consider the environment in the Australia-US free trade agreement. At least have some reference to it and make sure that it represents the interests of the triple bottom line—economic, social and environmental. On the second point with relation to trade bans, I did not quite get down exactly what you meant.

CHAIR—I will put it very briefly. Your point about land clearing is that we are in breach of the Convention on Biological Diversity, which we have embraced. I am all for people who agree to do things actually doing them. Under this configuration it seems to me if we did not do it then it would be open for the United States to impose a trade ban on us to make us do it in a trade agreement. The people that will hurt are not the government who have not abided by their commitment but the consumers, usually those with least opportunity to defend themselves. They will be the ones who are hurt. The imagery, as opposed to the ethics and equity of it, seems to be

all wrong. You should surely deal with the offending party and not impose a symbolic ban which looks like it is effective but actually hurts other people in society.

Mr Kerr—I suppose it will be determined by the extent of the ban or the penalty. I am not advocating a ban that would impact on Australian citizens. We do not know what the bans would look like. I suppose that would be the purpose of an environmental and social impact statement to assess what the free trade agreement would actually do. We would be able to work out what input of the ACF and others should be included; what the impacts might be on society in general.

Senator HOGG—It may well be that you would like to take these questions on notice, given the time of the day. Under the heading 'Investment and environmental laws' you state:

- Any dispute settlement process must be transparent, publicly accessible and adequately reflect the judicial traditions common to both Australia and the U.S.

Could you elaborate for us what you mean by 'transparent'? Transparent to whom? It may well be that it is transparent in the eyes of some groups in the community but in your view or in the view of another group it might not be. Give us some idea what you mean by 'transparent'. Secondly, what do you mean by 'publicly accessible'? That is a fairly broad concept. It may well be that in calling for a dispute settlement process, what is set up—whilst notionally it may be publicly accessible—because of the time and money involved in being part of the process, might not really be publicly accessible at all in that sense. If you can expand on that for us, that would be good indeed. In the interests of time, you might like to take those on notice. That will give my colleagues an opportunity to ask questions.

Mr Kerr—Yes.

Senator RIDGEWAY—Mr Kerr, given the concerns you have expressed in relation to the environment, what kinds of US investments do you think Australia would be exposed to in terms of the challenges to environmental laws that have happened as a result of NAFTA chapter 11 provisions?

Mr Kerr—There is one I was looking at before. There was a case involving a US corporation that took on the Canadian government back in 1997, regarding the petrol additive called MMT. This particular US corporation sued the Canadian government because it had a ban in place. It sued the Canadian government for $13 million and successfully won under chapter 11. The Canadian government had to remove that ban. Currently in Australia we have a similar ban on that petrol additive which, as I understand it, is highly toxic. For example, if you were to put a single drop of that substance in an Olympic swimming pool and were to drink some of the water, you would be either violently ill or die as a consequence.

Senator RIDGEWAY—Given the concerns that you have expressed about what Australia might be exposed to, and your view that the government needs to look seriously at introducing special legislation to deal with environmental standards, have you put those views to government and prepared some sort of submission that the committee might be privy to?

Mr Kerr—We have made a submission to DFAT, which is very similar to this submission, and it includes what environmental objectives could be included in that legislation.

Senator HARRIS—In your submission you use the quote from the *Australia State of the Environment 2001* report and then you go on to say that in 2001 ACF estimated that in excess of 670,000 hectares was cleared. What data did you rely on to arrive at that estimation?

Mr Kerr—It was a 2000 state of the environment report and our figures were for 2001, so that is the reason for the difference. Can I take that question on notice? It was not me that prepared that report, so could I provide you with some further information on that? But I can assure you that it was a very reliable source.

Senator HARRIS—Could you also, on notice, provide to the committee what actual on-the-ground verification ACF carried out to verify the data that was used. I would also like to know what areas were checked adjacent to those areas and what the stem counts per hectare were.

Mr Kerr—I detect from your line of questioning that you are questioning our assessment of Australia's land clearing. Is that correct?

Senator HARRIS—Yes. That is an issue that you have raised here. I am asking for clarification of the data.

Mr Kerr—I will do that. I just wish to point out that the federal government's own figures on this are extreme in their own right.

Senator HARRIS—No. You have quoted the 2000 figures and then you say: 'In 2001 ACF estimates ...' The question I am asking is: how did you arrive at that estimation, what data did you use, and what on-the-ground verification was carried out in relation to that data?

Mr Kerr—Including a count of stems per hectare?

Senator HARRIS—Yes. The only way that you can verify that an area has been cleared is to do a stem per hectare assessment on the adjacent areas, so that is the type of information that I am looking for.

Mr Kerr—Yes.

CHAIR—Thank you, Mr Kerr. I am afraid we have given you some homework to do, but we would appreciate it if you can manage it.

Senator HOGG—Can I ask one question, not related to the free trade agreement. Is there a reason why your organisation didn't put in a submission on GATS?

Mr Kerr—It was a resources issue. We did not have the time.

Senator HOGG—It is not a criticism, by the way. You made this statement. I am just interested in why.

