



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

SELECT COMMITTEE ON THE FREE TRADE AGREEMENT  
BETWEEN AUSTRALIA AND THE UNITED STATES OF  
AMERICA

**Reference: Free Trade Agreement between Australia and the USA**

MONDAY, 10 MAY 2004

CANBERRA

BY AUTHORITY OF THE SENATE

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**SENATE**  
**SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND**  
**THE UNITED STATES OF AMERICA**

**Monday, 10 May 2004**

**Members:** Senators Cook (*Chair*), Brandis (*Deputy Chair*), Boswell, Conroy, Ferris, Harris, O'Brien and Ridgeway

**Senators in attendance:** Senators Boswell, Brandis, Conroy, Cook, Ferris, O'Brien and Ridgeway

**Terms of reference for the inquiry:**

To inquire into and report on:

1. The Free Trade Agreement between Australia and the United States of America to ensure it is in Australia's national interest; and
2. The impacts of the agreement on Australia's economic, trade, investment and social environment policies, including, but not limited to, agriculture, health, education and the media.

**WITNESSES**

<b>BROWN, Mr Nic, Assistant Secretary, Trade Analysis Branch, Department of Foreign Affairs and Trade .....</b>	<b>1</b>
<b>CHESTER, Mr Doug, Deputy Secretary, Department of Foreign Affairs and Trade .....</b>	<b>1</b>
<b>CORDINA, Mr Simon, Acting General Manager, Intellectual Property Branch, Department of Communications, Information Technology and the Arts.....</b>	<b>1</b>
<b>DEADY, Mr Stephen, Chief Negotiator, Department of Foreign Affairs and Trade.....</b>	<b>1</b>
<b>GOSPER, Mr Bruce, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade .....</b>	<b>1</b>
<b>LEGG, Mr Chris, General Manager, Foreign Investment Policy Division, Department of the Treasury .....</b>	<b>1</b>
<b>LOPERT, Dr Ruth, Medical Adviser, Pharmaceutical Benefits Branch, Department of Health and Ageing.....</b>	<b>1</b>
<b>PARKINSON, Dr Martin, Executive Director, Macroeconomic Group, Department of the Treasury .....</b>	<b>1</b>
<b>SMITH, Ms Carolyn Margaret, Assistant Secretary, Targeted Prevention Programs, Department of Health and Ageing .....</b>	<b>1</b>
<b>SPARKES, Mr Phil, Deputy Chief Negotiator, Department of Foreign Affairs and Trade.....</b>	<b>1</b>

**Committee met at 4.26 p.m.**

**BROWN, Mr Nic, Assistant Secretary, Trade Analysis Branch, Department of Foreign Affairs and Trade**

**CHESTER, Mr Doug, Deputy Secretary, Department of Foreign Affairs and Trade**

**DEADY, Mr Stephen, Chief Negotiator, Department of Foreign Affairs and Trade**

**GOSPER, Mr Bruce, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade**

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**SMITH, Ms Carolyn Margaret, Assistant Secretary, Targeted Prevention Programs, Department of Health and Ageing**

**CORDINA, Mr Simon, Acting General Manager, Intellectual Property Branch, Department of Communications, Information Technology and the Arts**

**CHAIR**—I declare open this hearing of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America. Today's hearing is the committee's third public hearing and the first with the FTA negotiating team and DFAT officials—and, I acknowledge, officials from other departments. The committee expect to continue their examination of trade officials at a future occasion—that is, we do not imagine that, in the three hours allocated, we will exhaust our questions. Today's hearing is open to the public. This could change if the committee decide to take any evidence in private.

Witnesses are reminded that 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. Witnesses will be invited to make a brief opening statement to the committee before the committee embarks on its questions. If I may, though, I have a couple of general questions I would like to start with.

I understand and appreciate that this has been a very work intensive, arduous negotiation. While we have an obligation to the Senate, and through the Senate to the community, to conduct a scrutiny and make a report about these negotiations, I think all members of this committee would be of one mind in acknowledging the effort and diligence with which departmental officials have conducted the negotiations—and, for me at least, I want to put on the record that

acknowledgment up front. That will not deter us in questioning you, but it is fair and appropriate that we do acknowledge the work that you have done.

In USTR Zoellick's letter to the Senate and the House of Representatives, announcing that these negotiations would go on—I do not have a date for it but it is his official letter, as required—he effectively sets out what he will be seeking to negotiate with Australia. It is quite an exhaustive letter and has a long section headed 'Our specific objectives for negotiations with Australia are as follows' and then lists a series of subject headings. There is no reference at all to the Pharmaceutical Benefits Scheme. On a plain reading of this letter, it would seem that it was not what Mr Zoellick advised the American congress that he was going to negotiate on. Why then have we provisions on the Pharmaceutical Benefits Scheme in the agreement?

**Mr Deady**—I would have to have another look at the letter. I am sure what you have said is perhaps accurate—that is, there is no specific mention of the PBS—but I really would need to look again at the letter. Certainly, right from the very first round of negotiations held here in Canberra in March after the 90-day period that is required under the Trade Promotion Authority, the United States came to the meeting with a range of questions on the operation of the Pharmaceutical Benefits Scheme. That was very much an information exchange at that point in time. Notwithstanding what may or may not have been precisely identified in that letter, this was an issue that the Americans took up in the negotiations and it certainly became a priority objective for them to achieve some outcome in relation to pharmaceuticals in the negotiations.

**CHAIR**—So at some point during the negotiations, the Americans—not the Australians—introduced into these discussions issues touching on the Pharmaceutical Benefits Scheme and sought an outcome to those issues? Is that correct?

**Mr Deady**—That was certainly the case—right from the first round of negotiations. That was an issue that was taken up in the first round of negotiations in Canberra. It was very much at that point an information exchange. They asked us a number of questions on the operation of the PBS. They had a number of questions, which we were very well able to answer to clarify, on just what the PBS did and did not do. That was the first kick-off.

**CHAIR**—In terms of the structure of these negotiations—to me at least this is an important consideration—the Americans have a formalised structure for how they must negotiate, emanating from the Trade Promotion Authority. There is a requirement for the minister—in this case, the USTR—to notify congress as to what they are negotiating on. I note that the Hon. Mark Vaile put out a statement saying what Australia was going to negotiate on.

**Mr Deady**—He did, yes.

**CHAIR**—The Pharmaceutical Benefits Scheme is a major issue—at least in my mind—for this negotiation. If there is some light you can shed on how it does not rate a mention specifically in the letter to the congress from the American side, I would appreciate any advice.

Concerning another question I have, my recollection is that at Crawford, Texas, in the first half of last year, the Prime Minister and the President announced a deadline for these negotiations—that they would complete these negotiations by the end of the calendar year 2003. In the run to the line, that became a spill-over into January 2004, but there was always a clear

deadline that was being aimed at to conclude these negotiations. Were you consulted about that deadline, Mr Deady?

**Mr Deady**—No, I was not consulted on the deadline. I think it was described at the time more as a target for the negotiations. At the same discussions, I think comments made by the Prime Minister and certainly by Mr Vaile also identified that that was always an ambitious timeline. I think we talked about that. At the end of the day, whilst that was the target and both governments were committed to working towards that, the critical thing was to achieve a good outcome—a big outcome—from the negotiations. That was the context in which those comments were made and that is certainly what carried forward in the negotiations. That is certainly the message that we took from that discussion in Crawford, Texas, and I really think that that was the message that Ralph Ives and the US team also took from those discussions. It was giving us a clear mandate to get on and work as well and quickly as we could to achieve that target.

**CHAIR**—It was a target and not a deadline?

**Mr Deady**—In my view, it was always a target, yes.

**CHAIR**—In balancing the outcome, what was more significant was not the target but the content of the package. Is that what you are saying?

**Mr Deady**—Yes.

**CHAIR**—Mr Andy Stoler was before us last Wednesday. I think we can agree that he is an expert on trade negotiation. He says that this is an agreement completed in a rush. I do not have the *Hansard* from that night, but my recollection is that this was done very quickly. That is true, isn't it?

**Mr Deady**—Negotiations were completed in under 12 months. They were rapid negotiations. I do not think they were 'rushed' but they were certainly done in a very timely way. The Singapore negotiations, as you know, took us two years. The negotiations with the United States were completed in under 12 months. It was a significant effort and exercise to achieve it in that time frame.

**CHAIR**—I understand from your answer that, if the package was not there in an acceptable form, the target for completion was not as significant and that you could go over the target for completion.

**Mr Deady**—Yes.

**CHAIR**—When the target was set, did DFAT offer any advice to the minister about whether it was desirable to set such a target?