Mr Kerr—It was a resources issue, and we are also hopeful that some of the recommendations that we make through this process will be carried over to the GATS process—for example, that special legislation. I would encourage you to go and have a look at the US-

style legislation. It is not just related to environment; it is related to how the US gauges the impacts of trade and sets out its objectives. It is all in legislation, and it is footnoted in our submission. I would encourage you to have a look at that so that we are not, in the future, at a disadvantage when we are dealing with other nations that might have legislative processes in place.

CHAIR—This is quite an important point that you have just made. Under the American constitutional structure, their congress is required to enact a piece of legislation to give the President power to negotiate, whereas under our constitutional structure the executive has the power to negotiate, so the executive is not required to get an act of parliament through, giving them a mandate. As a consequence, in the US system, congress outlines the negotiating mandate and the committees of congress contribute to that process. In our system the government consults with industry organisations and community groups and decides the mandate. In the American process, on a straight up and down vote at the end of the day, they decide to adopt the package or not. In our system, cabinet makes that decision, preferably—and I imagine usually—after it has consulted with industry groups and key players about it.

This opens us to the argument: is there sufficient scrutiny in our system compared to their system? One has to have regard immediately to the constitutional differences, which does not end the argument, in my view. It means: do we need to adapt our system to provide greater scrutiny, given the implications of agreements like this? Your point, at least from my point of view, goes to one of the issues that are quite central to what we have to deliberate on in this inquiry.

Mr Kerr—Thank you for that observation. In response, under the external affairs power I would be quite confident that the Commonwealth could pass similar style legislation to deal with international trade agreements and putting in place such legislation, but that is for the committee to consider.

CHAIR—It could do it if it chose, but it is not required by the Constitution to do it, whereas the Americans are.

Mr Kerr—That is the difference.

CHAIR—Thank you very much.

[4.18 p.m.]

O'ROURKE, Ms Anne, Assistant Secretary, Liberty Victoria

CHAIR—Welcome.

Ms O'Rourke—I have changed my opening statement, because I have been here all day listening to various questions. First of all, I will tell you what my other hats are. In conjunction with doing this for Liberty, I am also doing my master's thesis in law on investment provisions and expropriation in bilateral agreements. Also, my full-time paid work at Monash is working on international trade agreements and labour standards, principally to look at this perceived north/south divide, which is whether unionists or workers in southern countries support the idea of the inclusion of core labour standards.

In doing that, I went to Bangkok and surveyed unionists at Education International. There were about 1,000 of them there and it was equally split between southern countries and northern countries. I also did the same thing at the international metalworkers congress and, last year, went to the ILO and did all ICFTU affiliates. Next year I am doing all the textile workers worldwide, or their representatives, when they meet in Canada.

Our research—those first results—has indicated that there is no split between the views of unionists in the south and in the north. In fact, the answer to the question, 'Is the push for the inclusion of core labour standards a protectionist device?' was overwhelmingly 'No'. It was not perceived that way by southern unionists. Something like 92 per cent said 'No'. On the issue of who they wanted to look at breaches of core labour standards, they did not trust the WTO, but they wanted a body that was linked between the ILO and WTO. We asked every question that governments had put up, and I can provide you with the research. This argument—that there is an objection to the inclusion of core labour standards in developing countries—may be true of the governments and the business sector, but it is certainly not supported by workers or workers' representatives.

Senator HOGG—Does your survey bring out which countries are involved?

Ms O'Rourke—Yes. There have been a number of agreements that include both environmental standards and core labour standards. It is not just NAFTA; there is the US-Jordan agreement, the US-Chile agreement—which has not been signed yet—and the US-Singapore agreement. There have also been American acts stretching back to 1974, their general system of preferences, which include some form of core labour standards and how countries comply and then give beneficiary quotas based on their compliance.

I agree with what you were saying earlier. There are certainly protectionist elements in America—and steel was one example of that—but there is also a history of the inclusion of these things in trade agreements with the US. The Cambodia-US textile agreement, where there have been significant reports done by the US Embassy, the ILO and the Lawyers Committee for Human Rights in Canada, has shown an improvement in Cambodia. It is monitored by the ILO, technical assistance is given in the textile industry and something like 50 factories have signed

on to this system. The government there used to clamp down on strikes and that sort of thing. After the agreement, they had a strike which the government allowed to take place. Not only has it had an impact on working conditions, it spilled over into civil and political rights. It is how you do these things.

CHAIR—Before I was a senator, I was an Australian union official.

Ms O'Rourke—I am aware of that.

CHAIR—I have, privately, a deep commitment to workers' rights. I am also not deaf to the conversation about core labour standards that goes on in the United States and who advocates what and for what reason. It is always possible that a bad idea can be turned to a good purpose. That is not to say that a lot of the momentum for core labour standards does not have its feet in a bad idea about using this for trade protectionist purposes and not, indeed, to advance the interests of workers. The trick here is to see whether it can be used to advance the interests of workers, I think.

The other point I would make is that I get a bit offended with my American cousins when they start lecturing Australia about labour standards, because I would like to take a long afternoon and tell them what I think is wrong with their labour standards.

Ms O'Rourke—Certainly, their standards are bad.

CHAIR—The proliferation of labour standards in US trade agreements, which is a particular US focus, can be turned to a good purpose but I suspect is not there for that purpose initially. That means we have to be on our guard against it, because it will not be the unions or the industrial relations community that will decide whether these things are or are not the case; it will be the American government or—the main influence on it—a number of American companies that will decide whether it is or not. There are many routes to use to lift labour standards, but not all of them are perfect, and this one has some very obvious traps and pitfalls in it to be avoided.

The other thing I should say, in all frankness—going to the WTO—is that it is the only organisation in the UN constellation of organisations in the world that has a dispute settlement provision in it that is enforceable and that brings errant parties into compliance. Everywhere else, including at the Security Council, there is no such mechanism. It is there to enforce trade disputes. What has happened is that it has acted as a magnet for everyone else that has a dispute to see whether they can load their dispute into a trade context in order to take advantage of the only enforceable means of making things stick and, as a consequence, it has skewed the trade debate to some extent. I am not above skewing the trade debate for an altruistic purpose, but if it blocks the other fundamental purpose of the trade debate one has to be a bit careful about it.

Ms O'Rourke—I am going to disagree with you there.

CHAIR—The fundamental purpose of the trade debate is to provide greater welfare for communities in the world.

Ms O'Rourke—But what you are saying involves an assumption that trade is somehow disconnected from other factors.

CHAIR—No, it does not.

Ms O'Rourke—If you look at the WTO cases—

CHAIR—I should listen to you, because I can talk any time.

Ms O'Rourke—Yes, that's right, I only have about 30 minutes! If you look at some of the cases they are expanding. There have been cases on consumer protection, health and medicine, taxation, national security and human rights—that was the one where the Massachusetts local government brought in a law about Burma. Trade law is expanding and encroaching on many other areas of public policy. Even trade itself—to get items made and exported—depends on workers being there to do that. You just cannot hive areas off that way. I think it is a false distinction to say that only this belongs there and all this belongs over there.

One of the other points that, I think, Senator Hogg asked the previous speaker about was transparency issues. I have not seen the text of this, because it is not out, but I have read the text of the Singapore-Australia Free Trade Agreement, which is very close to NAFTA. The dispute panel systems that they use under NAFTA—and has been put into the inter-SAFTA, I think they are calling it—are ICSID and UNCITRAL. One is a United Nations body and one is a World Bank body. Those bodies were primarily set up to arbitrate private commercial matters. It is not mandatory to even issue notice that writs are being served or that a complaint is being put in. They do not have to publish anything unless there is approval by the parties. In one of those bodies—and I am not sure which—they do not even have to publish the decision.

In purely private commercial matters, that is quite appropriate, but what you have under these investment provisions—under the expropriation provisions—is this new one that came with NAFTA that a few people have mentioned, where private firms can directly sue host governments. Prior to NAFTA, they had to go through their own government before they could sue another government. That posed problems, in that politics could get in the way. That is a bad thing in some ways, but in other circumstances it might be that there is something else going on which makes that litigation politically unpalatable that governments would know about. There is both a plus and a minus to that, but at the moment they can sue host governments direct.

When a government is involved in litigation, a government is not like a private commercial entity. A government represents the people and usually what is at issue—and what has been at issue under the NAFTA cases—is not what you would see as traditional expropriation, where a government has taken either the tangible property or a substantive bit of the title of ownership of whatever that investment is, be it property, a firm or a financial investment. Traditionally, that property had to be rendered almost useless before compensation was given for expropriation, and that is the way it has been under international law. What is happening under NAFTA is that government regulations—and most of them to date have been environmental—are being taken to the dispute settlement process. As we stand at the moment, I think the cases against Canada are in excess of $1 billion. That is paid out of public money, money that could be used for health, education and in various other policy areas where it is needed.

One of the problems with NAFTA—and also SAFTA—is that there is no definition of any of these terms; expropriation is not defined anywhere and it is largely left up to the dispute panel. If you look at the make-up of the dispute panel itself there is a problem—as these cases mount—that it is not made up of tenured judges. Because it involves governments I think it, first of all, should be open; the public should be allowed access to the documents. If something is commercial-in-confidence, even in the court system now those documents are not made public and the court rules that they cannot be disclosed, but the rest of the hearing is open to the public and that is what the last speaker was referring to about the notion of open justice.

If it is two private actors we do not have a problem with it, but when litigation involves a government under these kind of provisions and involves government regulations pertaining to the environment, public health, to industrial laws, et cetera—public policy areas—then the public has a right to know what is being challenged, why it is being challenged, and what the firm wants in compensation because it is the public paying that compensation. That is another problem. On top of that, they are ad hoc tribunals, so the panellists can, in a previous life, have been a lobbyist for one of the companies. Also, you do not have the notion of precedent in these tribunals. Any previous decision is not binding on subsequent decisions, so you do not have that notion of certainty in tribunal decisions under ICSID or UNCITRAL.

Senator HOGG—You are saying they would not have to declare a conflict of interest either.