**Mr Deady**—No, we did not provide any particular comment or briefing on that to the minister that I can recall. We, as negotiators, certainly heard the outcome of that discussion in Crawford and took that as an indication to continue to work as quickly as we could. I think we were always working with a view to concluding these negotiations as quickly as possible. Going back to the start of the first round of discussions and some of the comments that we were making at the

time, we made the point that we had a bit of a head start in negotiating with the United States for a number of reasons, including the fact that both sides knew each other very well and that we certainly did not need to spend nearly as much time talking about the broad framework issues—the structure of the agreements, how the negotiations would proceed—as would normally be the case. So we did get a bit of a kick-start and we got on and moved that process as rapidly as we could.

**CHAIR**—There is a perception—I do not put it higher than that, but it is in my judgment a strong perception—that in negotiations with the United States there is far less flexibility on the US side if you are negotiating in a presidential election year than there is at any other time. Would you agree with that, Mr Deady?

**Mr Deady**—I could not really comment. I am not sure precisely what you mean by that. The administration, because of the commitment of the President, worked very much to ensure that there were adequate resources. The team that was negotiating on the other side of the table from us was a very strong one put together by USTR with other agencies and had the full commitment of the administration to get on and do it. Again, the commitment from the level of the President to move these negotiations and to give them priority reflects the actuality of our processes last year.

**CHAIR**—Yes, but there are two processes. There is the executive process that you have just referred to and there is the congressional process in American law. It now requires the congress to endorse the outcome. As I understand it, the deadline has been announced. We are talking about the possibility of doing that in June in an election year at the US congressional end, when congress itself is going to be turned out to face an election.

**Mr Deady**—That is right. As you know, the agreement is to be signed next week in Washington. That then allows the next stage of Trade Promotion Authority process—that is, hopefully, the passage of the agreement through the US Congress. Yes, we have heard some talk about their trying to do that at the end of June or early in July. I think it would have to be done in that sort of time frame if it were to be considered by the congress in an election year. As you say, they get up in August. They come back for a little while after that but then they are off for the full campaign.

**CHAIR**—When is it going to be signed?

**Mr Deady**—It is to be signed next Tuesday, 18 May.

**Senator CONROY**—Is Minister Vaile going to be there?

**Mr Deady**—Yes, the minister is going to Washington for that.

**CHAIR**—I want to be careful about this. The signing of that agreement does not bring the agreement into force, does it?

**Mr Deady**—No, it does not.

**CHAIR**—What brings the agreement into force is both parliaments—if I can use that term with respect to the Americans—carrying the necessary implementing legislation.

**Mr Deady**—That is correct.

**CHAIR**—Completely, without amendment.

**Mr Deady**—Completely. Then there is an exchange of letters which establishes it, and I think the agreement provides for 60 days before that comes into force.

**CHAIR**—You would be aware that speculation about the Doha Round being bogged down in part relates to the fact that there is a US presidential election this year and that we are more unlikely to get executive decisions out of the US the closer to that election we go.

**Mr Deady**—It is an election year. I confess that I am not following the Doha negotiations as closely as I would have in the past, so I am not really the right one to comment on that. I think there is a strong effort to move that process on, but I defer to Mr Gosper to pick up any particular aspects of that.

**CHAIR**—Do you have anything to tell us on this subject, Mr Gosper?

**Mr Gosper**—With these large multilateral rounds there usually is speculation about the effect of events such as presidential and congressional elections, as there is this year on such things and on the changeover in European commissioners as well as other electoral events. This year, of course, one of the significant things in the Doha negotiations has been the signal by USTR Zoellick earlier this year, in February, that he saw a significant opportunity to move the Doha negotiations forward this year, including reaching a so-called framework agreement for the negotiations. That has been well reciprocated by other members. There will be meetings taking place in Paris this week—not just the OECD meetings but a number of mini-ministerial meetings and other informal meetings.

**Senator CONROY**—P5?

**Mr Gosper**—There will be a P5 meeting—a group of senior officials from five countries with a particular interest in the agriculture negotiations. All of that reflects a fair amount of energy that has been committed to seeing if we can get some progress on the Doha negotiations this year. Most members think that there is a significant opportunity over the next two or three months to do that, to capture these so-called framework agreements, notwithstanding other events that will occur later in the year.

**CHAIR**—I know there is a lot of commendable work going on. People are trying very hard at officer level. But unless there is political will from an executive of government to close a deal it is very difficult to move forward. That is the general understanding against the background of these types of negotiations, isn't it?

**Mr Gosper**—Indeed, I agree: political need is required. But what I am indicating is that one of the reasons most members are convinced there is some opportunity this year to move things

forward is an expression of political commitment by the US to do all that it can over the next two or three months.

**CHAIR**—Mr Zoellick is not going to offer for USTR in the next Bush administration, if there is one.

**Mr Gosper**—There are rumours to that effect, but I do not know that.

**CHAIR**—And Pascal Lamy steps down from the European Union in October.

**Mr Gosper**—There is a change of the commission in October.

**CHAIR**—Mr Oxley said to us this week—and, again, I do not have the benefit of the *Hansard* to point you to the actual reference; I am going on my recollection of his words, which I took down at the time, so this cannot be a quote—that it would be no big deal if this agreement were dealt with after the Australian elections. The AMA said to us something similar. They reported a conversation they had had with DFAT, as I recall, in which DFAT made remarks of a similar sort. My question is: would this agreement be lost to Australia if the Australian Senate decided to deal with the implementing legislation in February of next year, or would the agreement continue and still be able to be dealt with in February?

**Mr Deady**—There are no specific deadlines in the agreement in that regard. As you say, the requirement is for the implementing legislation to be passed in both countries and then notification. At the same time, the government has made it very clear that its target is to have this thing implemented and up and running by 1 January 2005. That is certainly part of the time frame that we are looking at—subject, of course, to the JSCOT reviews in their own inquiry. But that is something that the government has identified, and we are working toward those time lines.

**CHAIR**—If the Australian Senate said—and I am not saying it will or that I am going to propose that it does, nor has this committee as yet formed an opinion about it; I just want to stake out the options quite clearly—'We would prefer to deal with the implementing legislation not in the hothouse atmosphere before an election but in the cool light of day after an election, say in February next year,' the agreement would not be lost to Australia. That is correct, isn't it?

**Mr Deady**—The agreement is, as I said, to be signed next week. That includes these implementation issues, so I do not know what more I can add. We are working towards putting together the legislation that is required and having all that worked on.

**CHAIR**—I understand all that. You are reflecting the government's position, as you are bound to. You will get no argument from me about that.

**Mr Deady**—Again, it is difficult. It has not passed the US Congress. There is nothing in the agreement that sets those sorts of time frames. You mentioned the discussion at Crawford, Texas between the President and the Prime Minister. The reason we worked to that target was to see what could be done to ensure that the agreement could be voted on in the US Congress this year, and that is when we talked about June and July. As I said, the government has also committed to implementing the agreement, if possible, by 1 January 2005.

**CHAIR**—All that is understandable. But some of us here think that we stand a reasonable chance of winning the election—in which case, would it be sensible for us to rush into this or should we look at it after the election? That is a consideration for us. This occurs on the eve of a possible Australian election. What you are saying is that we will not lose this agreement if the Senate defers it to February.

**Mr Deady**—I do not know what I can say.

**CHAIR**—Are you saying that we will lose it?

**Mr Deady**—I do not think that is a question that I can answer. I can just say that we have negotiated the agreement. In order to come into effect the legislation has to pass in both countries.

**CHAIR**—And there is nothing in the agreement that says we will lose it?

**Mr Deady**—There is nothing in the agreement that says that we will lose it; it comes down to the fact that two governments have to implement this to bring it into effect. That is the only answer I can give.

**CHAIR**—I know Senator Brandis wants to ask a question on this point—

**Senator FERRIS**—We all want to—

**CHAIR**—I am just doing a few headline questions. I will give the call to him so he can do that because I am sure it is relevant to this discussion. Mr Deady, you have been around the trade scene for a long time—longer than I have, which is a hell of a long time. When the United States negotiated NAFTA it was negotiated under Bush, at first, but the congress declined to adopt it and it was adopted under Clinton with the negotiation by the Clinton administration, not by reopening the agreement but by negotiating some additional side letters to the agreement which enlarged the issues covered by the agreement.

**Mr Deady**—NAFTA was negotiated under the first Bush administration. I do not know the precise context or if a vote was put to the congress during that administration.

**CHAIR**—If you check I think you will find that no vote was taken by the US Senate.

**Mr Deady**—There were some changes made by the Clinton administration with the agreement of the other NAFTA partners, Mexico and Canada in that context, and it came into effect under the Clinton administration.

**CHAIR**—So there is an American precedent for holding these things over past an election and then coming back and looking at it.

**Mr Deady**—That was the situation with NAFTA, yes. I would like to make one point—one of my colleagues has passed over a reference. There is a reference in the Trade Promotion Authority. One of the obligations, requirements or priorities set by the congress for the

administration was to achieve the elimination of government measures such as price controls and reference pricing which deny market access for United States products.

**CHAIR**—That is an act that covers the entire world as far as the United States is concerned.

**Mr Deady**—It covers trade negotiations.

**CHAIR**—This letter by Zoellick covers the specifics of an Australia-US free trade agreement.

**Mr Deady**—It sets out key objectives. It clearly was not all the US objectives but it set out the key objectives.

**Senator BRANDIS**—I want to pursue the point that the chair has been pursuing with you, Mr Deady. I want to make sure we understand each other. The agreement will be signed next week. After that three things subsequently have to occur before the agreement becomes operational—not necessarily in this order. First, the Australian parliament has to enact all legislation giving effect to the terms of the agreement. Second, the American congress has to enact all legislation giving effect to the terms of the agreement from the American point of view. Those two steps do not have to happen in that order but they have to happen. Thirdly—and this is essentially a formal requirement—there has to be an exchange of letters confirming that that has been done. Upon the happening of that set of things the agreement comes into operation 60 days later. Is that correct?

**Mr Deady**—That is correct.

**Senator BRANDIS**—I understand the point that the chair is getting at—that there is no express provision in the agreement which imposes a deadline upon the enactment of the implementing legislation in either the US or Australia. Is it your view that there is nevertheless an informal political deadline in the sense that, if the American congress, either the House of Representatives or the Senate, were to discern that Australia was going to go slow on implementing the legislation from our side by holding it up in the Senate or deferring it until next year, then it may impose a risk that that might in turn prejudice the chances of the American implementing legislation being enacted by congress?

**Mr Deady**—The only way I can answer that question is to say that I know that Mark Vaile and Ambassador Zoellick have had discussions about moving the legislation forward in both countries. Ambassador Zoellick gave an indication to the minister of a time frame for achieving a vote this year in the congress. There is a very strong commitment on behalf of the US administration and the Australian government to complete those legislative processes so the agreement can enter into force on 1 January 2005. That is the commitment that is clearly there from both governments.

**Senator BRANDIS**—As you understand it, from the American point of view, is the June-July period this year the best window of opportunity to get congress to move on this?

**Mr Deady**—I think it is the only window for 2004.

**Senator BRANDIS**—Are you concerned that any evident delay from the Australian side could prejudice the chances of the American congress grasping at the opportunity?

**Mr Deady**—I think the US administration are looking for the assurances that they have got from the government that we are working very hard to move this thing as quickly as we can to complete the process so that it can enter into force as soon as possible.

**Senator BRANDIS**—I suppose it is a commonplace in any agreement—it is an implied term—whether it is a commercial or international agreement, that each side uses its best endeavours to ensure that the effect of the agreement is made available to the other side. Do you think that, if there was a perception by the Americans that Australia was not using its best endeavours to ensure the implementation of the agreement, it might be regarded by the Americans or by key congressional leaders as a sign of lack of good faith?

**Mr Deady**—It is very hard for me—

**Senator BRANDIS**—I am really asking you for a political assessment of—

**Mr Deady**—I think it is difficult. I really believe that the best I can say is that certainly a strong commitment has been given by both governments to move this thing as quickly as possible with a view to implementing the agreement as soon as possible—1 January 2005 is the target that has been set—so that the benefits accruing to industries in both countries can begin as soon as possible. That is the driver for both governments is to get on and do this work as quickly as possible.

**Senator BRANDIS**—I am wondering if there are other officers from the department, perhaps Mr Gosper or someone else, who feel able to give a political assessment about the passage of the agreement—

**Senator CONROY**—Mr Chester, would you like to intervene at this point?

**CHAIR**—I would be very interested if there are, because we will have a lot of questions.

**Senator CONROY**—Senator Brandis is trying to find out whether we can wait for Peter Costello to be Prime Minister to sign it. That is all he is really trying to ask.

**Mr Chester**—It is difficult for anyone at the table to answer the question you are asking, Senator Brandis, but maybe I can add a couple of observations. As Mr Deady says, there is a political commitment on both sides to do what is necessary to have the appropriate legislation passed in congress. That is going to take some political capital in Washington. Human nature is such that, if there is any sign of reticence or backtracking, the administration may react to that. These are all hypotheticals.

The other issue is that there is a known congressional make-up at the moment, and one would imagine that post November there will be a different congressional make-up—who the members and senators are. One would expect that a lot of the work that is being done in Washington at the moment to get the right vote would need to be repeated if there is a delay beyond the June-July period.

**Senator BRANDIS**—So the only window of opportunity we know about for sure is June-July this year?

**Senator CONROY**—For the Americans.

**Mr Chester**—The assessment at the moment is that that is the best opportunity in the United States.

**CHAIR**—Just on that answer, the executive in Australia—that is, the cabinet—would be sticking to the letter of their undertaking, as you would expect, if they presented to the parliament the enabling legislation, and if the parliament chose to do something else then the obligation of the executive has been met, hasn't it?

**Mr Chester**—That is correct.

**CHAIR**—This is not to hand immediately, and if I have to I will search for it and try to dig it up, but are you aware that the US President, Mr Zoellick and maybe even the ambassador to Australia said in remarks on this question that they—and this is the quote that sticks in my mind—'respect the Australian legislative process'? They have regard and respect for our process, as we must indeed have regard and respect for their process. Do you recall that?

**Mr Chester**—I do not recall it.

**CHAIR**—If they had said it, it would not be surprising?

**Mr Chester**—No.

**CHAIR**—Do you know that Mr Oxley said to us—and again we do not have the damn *Hansard*—and I think I have his words right, 'There is a fair chance that the US Congress will not deal with this agreement before their elections.' I interjected and said that I thought that it was a 20 to 30 per cent chance. He then went on to say, 'It is more than that, but who can read the mind of the Congress.' Mr Oxley is—I will put it in these terms; I do not do him any disservice—a leading hawk in favour of promoting the advantages of this agreement, and that is his view. Do you have an assessment of the likelihood of the American Congress dealing with it? Mr Oxley thinks that there is a more than a 30 per cent chance that they will not. Do you have a view?

**Mr Deady**—I am not going to speculate on what the percentages are of the US Congress dealing with it. Certainly, very clearly the administration is working very much to having a vote at the end of June or early July. Clearly, the congressional processes and the congressional legislative strategy are a matter for Congress. It is something that is done in very close consultation and discussion as part of TPA, but also as part of the ongoing part of government business in the United States. The indications are that there is an expectation that there will be a vote in that period. Some of the comments attributed to, I think, Ambassador Johnson, the lead agriculture negotiator in the USTR, are that he believes that the Australian vote certainly can go up in June or July. I think Ambassador Zoellick is saying similar things but, at the end of the day, it is the congressional timetable that will determine it.

**CHAIR**—I had better wind up. Going to the end game of these negotiations, did Dr Calvert and the minister get involved in these negotiations at some point?

**Mr Deady**—Yes, Mr Vaile arrived around, I think it was, the Australia Day weekend. We had been there a week as officials. The negotiations continued then for a fortnight or so in Washington in that period in early February.

**CHAIR**—At some point, did they take over the negotiations and you were not involved in the discussions?

**Mr Deady**—It is not a matter of taking over the negotiations. There was an ongoing process right through that period. There were still ongoing negotiations. Some of the working groups, the negotiating groups at officials' level, continued right through that period. There was a whole raft of daily meetings between Minister Vaile and Ambassador Zoellick, with a range of officials on each side of the table dealing with particular issues as we got to the end point of the negotiations. It was an ongoing, rolling process right through that period in which the minister certainly was heavily involved. Dr Calvert was involved, I was involved and officials on IP, or whatever the issue might have been, were fully involved in those discussions.

**CHAIR**—From the point at which the main speakers on the Australian side were the minister or Dr Calvert, what changed in the package?

**Mr Deady**—I could not answer that. I do not think it is appropriate to answer it. I could not answer it in the sense that the package was still being developed. It was not just that the only discussions going on were those between the ministers. There was a whole raft of discussions still going on at officials' level on various aspects of the package. Ralph Ives and I identified, before the minister arrived, a checklist of where we were. This included the outstanding issues: those issues that we believed needed more work at officials' level; those issues that we thought may need some input from ministers but were not at that stage yet, because more work could be done; and then a final category where we thought there was a range of issues that would clearly be something that the ministers would need to start discussing from the time the minister arrived.

**CHAIR**—Did that process then lead to a conclusion where you reached a point in which there appeared to be no further basis for ongoing talks and you addressed the question of accepting what was in front of you and agreed to the package? Is that how it went?

**Mr Deady**—We continued to build the package right through that process. The point was reached in the negotiations where the final deal, the balance of the deal, was struck. There were a lot of conversations and discussions between the minister and colleagues back here. That overall package is one that the government looked at and made the decision that this was overwhelmingly in the national interest, and the negotiations concluded at that point.