Ms O'Rourke—No.

CHAIR—They are nominated by their government.

Ms O'Rourke—No, one is nominated by the government, one is nominated by the parties. If the government is one party they nominate one panellist. The complainant, the person who is litigating against the government, nominates another panellist. If those two parties cannot agree on the third panellist the secretariat of ICSID, or UNCITRAL, appoints the third. That is the way it is done.

Senator HOGG—Conceivably you could have people who were there who had a conflict of interest.

Ms O'Rourke—Yes, you could. The conflict could be that a subsidiary of a company they previously lobbied for is on the panel.

Senator HOGG—Yes.

Ms O'Rourke—You do not have this situation in normal courts, in domestic courts. The other problem with it is that in some of these decisions under NAFTA—and which we pointed out in our submission—they had some discussions on the panels that judicial decisions could be a form of expropriation. That is just totally absurd. It is also absurd that an ad hoc tribunal, which does not follow the normal rules which apply to the courts, can discuss that at some point in the future they may have to—what amounts to—overturn a judicial decision, or they can find that judicial decision amounts to expropriation. That has never appeared anywhere in any jurisdiction. They have never allowed a judicial decision.

Senator JOHNSTON—But that obiter dictum went on to say that it had to be an unsustainable incongruous—and they are my words.

Ms O'Rourke—Yes, that is right—something like that.

Senator JOHNSTON—But I think your submission sets out that it really has to be an unjust and unsustainable decision.

Ms O'Rourke—But even if it is, an ad hoc tribunal that does not follow those normal rules—like being free of political influence, there is no life tenure, it is not open and accountable—should not ever, even in those circumstances, serve as an appellate jurisdiction to a constitutionally established court. That would basically overturn the whole legal system of most Western democratic countries.

Senator JOHNSTON—Yes, that is right.

CHAIR—But would it? Maybe I am a child of the Australian industrial relations system, but we provided in our Constitution a provision that set up an arbitration commission to settle industrial disputes. The people who sat on that body, and still sit on the latest version of it, do not need to be lawyers. In fact, the preference expressed at the time was that they would not be lawyers but people with a practical understanding of life in the workplace, able to arbitrate on disputes arising from the workplace.

In some respects that is an analogy to—I understand all your qualifications and I am putting a countercase—people expert in understanding trade law, trade activity, contract and conduct being able to arbitrate on disputes between a company and a government in these circumstances.

Ms O'Rourke—They have a limited jurisdiction for a start. They would not be able to overrule a decision of the High Court or the Federal Court.

CHAIR—If there are legal elements of the arbitration that offend the laws of the country, then they are appealable, but the judgments they express—

Ms O'Rourke—The WTO has an appellate jurisdiction, but ICSID and UNCITRAL do not.

CHAIR—We are not talking the about the WTO.

Ms O'Rourke—It is more open than these arbitrations.

CHAIR—Yes. We are talking about something the Americans, the Canadians and the Mexicans have agreed to. We are not talking about what the WTO has agreed to and Australia has not. I am not here to defend Australia; I am here to inquire into its conduct. But Australia has not committed itself to that type of structure.

Ms O'Rourke—Yes, it has, under the SAFTA. That is the disputes settlement system under SAFTA so it is likely to be with this.

CHAIR—Yes, you are quite right.

Senator JOHNSTON—What you are saying is that a judicial finding of fact between two companies and then a subsequent arbitration hearing later is going to perform its arbitration function without regard to any judicial findings from either of the countries of the two parties, if you like.

Ms O'Rourke—That is what the discussion, in the cases that have arisen under NAFTA, indicates. It may not happen, but the mere fact that they are discussing this idea suggests that there is something quite wrong with this process. When high courts and federal courts are established under a constitution with specific rules, they should not be able to be overturned by an ad hoc tribunal that does not work under those rules, that does not have the same sort of safeguards as conflict of interest, permanent tenure, free from outside influence.

In the decision in one case in the US of Loewen Group, they discussed that and did overturn it. There was a jury in the first instance, a jury decision which awarded damages against one party and the NAFTA tribunal did overturn that.

Senator JOHNSTON—That is not a terribly strong example, I do not think.

Ms O'Rourke—No, but there need to be clear rules about the interaction between a domestic judicial system and an external ad hoc tribunal. There have been no rules set down in any of these agreements today. Initially there did not have to be because it was international arbitration, but between two private parties. Where you need the rules is when you actually start making a government one of those parties. That was one of our major concerns about what is developing under this.

CHAIR—We may have to continue this discussion further at some other time because we do not want to be cramped by time and this is quite an important point. Can I just raise another matter with you because we are having an interesting discussion about this and it is useful, and I hope it is from your point of view, too.

Ms O'Rourke—Yes.

CHAIR—I need to go back and look at the Australia-Singapore free trade agreement to see what the full implications of its dispute settlement is. But if a dispute were to arise under that agreement, my understanding—subject to a further re-examination of the clause—is that it is a dispute between the two governments.

Ms O'Rourke—Under which one?

CHAIR—The SAFTA.

Ms O'Rourke—No.