**CHAIR**—Was it subsequent to that point that the Prime Minister spoke to the President about the negotiations?

**Mr Deady**—I certainly could not tell you the days now but there was a discussion. The negotiations were taken to a point where there was a discussion between the President and the Prime Minister. It was after that discussion that in the end the decision was taken by the Prime

Minister and colleagues that it was overwhelmingly in the national interest to sign off on the deal.

**CHAIR**—So it was before the final rule-off. What was added to the package, if anything, after the Prime Minister spoke to the President?

**Mr Deady**—I am not going to speculate on—

**CHAIR**—I am not asking you to speculate; I am just asking you to tell me.

**Mr Deady**—There was a discussion between the President and the Prime Minister which clearly I was not privy to. The deal that emerged following that discussion and the discussions that went on over the three weeks was the package that was negotiated. That was the balance of the deal; that was the best deal possible to be negotiated between the two governments. The government of Australia took the view that it was overwhelmingly in the national interest. There was the sign-off in the negotiations at that point.

**CHAIR**—I understand that. Did anything new go into the package after the discussions between the Prime Minister and the President?

**Mr Deady**—The package was there. There was a discussion, as I said, between the Prime Minister and the President. There was an agreement then that that was the deal.

**CHAIR**—Nothing new went in?

**Mr Deady**—The package was built. The balanced deal was thrashed out over that period. There were some further discussions between the President and the Prime Minister about that package. Part of that process was that this was the overall outcome that the government looked at.

**CHAIR**—I understand exactly that. You have told me that. But my question is: subsequent to the discussions about this package between the Prime Minister and the President, was anything new added to the package or not?

**Mr Deady**—I cannot comment on that.

**CHAIR**—Why not?

**Mr Deady**—You get to a point in these negotiations. This is a comprehensive agreement against those 23 chapters, as you know. The minister and the Australian team and the US team got to this point where this was the deal that was negotiated. There was a further discussion between the President and the Prime Minister. Following that discussion, the deal that emerged and—

**CHAIR**—Was wrapped up.

**Mr Deady**—the deal that is publicly out there now was the deal that the Australian government considered to be overwhelmingly in the national interest.

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**CHAIR**—I put it to you that nothing new was added.

**Mr Deady**—I am not sure—

**CHAIR**—Was it?

**Mr Deady**—What was added was a discussion between the President and the Prime Minister that said that—

**CHAIR**—But nothing of substance went into the package as a consequence of that discussion?

**Mr Deady**—I am not going to speculate on what went into it.

**CHAIR**—I am not asking you to speculate. You were there. You had the package in front of you.

**Senator CONROY**—You have to answer the question.

**Mr Deady**—I have answered the question.

**Senator CONROY**—It is a factual question.

**Mr Deady**—It is a factual question in that we built the deal, the government looked at that deal, there was a discussion between the President and the Prime Minister and the deal that emerged following that discussion was the deal that is out there.

**Senator CONROY**—Was it the same as what was there before?

**Mr Deady**—I do not know.

**CHAIR**—We are not asking you to speculate.

**Mr Deady**—I know.

**CHAIR**—This is within your knowledge.

**Senator CONROY**—You do know, Mr Deady.

**CHAIR**—This question is within your knowledge.

**Mr Deady**—You know that in this whole process nothing is ever agreed until the final thing is done. That is what we do.

**CHAIR**—I know. That is the principle that underpins us all.

**Mr Deady**—We negotiated a deal between both governments. There was a further discussion. You are not asking me if things were taken off the table as part of that.

**CHAIR**—Were they?

**Mr Deady**—All I am saying is that there was a balanced deal. It was as big a deal as we could negotiate and put together.

**Senator CONROY**—And did anything change? It is a factual question.

**Mr Deady**—My answer to that question is that the deal was done. The Prime Minister had the discussion. I am not going to comment on what those discussions involved or did not involve. The government of Australia then looked at that overall deal and said, ‘Yes, that is the deal that is overwhelmingly in the national interest.’ That is the outcome of the process. That is the deal that we now have in front of us and that is being reviewed. That is the deal; that is the package.

**CHAIR**—Nothing is agreed until everything is agreed, and everything was agreed only after the Prime Minister and the President spoke.

**Mr Deady**—That is correct.

**CHAIR**—My question is not about the principle of nothing before everything. My question is about how the package evolved. Unless you have a different answer, I must make a note that you have not been able to answer that question directly.

**Senator BRANDIS**—On a point of order, the questions have been unfair to the witness. I have not said anything so far, but I will now. You are putting propositions to the witness and then accusing him of not answering them on a false premise—the false premise being that there was some identifiable form which was, in an identifiable way, varied in some unknown respect as a result of the discussions between the Prime Minister and the President.

**CHAIR**—That is not the proposition. The proposition is that it was not.

**Senator BRANDIS**—What the witness has denied seems, to me at least, to be saying that there was no identifiable thing that was then varied in some discernable form.

**Senator CONROY**—They just had a general chat.

**Senator BRANDIS**—Exactly. So the questions are unfair to the witness because the premise is false.

**CHAIR**—I do not accept that the premise is false, but I take the point of order. I do not have any further questions on this subject for Mr Deady at this point, other than to say that what I am trying to assess is—

**Senator BRANDIS**—You do not need to be a commentator on your own questions.

**CHAIR**—No, but sometimes you are and sometimes I am. I am trying to assess what the nature of the special relationship between the Prime Minister and the President is in hard trade terms. I think I have got as far as I can on that subject. I have a series of questions about providing records of advice from the departments to you internally in these negotiations, but I will put them on notice. I am looking for a comprehensive return to order on information—that is, analytical information provided by the departments to you as the head negotiator, any written information about how you analysed that and balanced your negotiating targets, advice internal to the departments informing their opinions to provide to you what their perspective on the negotiations were. I will give you a note about what I am seeking in detail.

**Senator BRANDIS**—I have a question that is possibly for Mr Deady, but if there are other officers who are in a better position to answer then it is really directed to whoever can answer. I direct your attention to article 21.2 of the agreement. Article 21.2 seems to me to say that the dispute settlement mechanisms are invoked if one of the three circumstances provided for by (a), (b) or (c) arises. I am particularly interested in (c)—that is, when a party considers:

a benefit the Party could reasonably have expected to accrue to it under—

then certain particular chapters are identified—

... is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

My first question is: are provisions of that type common or usual in free trade agreements, either generally or specifically in agreements to which the United States is a party? In other words, is the dispute resolution machinery provided for here, and in particular this triggering mechanism, a familiar mechanism?

**Mr Deady**—Yes, the dispute settlement mechanism is a feature of most trade agreements, including bilateral—

**Senator BRANDIS**—So including triggering mechanisms of the kind provided for by 21.2(c)?

**Mr Deady**—That is so.

**Senator BRANDIS**—Is that common?

**Mr Deady**—The concept of ‘non-violation nullification or impairment’, as they refer to it—that is, a breach that is not a breach of a precise obligation under the agreement—is included in GATT 1947, and it is a part that is carried down from the GATT.

**Senator BRANDIS**—Does it follow from that that a party to the agreement can therefore subject to the dispute resolution procedures any relevant piece of domestic legislation which falls within chapters 2, 3, 5, 15 or 17, notwithstanding that it is not inconsistent with the terms of the agreement? To me that is what it seems to be saying. Am I reading it correctly?

**Mr Deady**—My understanding is that this nullification or impairment provision means that there could be an action taken by a party that is not obviously a breach of any particular

commitment under the agreement but nonetheless impairs or reduces what was a reasonable expectation on the part of that other party. That is what that is saying, and that is a feature of the GATT and the whole system.

**Senator BRANDIS**—You say ‘an action’ by ‘a party’ but that is not what (c) says. It simply says that a benefit is not going to accrue. That could apply to the status quo, could it not? For argument’s sake, let us say that there is a provision of American law at the moment which is jurisdictionally relevant because it relates to a matter in chapter 2, 3, 5, 10, 15 or 17. Notwithstanding an absence of inconsistency between that provision of American law and any term of this agreement, Australia could nevertheless subject that existing provision of American law to the arbitral process. Is that right?

**Mr Deady**—In that situation we have knowingly signed off the agreement and our reasonable expectations could not have been formed on anything other than the existing US law, so we would have no chance, in my view, of winning a nullification or impairment case in that regard.

**Senator BRANDIS**—Obviously, the reverse applies, so the Americans, in your view, would have no chance of really winning a nullification or impairment case if the roles were reversed and they were to complain in relation to an existing provision of Australian law?

**Mr Deady**—That is certainly so. I do not know if there has been a lot of that but that is the jurisprudence.

**Senator BRANDIS**—That is very helpful, thank you. I am moved to ask these questions because we heard evidence from a witness at our last hearing, Dr Faunce, who, as I understood him, seemed to be saying that 21.2(c) provided a mechanism whereby the existing provisions of the Australian Pharmaceutical Benefits Scheme could be attacked by the Americans. Do I understand you to be saying to us that 21.2(c) simply could not be invoked against a pre-existing law that was known to either of the parties to this agreement at the time the agreement was signed?

**Mr Deady**—Yes, that is very much my view. We had long negotiations on pharmaceuticals, or certainly this was an issue, as we talked about before. There were commitments entered into by both governments and then there were some particular commitments in a side letter. They formed the basis of the commitments Australia entered into, and the United States trade representative writes back and acknowledges that letter. So that is the reasonable expectation that is established following the negotiations, so existing measures are certainly understood and certainly could not form the basis of a nullification case.

**Senator CONROY**—I want to focus on the PBS for a little while, Mr Deady. Annex 2(c) of the agreement establishes transparency principles for pharmaceuticals. As part of that medicines pricing process, an independent review process may be established at the request of an applicant directly affected by a recommendation or determination. Has the structure of the independent review process been established yet?

**Mr Deady**—No, the structure of that independent review has not been finally determined by the government. As part of implementation, that is an issue that is still before the government.

**Senator CONROY**—You may not have any idea of this, because you may have moved on to something else; if not, who is in charge of this discussion? But have you any idea how long this may take or what the progress is? If there is somebody else in the room who is now handling it while you are taking a well-earned break, are they about?

**Mr Deady**—There are certainly some colleagues from the department of health who would have the main responsibility for establishing this process. I know it is envisaged that there would be detailed consultations with stakeholders as the government goes through the process of determining and establishing this review. We do have colleagues joining us, I think.

**Senator CONROY**—Who is coordinating this process?

**Dr Lopert**—The process of developing the mechanism of implementation of the independent review has begun as a series of consultative processes which will continue for some time. The process has just begun. The minister has given a commitment, and there will be a wide range of consultations involved in developing this mechanism and that will take some time.

**Senator CONROY**—In future, if I am seeking information on this should I keep harassing Mr Deady or should I harass you?

**Dr Lopert**—It is a portfolio responsibility of the Department of Health and Ageing.

**Senator CONROY**—So if somebody at estimates in June asks Health about it, it will not be referred to Mr Deady?

**Dr Lopert**—Questions were addressed to Health at the last estimates on this subject.

**Senator CONROY**—There is no question that I or whoever can come along and ask questions about how this process is going at the moment?

**Dr Lopert**—That is correct.

**CHAIR**—You had better ask Mr Deady whether that is okay with him.

**Mr Deady**—That is fine by me!

**Senator CONROY**—You are happy to handpass that across.

**Mr Deady**—We would also be open to questions, though, I am sure.

**Senator CONROY**—Who is involved in the consultations?

**Dr Lopert**—The breadth of consultation is not entirely clear yet because the process has just begun. Thus far some key stakeholders have been consulted but, as I said, the process has a long way to go at this stage.

**Senator CONROY**—Who has been consulted so far?

**Dr Lopert**—Medicines Australia has been consulted and the Pharmaceutical Benefits Advisory Committee has been consulted. There has been a brief discussion with the AMA, and I understand that they made a submission to this committee which indicated that they had already given some consideration to that process. We have also conducted a series of stakeholder briefings more generally in relation to the outcomes of the FTA in relation to the PBS. A large number of parties indicated that they would be interested in having input into or comment on the development of the implementation review mechanism. It is anticipated that that will be part of the process.

**Senator CONROY**—Apart from initial consultations, are you pulling together a draft paper? What will the actual process be?

**Dr Lopert**—There will be a draft paper but it has not yet been circulated.

**Senator CONROY**—Will that then go out for consultation?

**Dr Lopert**—That is anticipated, yes.

**Senator CONROY**—I am just trying to get a feel for the sort of timing of each of these steps, if I can describe them as that.

**Dr Lopert**—The minister is still considering the time frame for this process.

**Senator CONROY**—Would you have any idea whether or not it would be completed prior to the parliament voting on the legislation? The anticipation is that that will be around early August.

**Dr Lopert**—I imagine that it would be completed by that time, but I could not make a commitment to that.

**Senator CONROY**—I am not trying to pin you; I am just trying to get a feel.

**Dr Lopert**—Certainly that would be the hope.

**Senator CONROY**—Okay. You mentioned Medicines Australia. Are they only US pharmaceutical companies?

**Dr Lopert**—No, Medicines Australia represents approximately 90 per cent of pharmaceutical companies operating in Australia.

**Senator CONROY**—So there are European pharmaceutical companies involved in the discussions?

**Dr Lopert**—Medicines Australia is the peak body—the discussions have been with the peak body—but it certainly represents pharmaceutical companies other than US pharmaceutical companies.

**Senator CONROY**—Are you having discussions directly with any pharmaceutical companies or are you just confining it to Medicines Australia?

**Dr Lopert**—There have not been any to date, but the process does not preclude that.

**Senator CONROY**—And would you consider talking directly with European pharmaceutical companies as opposed to just the American ones? The natural thing would be to think, ‘Well, it’s a US free trade agreement; we’ll chat with the US.’

**Dr Lopert**—The intention is that the provisions of the US free trade agreement, insofar as they relate to the process and transparency of the PBS, will encompass all applicants, regardless of whether they are US companies, European companies or—

**Senator CONROY**—So this is a general thing?

**Dr Lopert**—It is a general provision.

**Senator CONROY**—A European pharmaceutical company can use this mechanism created under the FTA?

**Dr Lopert**—Yes. The provision states that we will make available a review mechanism; it certainly does not confine it to pharmaceutical companies of a particular origin. It actually says that we will make a review mechanism available to the applicant. In fact, in rare occurrences the applicant has not been a pharmaceutical company. Although that is unusual, it has occurred.

**Senator CONROY**—So if somebody was waiting for a drug to come on the market for their health needs, could they make an application?

**Dr Lopert**—Any party can make an application to the PBAC, provided that they do so in accordance with the guidelines.

**Senator CONROY**—What is the definition of a party? Could I make an application?

**Dr Lopert**—Yes, certainly you could.

**Senator CONROY**—So anybody in Australia, basically, can make an application.

**Dr Lopert**—Yes. There was a drug listed on the PBS last year on the basis of an application made by a group of clinicians.

**Senator CONROY**—‘Party’ implies that they are a party to taking the drug or something like that?

**Dr Lopert**—No.

**Senator CONROY**—It can just be absolutely open to anybody?

**Dr Lopert**—Anybody can make an application to the PBAC, provided that they do so in accordance with the guidelines.

**Senator CONROY**—Is there anything restrictive in those guidelines? I have not read those guidelines recently.

**Dr Lopert**—Restrictive in what sense?

**Senator CONROY**—Is it just, ‘Here’s the form and you’ve got to complete it’?

**Dr Lopert**—The guidelines are very detailed in describing the nature of the information that needs to be collated to inform the PBAC’s decision making, and those requirements are not insignificant; they are quite detailed.

**Senator CONROY**—But there are no criteria to exclude an applicant?

**Dr Lopert**—No.

**Senator CONROY**—It is just: ‘Here’s the information you need.’

**Dr Lopert**—Providing you can collate the necessary information, you can make an application.

**Senator CONROY**—Which departments are involved other than yours? Yours is obviously the head agency coordinating it. Are Mr Deady and DFAT involved?

**Dr Lopert**—DFAT, the Department of Industry, Tourism and Resources and PM&C are involved.

**Senator CONROY**—Is Finance involved? They normally get their bib in everywhere.

**Dr Lopert**—Indirectly, yes, I guess. But in terms of the actual process itself—

**Senator CONROY**—So it is PM&C, Industry, DFAT and yourselves.

**Dr Lopert**—Yes.

**Senator CONROY**—With Finance keeping a wary eye on it, as usual.

**Dr Lopert**—Yes.

**Senator CONROY**—Will the review committee, when it is established, report back to the PBAC or to the government? Is it possible to say?

**Dr Lopert**—That has not been established yet.

**Senator CONROY**—I got the impression it was meant to be reporting back to the PBAC as part of the terms of the agreement.

**Mr Deady**—No, it is not. Again, Ruth is more expert, but there is nothing in the agreement that specifies to whom the review will report back.

**Senator CONROY**—I just got a sense from previous discussions that it had always been described as ultimately going back to the PBAC to make the decision.

**Dr Lopert**—Ultimately the PBAC is the only body that can recommend to the Minister for Health and Ageing that a drug be listed on the PBS, but the actual direction of recommendations or outcomes from the review mechanism is one of the issues that needs to be pinned down as part of the development of the review mechanism. I would not like to pre-empt that.