CHAIR—Not a dispute between a private company and a government?

Ms O'Rourke—No, it has investor state provisions in there. If you look at the investment provisions and then go to the dispute settlement part, it does name those two bodies, as with the NAFTA.

CHAIR—So an aggrieved company in one country who asserts a grievance can take action against a government of the other country?

Ms O'Rourke—Yes.

Senator JOHNSTON—And that is the NAFTA model.

Ms O'Rourke—Yes.

CHAIR—That is the NAFTA model. It is not the WTO model, which is what I am more schooled in.

Ms O'Rourke—That is quite different, yes.

CHAIR—In the WTO model, the governments wage it out.

Ms O'Rourke—Yes. In NAFTA there are, I think, four dispute settlement processes. There is the investor to state one, which is that one that allows private companies to sue host governments, and that goes to the ICSID and UNCITRAL bodies. There is another dispute panel process that covers intellectual property disputes. There is another mechanism that allows state to state disputes. There is one other one, and I cannot remember what it covers now. It might be countervailing measures or something like that. It covers other commercial matters.

Senator JOHNSTON—Probably economic zones.

Ms O'Rourke—I cannot remember. They have not caused anywhere near the same degree of controversy, so I have not checked on them as much.

CHAIR—Does it go to deciding what the countervailing measures will be by way of penalty in the event of a breach?

Ms O'Rourke—It may be that. It is another controversial issue, but not controversial in the same sense that the chapter 11 provisions are.

CHAIR—We have broken down your presentation to have a discussion. I am sorry. You are going to have a few questions at some point. Do you want to complete your presentation and we will hold our peace, and then come to the questions, or do you prefer this system?

Senator HOGG—You can put in a supplementary submission if you desire—it does not have to be lengthy—if that helps you out.

Ms O'Rourke—There are a couple of other things that have come up during the day.

CHAIR—Please go to them.

Ms O'Rourke—This one does not actually go to our submission. It is just a point of clarification. The speaker from International Trade Strategies mentioned foreign students

generating income for universities. Working in a university, I am aware of another development there. You get foreign students who are capable of paying, particularly at a master's level. We have turned a number of those students away, and I know that is not the case in other places. Yes, it does generate income, but it also generates a bit of dumbing down in the standard if the most important thing is just to take money from overseas students. There are different aspects when you are talking about services. It is also about quality, not just about income.

CHAIR—It is a competitive market that universities are in—an Australian university competing with American, European and other universities for this pool of students. At the end of the day, if you do not get a quality degree out of it, if you get a sort of joke degree, then your marketability is far less, so that the countries that offer quality win the race. So goes the argument. But the controversy in Australia is that it has led to flattery in marking, which does dumb down the standard of the degree, and if that is the case then we have shot ourselves in the head for the future of this market.

Ms O'Rourke—Certainly, anecdotal evidence tends to suggest that that has been going on, so I think when you are looking at things like that, the quality is just as important as the finance. The other thing I wanted to say, in answer to something you raised before, was that there are the OECD guidelines for multinational enterprises. That has a national contact point in all OECD countries. There is the global compact that is establishing a code of conduct for multinational enterprises. There are a couple of others. That is going on, but none of them are binding. They are just guidance.

CHAIR—And the OECD one only applies to the rich countries.

Ms O'Rourke—Yes, that is right. Our submission does not address GATS. I assisted the Greens with their GATS one, so I did deal with the GATS issue but under another hat. Article I:3(b) and (c) came up before. There have been no cases on that, but if you read some of the WTO cases, and in particular the European bananas case, they do discuss how that will be interpreted. That gives you some idea of how dispute panels are going to look at that so-called public service protection or exclusion provision under GATS, and it does not look good for public services if they are included, if they are listed. There are also a number of interpreted notes by the Council for Trade in Services that give an indication of how that will be interpreted as well, so there are some details on it. I do not think there was anything else I wanted to say in opening.

Senator JOHNSTON—In your very good submission, may I say, you have made a number of references to the Jordan agreement. I have not read that agreement. Firstly, broadly, how does it differ from NAFTA, SAFTA, et cetera? Was there a different US mind-set in dealing with Jordan?

Ms O'Rourke—Yes.

Senator JOHNSTON—And do the differences extend beyond ILO and environment?

Ms O'Rourke—In terms of the investment provisions and those sorts of things, they are largely the same. With NAFTA, the labour provisions and the environmental provisions are side agreements, afterthoughts, and they were put in there largely because the American elections

were coming up. Clinton was having a lot of trouble with his own constituency and with the labour and environmental movements. To get their support, he promised that he would ensure that there were some labour and environmental provisions in it. Those provisions turned out to be these supplemental side agreements. In practice, they have proved totally useless. While investors are compensated in the event of a breach, what has happened, certainly under the workers' rights one, is that, even in a case where they found that the worker was unfairly dismissed or treated badly, it has been mostly a smack on the fingers—not even compensation.