**Senator CONROY**—Why would it go anywhere other than to the PBAC? Why would it go to the government first? What would be the rationale behind that?

**Dr Lopert**—As I said, I would not like to pre-empt the outcome.

**Senator CONROY**—No, I am asking for a rationale.

**Dr Lopert**—There may be a rationale. I do not wish to speculate, but it might be considered more appropriate if the outcome of the review were to report to the minister and thence to PBAC or directly to PBAC. As I said, I do not want to pre-empt it.

**Mr Deady**—I probably said this before and perhaps that is where you got this point from: certainly it is very clear—and again Ruth can correct me—that it is for PBAC to make the recommendation, and there is nothing here that would alter the legislation that a minister cannot override a negative finding. So, as Ruth says, the precise process of the independent review is being worked through and considered. We cannot speculate on or anticipate at this point precisely how it will work. But here we are talking about negative findings, negative recommendations. That article needs to be read in concert with the separate letter from Australia setting out precisely what it intends to do in this area. That makes it clear that we are talking about recommendations not to list that are subject to this review. The minister cannot overrule negatives, so there would have to be a process here.

**Senator CONROY**—As was mentioned at the beginning, these offer some transparency principles. Are they public? When will the public find out about both what is going on in the actual process and when the recommendations will possibly be made to the government? Do we have an idea?

**Dr Lopert**—All these are details that need to be developed as part of the consultation over how the review mechanism will work. These are procedural issues that are part of that process and, while I may have personal views on how that should work, I certainly would not want to pre-empt the consultation process.

**Senator CONROY**—I know that Medicines Australia in particular has been calling for greater transparency and that the pharmaceutical companies have spoken on a number of

occasions wanting a more transparent system. It would seem incongruous if it were not held in public.

**Dr Lopert**—That may be one of the outcomes but, as I said, it would be premature to comment on that at the moment. Certainly greater transparency is an outcome—

**Senator CONROY**—That does not mean public transparency?

**Dr Lopert**—Transparency encompasses a number of aspects.

**Senator CONROY**—But possibly not public.

**Dr Lopert**—I am not precluding that; I am just saying that I cannot pre-empt it. Transparency may be achieved by putting material into the public domain or by holding hearings in public. There are different ways of achieving that and, as I say, I would not like to pre-empt them.

**CHAIR**—Dr Lopert, can you give us a categorical guarantee that we will know the outcome of these consultations and the extent of transparency before the bills are presented to the Senate?

**Dr Lopert**—I cannot give you a categorical guarantee, but it is certainly my expectation that that is the case.

**Senator BRANDIS**—You do not see any difficulty with that happening? You are not aware of any circumstance that might defeat your expectation?

**Dr Lopert**—No.

**Senator CONROY**—Once the decision is made by this working party, is it then locked in as part of the agreement? Can it be varied in the future?

**Mr Deady**—I am not sure what you mean—the review process?

**Senator CONROY**—Yes.

**Mr Deady**—It is purely for the government of Australia to determine that review process. If you are asking whether it then could be modified in certain ways, again, providing that it is consistent with the obligations, we would have to establish an independent review that looks at decisions not to recommend—and that is not to say there could not be adjustments to that over time, obviously provided that you are still meeting that commitment. So it could evolve. Again this is speculation—these are perhaps the sorts of things we could talk about—but there is nothing that would prohibit that review mechanism being reviewed from time to time.

**Senator CONROY**—This is just an example. Suppose it was decided not to hold meetings in public and then we got elected and decided we did want to hold meetings in public, would that cause any conflict with the terms of the deal?

**Mr Deady**—No; there is nothing in the agreement. The obligation on Australia is to establish an independent review to do what we said we would do.

**Senator CONROY**—What is the definition of ‘independent’ in the legal-trade jargon talk? I know what I think independent means, but what meaning is envisaged here?

**Mr Deady**—The lawyers will correct me, but in treaty interpretation ‘independent’ would mean just that.

**Senator CONROY**—Independent of government?

**Senator BRANDIS**—It is not a term that is hard. ‘Independent’ means independent.

**Mr Deady**—The normal meaning is how treaty lawyers would interpret it, and that is arms length—

**Senator CONROY**—Arms length from who? I am asking: who does it have to be independent of—the department, the government, Senator Brandis, me, PBAC itself? Who does it have to be independent of?

**Mr Deady**—The best answer I can give is that the government, in implementing this part of the commitments and putting this together, would need to demonstrate, if asked, that it is an independent review. That would be the challenge that an American—

**Senator CONROY**—Independent of who? It has got to be independent of something.

**Senator BRANDIS**—What it in fact has to be is independent of everything, which is what I think Mr Deady is saying.

**CHAIR**—I thought that was the question.

**Senator CONROY**—That is what I am asking. I probably do not disagree with Senator Brandis.

**Senator BRANDIS**—So you agree with me?

**Senator CONROY**—That is a big assumption.

**Mr Deady**—It is broad. In the interpretation ‘independent’ means it has to be a transparent process independent of influences that would otherwise—

**Senator CONROY**—I seek the assistance of any lawyers in the room, God forbid. Senator Brandis, that does not include you.

**CHAIR**—Does it have its own secretariat and its own funding?

**Mr Deady**—These are the sorts of things that will be developed as this thing is put in place.

**Senator CONROY**—Who would pay for the secretariat? If the government paid for the secretariat there could be arguments that it is not independent. If the industry were levied and the

money was coming from the industry, or if there were donations, could it be considered to be independent? These are genuine questions. We have an independence clause and I am seeking to understand who it is that it has to be independent from.

**Mr Deady**—We have a commitment to establish an independent review process and that is what the government would ensure—that we do establish an independent review and that we honour the obligations entered into in good faith. It is very difficult at this point to be more precise than that.

**Senator CONROY**—Precisely—who is it independent from?

**Mr Deady**—Again, the obligation is to the United States government here. If we established a review process which the Americans believed was not independent in some way, that continued to be influenced—

**Senator CONROY**—Let us say the industry offered to pay for the entire process. Would that be deemed to be independent under the terms of the agreement?

**Mr Deady**—These are hypothetical questions.

**Senator CONROY**—Have we got a lawyer in the room that can help us?

**Ms Smith**—First of all, I am not a practising lawyer.

**Senator CONROY**—Thank God. There is a chance for commonsense. Please proceed.

**Senator BRANDIS**—That is all right because it is not a legal issue.

**Ms Smith**—I was part of the health negotiating team on the free trade agreement. Certainly our understanding is that it involved a degree of independence from those involved in the original decision making, so that to some extent you get a fresh set of eyes looking at the evidence. That is how we are interpreting ‘independent’.

**Senator CONROY**—So the secretariat could be provided and paid for by DFAT, it could be provided and paid for by the industry or it could be a mixture and they would all qualify as independent because they were not part of the original decision.

**Ms Smith**—We would not expect that the secretariat would be provided by the industry. We would expect that the support for the mechanism would be provided by the department of health, as is support for the existing PBS mechanisms.

**Senator CONROY**—If you are providing the existing support for the current mechanism, how can you be a fresh set of eyes, then, in terms of providing support for the independent review process?

**Mr Chester**—Who provides the support does not determine the independence of a group of people that are looking at an issue. There are plenty of examples right throughout society of

independent bodies that are funded from a particular source, like the courts. We say that the courts are independent.

**Senator CONROY**—This is not a court.

**Mr Chester**—No, but I am using it as an example. There are plenty of examples.

**Senator CONROY**—Okay. As there is a bit of a peanut gallery down the other end of the room, I will just take you to an example that I am working through at the moment. A thing called the Financial Reporting Council currently has a secretariat provided by Treasury. There is a strong debate in this country, as part of CLERP 9, for there to be an independent secretariat. The clear reference of the word ‘independent’ is independent of Treasury—no offence to my learned colleagues here from Treasury. That is a clearly understood principle that people are debating at the moment over the word ‘independent’. I am really just trying to understand whether we are all psycho in the other debate by saying that ‘independent’ means independent of the government, because they are providing it and they are seen to be driving the agenda. This is the debate that is taking place. In fact, the chair of the FRC—a government appointment—has said that he believes the secretariat of the FRC into the future should be independent of Treasury. That way, it takes away any potential conflict that the government is driving the agenda of the FRC. Does that help clarify the debate for anybody in the room—or preferably for the officials at the other end of the table?

**Dr Lopert**—The suggestion that the government providing secretariat support for the independent review means that it would no longer be independent would suggest, by the same token, that the PBAC in its decision making is not independent, and I think that would be an unfortunate conclusion to draw.