After that, because that proved to be fairly useless, when Clinton went to have fast-track authority renewed, the unions, environmentalists, church groups and various others, lobbied effectively and had a public campaign that meant that even Clinton's own party would not approve a renewal of fast-track authority for him. Basically, the biggest issues were labour issues. Clinton, I think in an attempt to try and overcome that, negotiated the Jordan agreement. Where the Jordan agreement is different to NAFTA is that the environmental and labour provisions ended up being in the main text. The enforcement mechanisms were better but not on parity with the investor rights provisions or the rights of intellectual property owners, or that kind of thing. But it was certainly a step up and so they were seen as kind of model labour provisions by the union movement.

After that, when Bush got in, he went for TPA. You raised a few times before that they are a conservative government, so how come they are doing this? They are not doing it out of any love for labour.

CHAIR—I know why they are doing it. They are doing it because the only way to get the majority of the TPA—

Ms O'Rourke—Because they want the TPA.

CHAIR—is to get Democrats on side.

Ms O'Rourke—Yes, that is right, and that is why they put it in. I have seen the labour and environmental provisions of the Chile-Singapore agreement. They are likely to want the same provisions in the Australia-US agreement, because they are in accordance with the requirements of the Trade Promotion Authority. They are pretty close to the Jordan agreement, but if you go through the language it is not mandatory. I think there is only one provision that is—

CHAIR—Best endeavours.

Ms O'Rourke—Yes.

Senator JOHNSTON—SAFTA is best endeavours, is it?

Ms O'Rourke—SAFTA does not have any environmental or labour provisions.

CHAIR—SAFTA is the Australian one, not Singapore.

Ms O'Rourke—Yes, the US-Singapore one.

Senator JOHNSTON—Sorry, US-Singapore, yes.

Ms O'Rourke—The language is like 'shall strive', 'may' and this sort of thing. There is only one labour provision—and I think it is the same with the environment—that you can take to a dispute panel. They are certainly quite comprehensive in terms of the NAFTA ones, but not the other provisions, such as investment, intellectual property—and they do want some changes to the dispute settlement process. The dispute settlement process under the TPA is much better under the NAFTA, in that they are saying that they must have amicus briefs and that the process has to be open. We are happier with what they are going for in terms of dispute settlement under the TPA, but when you read the whole TPA act part of the problem is that America is not happy with some of the decisions that have gone against it in the WTO.

The TPA applies not just to bilaterals. There are sections on what the US has to pursue under WTO negotiations. I think the dispute settlement provisions are better under the TPA. It is the same with the labour provisions. As to why America is doing it, they have their own particular agenda.

CHAIR—We seem to have been talking about what the US has been asking for. I wanted to get your comments on the process. The process in the United States is vastly more transparent than the process in Australia.

Ms O'Rourke—Yes.

CHAIR—If you have put the hard yards in and been here all day, you will have heard us on this subject before.

Ms O'Rourke—Yes.

CHAIR—I will not rehearse it now, but do you have any comment about our process, given the access, scrutiny and transparency of the American process?

Ms O'Rourke—I think the process here is shocking. In terms of democratic oversight, we do not have one. There is not much about the American political system I like—it is problematic in many ways—but occasionally they have these checks and balances that are little gems and that process is one. We have a situation here where, if you want to put in submissions to JSCOT on SAFTA, you have to get them in by tomorrow. Yet we had the Minister for Trade put out a press release, I think on 13 February, saying the agreement had been signed.

CHAIR—Yes, I know.

Ms O'Rourke—That is absurd, particularly when you have this committee looking at both GATS and AUSTFA, so it cannot even take into account recommendations or what your report says from this examination. In some sense, it makes the process farcical. For those of us who are interested—watch these sorts of things and are concerned about them—it says in a way, 'Well, we don't care what you say. We're going to do it anyway.' I believe there needs to be a better process, where there is some parliamentary oversight of these agreements and not just implementing legislation as a result of the agreements. I think that our system is pretty much a joke in this respect, particularly when you have a system where its dispute panel has binding

decisions on a country and particularly when a federal government can sign onto an agreement that affects state and local governments and can make binding decisions against them.

Senator HOGG—As a matter of interest, has your organisation put in a submission on SAFTA to the Joint Standing Committee on Treaties?

Ms O'Rourke—Not yet. I assisted the Greens with theirs, so there is one going in raising some of this stuff and, particularly, talking about the process.

Senator HOGG—But your organisation, as such, has not?

Ms O'Rourke—At the moment, we are putting in about six different submissions, one on some customs legislation. We have two going into the state government. Basically what we do is watch legislation and comment on it, both federal and state. It is also resources; who is going to do which one. We have not on SAFTA, but we intend to maintain a watch over the provisions of these agreements.

CHAIR—Can I come back to the thread of my question about transparency? You have given us your views—and I do not disagree with them—on our system; about what is wrong with it. What I would be interested in knowing is what changes, consistent with our constitutional structure, could be made which would give greater transparency?

Ms O'Rourke—I think the most meaningful change would require a change to the Constitution. It is in these sorts of matters that there needs to be something in the Constitution that recognises the need for parliamentary oversight and there should be some split, as occurs in America, where the president, I think, has the right to negotiate foreign agreements with other countries, but where the Senate retains rights over all matters in commerce, et cetera.