**Senator CONROY**—I am not suggesting that. I am just trying to clarify the issue.

**Dr Lopert**—But is that not the implication of suggesting that the government could not equally provide secretariat support for an independent review—

**Senator CONROY**—There may be some who could argue that, and that is what I am trying to get an understanding of. Some people may argue that it is not independent of the government right now. I am not making that argument myself. I am just trying to clarify, for the purposes of the discussion, whether or not the word ‘independent’ means independent in the same sense as in this other discussion and debate I am having about a similar type of body with statutory powers. The FRC is established by legislation and under CLERP 9 it will have a much broader set of powers. So I am just trying to get an understanding.

**Dr Lopert**—But I think it goes to what Ms Smith was saying in relation to the definition of ‘independent’ in this context, in that the decision is made by a fresh set of eyes. Provided that the composition of the review panel—whatever form it takes—is independent, that is the critical issue

**Senator BRANDIS**—Don’t you think it is also fairly safe to assume, Dr Lopert, that professional people charged with making decisions like this are going to act with integrity?

**Dr Lopert**—Absolutely.

**Senator CONROY**—Going back to the fresh set of eyes, PBAC is a pretty pointy-headed sort of structure at the moment. It has got absolute experts on incredibly complex and detailed medical issues, pharmacological issues and the like. What is the thinking so far about who should comprise this body? Do you think it will be necessary for people with similar qualifications to be able to be a peer review? That is what this is; it is a peer review. So I could not be on it, with all my years of expertise in these issues.

**Dr Lopert**—I would anticipate that it would be necessary, whatever form the review takes, for it to comprise expertise that is similar to the profile of the PBAC, but as I said repeatedly, I do not wish to pre-empt the consultative process that will determine what that mechanism looks like.

**Senator CONROY**—Okay. As part of this process, has anyone suggested, or has it been considered yet, whether a consumer representative may be part of these discussions?

**Dr Lopert**—As I said, we have not canvassed to that level of detail at this point. I anticipate that there will be views about the need for consumer representation.

**Senator CONROY**—Has anyone put that view to you yet?

**Dr Lopert**—Not formally but certainly informally.

**Senator CONROY**—There is currently a representative on PBAC from—

**Dr Lopert**—There is a consumer representative on PBAC, yes.

**Senator CONROY**—And someone has been associated with the pharmaceutical company who is now on PBAC, from recollection.

**Dr Lopert**—No, that is not the case, Senator. There was previously but not at the moment.

**Senator CONROY**—He is not at the moment.

**Dr Lopert**—No.

**Senator CONROY**—Okay. Thanks.

**CHAIR**—That option is not ruled out, is it?

**Dr Lopert**—I am sorry; which option is that?

**CHAIR**—To have a pharmaceutical company representative on the review committee.

**Dr Lopert**—As I said, the issue of the composition of the review panel has not been considered.

**CHAIR**—So it is not ruled out.

**Senator CONROY**—So a member of the pharmaceutical industry could be on this committee and they would be deemed to be independent. By definition—

**Dr Lopert**—I cannot comment on that.

**Senator CONROY**—But this is a question of independence. We have a clearly established view, according to Senator Brandis and others around the table, about what is independent, and a ‘fresh set of eyes’ is the non-legal definition at the moment. Would a representative of a pharmaceutical company fall into the category of being independent? That is just a question going to the logic of what has already been put forward.

**Dr Lopert**—I do not think it is possible for me to respond to that at this time. As I said, I do not wish to pre-empt that consideration, and I do not wish to declare a view on that when I am not able to do so.

**Senator CONROY**—I am going to ask some questions which I may have to come back to in June and probably in July—hopefully we will see you again then—to see how much further we have gone. I am sure we will all enjoy that! Will the review committee’s decisions be in a written report? Is that too early to say at this stage?

**Dr Lopert**—Yes.

**Senator CONROY**—Mr Deady, would it improve transparency if there was a written report?

**Mr Deady**—Again, I think all these—

**Senator CONROY**—Do smoke signals go up after they have all sat around and watched?

**Mr Deady**—As Dr Lopert has said, all these issues are being thought about and considered as the government looks at this obligation and looks to implement it. The precise nature of the processes of things are still being worked through and will be worked through over the next several weeks.

**Senator BRANDIS**—Do you expect that, where decisions are made, reasons for the decisions will be published?

**Mr Deady**—The government, in introducing this review process, will certainly look to ensure that it is, very clearly, a transparent process, that it does reflect the level of independence that the senator has talked about and that its decisions will be there for scrutiny and comment. Again, the precise details of exactly how that is done is something that the government is working through. This review mechanism—how it will operate and what it will do—is something that in the normal course of these sorts of processes, right across different aspects of government, is pretty well established. I do not think we are going to reinvent the wheel with this review process, I must say. I think the precise nature of it, given the subject matter, and the issues that would be addressed are things that we are working through in consultation internally with government, then with other consultations and then the process will be worked out. Again, as Dr Lopert has

said, it is looking at perhaps producing a paper at some point which would be put up for discussion. These are the sorts of things that you would think would be teased out in those processes.

**Senator BRANDIS**—Are they going to be reviewable decisions under the ADJR?

**Mr Deady**—No, they will not be reviewable under the ADJR, as far as I am aware. This is a review of a recommendation not to recommend.

**Senator FERRIS**—Mr Chair, I have some questions on the PBS when that is appropriate.

**CHAIR**—Thank you. Senator Ridgeway has indicated that too.

**Senator CONROY**—Senator Brandis cut in on me.

**CHAIR**—While I am on this subject, Senator Boswell and Senator O'Brien, do you have questions on the PBS?

**Senator BOSWELL**—I have questions on the agricultural aspect but, if you cover the questions in relation to the Pharmaceutical Benefits Scheme first, I will come in after.

**CHAIR**—Okay.

**Senator O'BRIEN**—I would like to ask a question which arises from Senator Brandis's questions to Mr Deady. Mr Deady talked about the jurisprudence on the 21.2(c) type of provision, and he said that there was not a lot of it. How much is there? What is the detail?

**CHAIR**—I was not asking you to ask a question; I was just inquiring if you had any questions.

**Senator O'BRIEN**—I thought it might be useful to get it out of the way, as it is a very small area and it follows up on previous questions. I did not interrupt anyone.

**Senator CONROY**—We let Senator Brandis intervene.

**Senator BRANDIS**—I was just trying to hurry you up, Senator Conroy.

**Senator CONROY**—As always, you are helpful! You have been doing a bit of that lately.

**CHAIR**—Order! Senator O'Brien, would you like to ask your question?

**Senator O'BRIEN**—I think I have asked it.

**Mr Deady**—Again, I would have to defer to the experts. There has not been a lot of jurisprudence in the GATT or the WTO on non-violation nullification or impairment cases. They are often part of a dispute process, but the point is that in relation to these things it is very difficult to demonstrate reasonable expectations and these sorts of things. So there have not been

a lot of cases. Most WTO cases are about breaches of the precise commitments that are relevant to it.

**Senator O'BRIEN**—Could you give us a considered answer to that rather than off the top of your head? Could you give us the details of the nature of the jurisprudence on this very issue?

**Mr Gosper**—As Mr Deady said, there has been very limited jurisprudence on the non-violation clause in the GATT and the WTO. Three cases in particular—the EC asbestos case, the Japan film case and the EC oil seeds case—featured some discussion of the jurisprudence of this case. The basic reading of the provisions, of course, is as Mr Deady indicated in his earlier answer. One thing to note in particular is that the panel in one of these cases affirmed that this was an exceptional provision and should be addressed with caution. In other words, because it did relate not just to the legal text of agreements but to measures which might affect the benefits that would flow from negotiated provisions, it was seen to be something that was a little out of the ordinary—exceptional. In examining the jurisprudence of this matter it would be examined with a great deal of caution by a WTO panel or the appellate body. But we can provide you with some written material on these precedents.

**Senator O'BRIEN**—Thank you.

**Senator BRANDIS**—The general principles expressed by Mr Deady are reasonably established.

**Mr Gosper**—Indeed.

**Senator CONROY**—I have some questions on this section as well. I will get to those but probably not today. Coming back to the committee that has been established to deal with the review of PBAC decisions, will it be reviewing the procedural fairness of it or will it be reviewing the substance?

**Dr Lopert**—My understanding is that it will relate to substance because there is a mechanism for reviewing procedural fairness already under the ADJR. On several occasions that avenue has been exercised and pursued.

**Senator CONROY**—Could you outline the size of PBAC at the moment? You just indicated that, basically, they have to look at the science in the same way that PBAC does.

**Dr Lopert**—I am having a little trouble here. Did you say the size or the science?

**Senator CONROY**—The science. I actually also want to know the size of PBAC.

**Dr Lopert**—PBAC currently consists of 12 people, including the chair. Legislation has been passed to increase the membership to 16, but that has not taken place.