CHAIR—He has the right to negotiate if the congress confers the power on him to do it and then within the limits of how they confer that power. If he confines himself to those limits and brings back a package, they have to vote for it to become binding.

Ms O'Rourke—No, that is not quite right. Under their constitution, the president does have the power to negotiate with foreign countries. Congress has rights over all matters as to commerce. What generally happens and why they started the fast-track process is that, because of the way American politics works, whenever they negotiated a treaty there was this ongoing cumbersome process where the president or the trade representative would go to another country, negotiate the treaty, come back to congress and different ones would say, 'I want that changed,' because of lobbying and various other things. What they did—and it first came in in the Trade Act of 1974—was they brought in this expedited process, which is as you described it.

CHAIR—It is not a constitutional requirement; it is an adoption of the system.

Ms O'Rourke—The splitting of power is a constitutional requirement, but to overcome the long time that it took to negotiate because of that constitutional requirement the fast-track process was put in place under trade acts. When it is put in place, it only has a life of six years and must be renewed.

CHAIR—But the analogy to the Australian system is: off goes the executive and does a deal and, as a consequence of having to honour that deal, there is legislation and then the parliament gets to have a say, whether it supports the legislation or not. There is, to some extent, an analogy to what used to be the American power in congress over commercial activity.

Ms O'Rourke—But it is only if you need legislation.

CHAIR—It is only if you need legislation, and a lot of things can be done by regulation and a lot of things can be done by influence exerted on the states et cetera. I am not talking as if we have a massive chunk of power, because all of these things inevitably involve some degree of legislative change. It is assumed, if the executive has committed the nation, that the parliament will toe the line. It would seem to me to be a very courageous—in the Sir Humphrey use of that word—executive to make that assumption, on some controversial issues of the nature we are talking about, of the parliament. What is entertaining my mind is whether there is some sort of ideal way of bringing the parliament and the executive together at the point where the real decision is made. I take your point that there are some gems in the American system but I also take your more general point about the system overall. I think we have a far better one, and because it is made in America it does not necessarily mean it is the best. Often things made in Australia are a damn sight better because of our ability to be innovative and so forth.

Given our constitutional structure, I think one of the things that we need as a committee to give some thought to is whether there is some way of creating a process which means that the parliament is not antagonistic to the executive, and the executive is not antagonistic to the parliament when some of these things with wide-ranging implications are done. What they might be—if it is capable of being done in our system—are the things we will have to talk about in this report. If you have any ideas, Ms O'Rourke, I would be delighted to hear them.

Ms O'Rourke—I will bring this up at the next Liberty meeting and get something to you. We have been talking about this but have never seriously put anything on paper. But it is of concern, so I will follow that up. One of the problems I can see is anything substantive will have to get government agreement. Unfortunately—and no disrespect meant—whichever government is in, I do not think they would agree to it. But I agree with what you are saying: in the way the world operates now, more and more of these sorts of things are going to come up.

CHAIR—Once governments have executive power, they like to exercise it.

Ms O'Rourke—That is right.

CHAIR—That is the basic truth of it. But what stands there like a pikestaff before your eyes is, notwithstanding that natural predilection, they still have to legislate. Given the structure of our two houses et cetera, it is unlikely foreseeably that the government will have control of both houses, so there is always a degree of iterative debate about what is acceptable and what is not, and uncertainty as to outcome. While that is the case, then the executive authority is to some extent limited—I am not saying by a hell of a lot, but there is a limitation there. Once a government at international level has made a commitment to another government, that is a very serious issue indeed. If it were to be dishonoured by virtue of the government not commanding its own legislature, then the ability to negotiate again at international level with credibility and the standing of that government around the world is diminished as well.

If that happened in the case of Australia, that would be a very serious thing for a smaller middle power like us. Maybe it would not trouble a superpower but it sure as hell would trouble us in terms of how we are perceived by other governments in dealing with us. There is an issue here we have to tease our way carefully through. I do not come with preset conclusions but I am interested in any informed comment on the subject.

Ms O'Rourke—I will take it back and get back to you on it. I agree there is a problem there. How do you make it better?

CHAIR—Just to cut across you, the other point relates to this constitutional problem where, under the foreign affairs power, you can commit the states or you can clothe the Commonwealth government with power to override the states' constitutional rights on service delivery issues, health, education, policing, water—all those things we have been talking about. That does turn the notion of our federation on its head. Personally I do not have a high opinion of the forefathers. They did some great things but the Australian Constitution is a contract between states to provide a central government. It is not elevated by any great inspiration beyond that, in my view; I might be a cynic. Nonetheless, that is the structure we have and the structure we abide by and that is turned on its head in these circumstances.

Ms O'Rourke—I agree entirely. Any international agreements that impact on state and local governments to the point where they may have to pay compensation or there are sanctions or anything like that should involve them from the beginning. But you reminded me of something with your comments a minute ago. One of the reasons the Republican administration gave way on labour standards and the environment was the business roundtable in America was becoming so concerned about their inability to actually negotiate these agreements.

CHAIR—But they had to give way.

Ms O'Rourke—Yes, that is right.

CHAIR—One of the reasons why President Bush said on the weekend to our Prime Minister that we have got to do this before Christmas is that next year is the presidential election year and the composition of the Congress may change after that, but right now its present composition probably would tick any quite soft agreement on labour standards.

Ms O'Rourke—I met with the US deputy under-secretary of labor when he was out here the other week.

CHAIR—So did I.

Ms O'Rourke—I was actually surprised; it sounded to me like there was no problem with the fact that America wanted these provisions. But I also saw the article in yesterday's *Australian* that indicated there might be a problem. America has that view that it does not have to sign on to ILO conventions because its constitution is 'the' constitution and there is nothing above that and rights are under that. But Australia has ratified the ILO convention on collective bargaining, yet over the last 10 or 15 years we have restructured more towards enterprise bargaining. There is a contradiction between what is happening internally and the fact that we have ratified this ILO convention.

At the same time, you have the US coming in saying, 'You have to comply with the core labour standards.' I am not sure, even in relation to that, how this will all play out. I cannot really see the US taking us on over labour standards. I think what the US wants is for them to be in so that they are complying with TPA. I do not think this is a labour of love here at all.

CHAIR—I think that is right. I do not have any further questions.

Senator HARRIS—Ms O'Rourke, you raise two issues under issue 6 in your submission relating to intellectual property rights and human rights. In particular, you focus towards Indigenous medicines. You say:

Some protection is required in the area of traditional knowledge before any company is allowed to patent such products prior consent should be obtained from Aboriginal communities or representative Aboriginal community councils.

My personal view is that they ought not to be able to patent them, full stop. Is there any particular reason why you have not made that assertion? Is there a legal reason why not?

Ms O'Rourke—No, other than if we sign on to this—and we have already signed on to the TRIPS agreement under the WTO, which is the agreement relating to intellectual property and patents and copyright—we are going to be bound by it. Having said that, there is emerging this huge problem, particularly I think with US pharmaceuticals going into places like India and others and doing this. What made me put that in was that I heard a report last year where this was already occurring in Queensland, almost like a repeat of that old Nestle campaign years ago, where someone was going in with a white coat and asking about this, that and the other without actually saying where they were from. We do not want to see a repeat of the situation that has gone on in India where a community which had been using a particular knowledge and sharing it with the rest of the community suddenly finds a US pharmaceutical patenting it and they are not allowed to use it any more. That is absurd. It is also more than that; it is also theft under those circumstances.

Senator HARRIS—I concur with that. I would even go further because I am aware only recently of a person interviewing an elder in North Queensland, signing a confidentiality consent to the effect that they would do nothing until they came back to that person, who sat down and was provided with all the information and then, to the astonishment of the elder, the person tore the document up in front of them and walked out. There is a real concern in relation to this first issue you are raising.

The second issue you raised was in relation to the patenting of genetically modified plants. You raised the issue of genetic transfer into adjacent properties. For the committee, could you just bring that into relativity in relation to the trade agreement as well.

Ms O'Rourke—Because the trade agreement has both an intellectual property rights section and because America want to get us to export genetically modified food here, they actually have a problem with this because EU and other countries will not accept it. They have to put it somewhere and we already have had genetically modified corn come in as animal food stock. That corn was banned in America by the APA as not fit for human consumption, although, using it for animal stock, I would have thought it would get into the food chain anyway.

One of the problems that occurred over there is that you cannot stop this genetically modified wheat going to the non-genetically modified wheat in the next paddock. What happens is that companies like Monsanto go around picking a bit of the wheat and then testing to see whether their modified gene is in it. They have found some of their modified gene in the non-GM crop. They are suing farmers, saying that farmers are in breach with the intellectual property rights. In the case that has caused the biggest fuss in Canada the farmer was actually found guilty and had to pay Monsanto. It is now on appeal.

There is a problem in how you deal with this. How do you protect the rights of farmers who do not wish to engage in growing genetically modified food? With this kind of auditing of farms, there is a grey area emerging where some of these agribusinesses, like Monsanto, have more rights against farmers. It is emerging as a problem now and I think it will become increasingly a problem.

I was told not so long ago by some farmers here that they do not want to grow this crop but because of the drought and various other things they are being offered money to grow it. Their financial situation is such that they have no other choice. They got in touch with Liberty—and we are not a group that farmers ever come to, but someone rang us up to ask what they could do about it. This is an emerging issue as well. In the next 10 years these things will have to be sorted out; otherwise we are going to have court cases and litigation. I raised it to point out an emerging problem rather than having any solution to it at the moment.

CHAIR—I think that concludes our questioning. Thank you, Ms O'Rourke. It may be that we will need to talk to you further if you are available.

Ms O'Rourke—I will bring that up with Liberty about parliamentary power and more accountability and get back to you.

CHAIR—If you have any views on that subject, we would be delighted to hear them.

Ms O'Rourke—Okay.

CHAIR—That concludes our hearing for today. We are now adjourned until nine o'clock tomorrow morning.

Committee adjourned at 5.17 p.m.