**Senator CONROY**—Is that because it is hard to get everyone together at once? If the key pointy head cannot come—

**Dr Lopert**—No, that is not the issue. The issue is to broaden the range of expertise available. In particular, it is perceived that there are some areas in which PBAC could benefit from specific clinical expertise.

**Senator CONROY**—Given the job of the review panel, as you have described it, is to review the same facts—perhaps there will be new facts, but at the time of the appeal they will be reviewing the same facts—is it logical to conclude that the committee will have the same sort of experience as PBAC? That to be able to adequately review the work of PBAC it needs to contain not absolutely the same amount but the same breadth of experience?

**Dr Lopert**—As I have said repeatedly, I do not want to pre-empt the process, but I would imagine that it would be appropriate, given the complexity of the decision making process, for it to require multidisciplinary expertise. It may depend on the nature of the issues in question in the review. Could I add that you may wish to have access to a range of expertise to draw into a review mechanism, but you might not choose to draw on it on each occasion, depending on the nature of the issues to hand.

**Senator CONROY**—I was asking that because, if it needs to draw on all those same levels of expertise, the resources would need to be reasonably similar, I would have thought, to PBAC.

**Dr Lopert**—It may not be necessary to have the range of clinical expertise that is available to PBAC in reviewing a decision in relation to a particular clinical substance.

**Senator CONROY**—That is 12 to 16, though. You said the 12 to 16 increase was to accommodate those.

**Dr Lopert**—It was to accommodate the range of submissions and the range of clinical issues that are put before PBAC now. But this is extremely broad.

**Senator CONROY**—Sure. But it would not be unreasonable to anticipate that the cost and the resources necessary to support a committee that is doing a roughly similar job will be roughly the same.

**Dr Lopert**—I would anticipate—and as I said I do not wish to pre-empt the outcome—that any sort of panel involved in review would be substantially smaller than PBAC. It would not, as I said, be necessary to have precisely the same range of expertise because PBAC has to encompass every clinical area. That would not necessarily be the case for a review, providing that the necessary expertise could be drawn on if required.

**Ms Smith**—The review is only of decisions not to recommend listing, which is only a subset of the workload of the PBAC.

**Senator CONROY**—Has any thought been given to whether members would be paid or would it be voluntary? Has that been something that has been canvassed yet?

**Dr Lopert**—Again, that is something that thought has not been given to at this point.

**Senator CONROY**—Okay. So it could be voluntary, it could be a sitting fee or it could be salary.

**Dr Lopert**—The current paradigm that operates for the PBAC is that the members are paid sitting fees.

**Senator CONROY**—I am sure you have heard these both formally and informally, particularly if you have been following the JSCOT or this committee. Concerns have been expressed by former PBAC members that over time the review process will build up pressure on PBAC to make more favourable drug listing decisions. It may not happen immediately but in time this may occur. Would you like to respond to that? I am sure you have heard that.

**Dr Lopert**—I have. The comment has been made before that there is always pressure applied to PBAC into the process from different quarters to modify or to arrive at a particular decision in relation to a particular application. That is not new and that has always been the case. I would imagine that this review process will provide a focus and a channel for those existing pressures and lobbying, if you like, that already occur. In doing so it will provide—as you alluded to—an avenue for making that more transparent. There are in fact advantages to be gained in terms of transparency, as we have said, in providing this review mechanism.

**Senator CONROY**—Hopefully, we can maximise those advantages by having it fully transparent. Or is there a limit to where transparency maximises the improvement?

**Ms Smith**—You are certainly not the only person who has argued for that transparency to be applied to that process. That is a view that the government is taking very seriously in deciding how to take this issue forward.

**Senator CONROY**—Do you get nervous when you read Medicines Australia saying this is the most fantastic change it has ever seen? Does that give you cause for concern at any stage?

**Senator FERRIS**—Do not—

**Senator CONROY**—You do not have to take direction. I am sure the officials can manage without Senator Ferris's help.

**Senator BRANDIS**—Chair, there is only about an hour left, I understand. Senator Ferris has quite a number of questions. With the exception of about 10 minutes from me, the last hour and a half has been dominated by you and Senator Conroy. That is not a criticism of either of you but isn't it about time that we gave the call to somebody else?

**Senator CONROY**—This is a matter we might want to have a private hearing about rather than debate on the floor.

**Senator FERRIS**—It is not a debate. It was a question.

**CHAIR**—It is incumbent on me to make sure that everyone gets their full go. These are quite important subjects. I have indicated that.

**Senator BRANDIS**—Senator Ferris probably thinks her subjects are equally important.

**CHAIR**—Yes. So far as I am concerned, everyone is going to get the opportunity to ask their questions. No-one is going to be stopped from asking their questions. How much further do you have to go, Senator Conroy?

**Dr Lopert**—Can I just comment in response to Senator Conroy's previous question.

**CHAIR**—Let us settle this procedural matter first.

**Senator CONROY**—I have about 10 more questions that hopefully will not take too long. It depends on what the answers are. Often they are interesting answers that require further investigation.

**CHAIR**—Senator Ferris, how long do you think you will take?

**Senator FERRIS**—I have a number of questions and, Chair, you will recall that last week to assist the process I put a number of my questions on notice. Notwithstanding that I have had to leave to chair a whips' meeting, I have been patiently sitting here since 10 past four waiting for an opportunity to ask questions that I also believe are important. I am wondering how long I will be waiting.

**Senator BRANDIS**—I think that relatively speaking each senator should get about an eighth of the time, so opposition senators should have about three-eighths of the time between them and so should government senators.

**Senator CONROY**—As I said, that is a procedural issue for us to debate privately. I am happy to have a discussion about that.

**Senator FERRIS**—Let us have a private meeting and settle it now. If we are going to wait another hour before everybody is finished I am certainly not going to have my time, and I do not want to be in a position of having to put my questions on notice once again when I was the only person who had to do it last week.

**Senator BOSWELL**—Can we break a line of questioning? If Senator Conroy has another 10 questions to take an hour, why don't you come back to Senator Conroy after—

**Senator FERRIS**—Senator Ridgeway.

**Senator BOSWELL**—Senator Ridgeway or one of the coalition senators.

**Senator CONROY**—I am happy to break.

**CHAIR**—Thank you, Senator Boswell. Senator Ridgeway, you have questions, I think.

**Senator RIDGEWAY**—Mine are fairly straightforward—probably five questions at the most. Some of those may well be taken on notice but they are pretty straightforward, and I am looking forward to an opportunity as well.

**Senator CONROY**—As I said, I am happy to break and come back. If we run over and do not finish by seven—and I never envisaged that we could be restricted to about 25 minutes of questions each to solve the mysteries of the pharmaceutical benefits in the FTA, which covers 23 chapters—then we can go into Tuesday. I am happy to take up my questions on Tuesday when we hopefully come back to do it some more.

**CHAIR**—Thank you. At this stage I will ask you to finish this line of questioning in the next five or so minutes before we break from you.

**Senator CONROY**—I am happy to break at this point and come back to the rest of my questions later.

**CHAIR**—In that case go ahead, Senator Ferris.

**Senator FERRIS**—It would be fair to go to Senator Ridgeway.

**CHAIR**—Senator Ridgeway then.

**Senator RIDGEWAY**—This follows on from questioning by Senator Brandis and Senator Conroy on the dispute settlement mechanism and your answer in relation to pre-existing arrangements, taking the example of the PBS—presumably one amongst many. As I understand it, but for the request from the US for an independent review mechanism we would not presumably be dealing with legislation at all. If that is the case, what I am trying to establish is—separate from an independent process or not—where pre-existing stops and starts. Does it have a narrow definition in relation to any changes that might be made to existing legislation? I guess I am asking whether future governments or even the existing government are constrained from modifying the legislation in a narrow form or a major form.

**Mr Deady**—I am not precisely sure. In this particular area, of course, we are not looking at any legislative changes to give effect to the specific commitments in the PBS area. We do not think there are any legislative changes required. The obligations on the government of Australia—

**Senator RIDGEWAY**—But it is possible that in the future another government might think that the legislation giving effect to the PBS can be improved. Will they be constrained by whatever the definition of pre-existing is, or will that change the arrangement?

**Mr Deady**—No; again, I think the obligations in relation to the PBS are very clear in the agreement. Any future Australian government certainly would be bound by the commitments that we have entered into, but that does not mean that there could not be changes to the PBS or changes to other pieces of legislation, provided they are consistent with the obligations in the agreement. It does not preclude changes to the legislation.

**Senator RIDGEWAY**—And if they are not consistent?

**Mr Deady**—If they are not consistent with the obligations under the agreement, they would be in breach of the agreement. That certainly is an issue but, again, that is hypothetical. Governments in the future will see and understand the obligations that we have entered into here.

Where they are binding commitments, there certainly are limitations on the flexibility of governments into the future—but that is the nature of the binding commitments that we have entered into. As I say, in this area, the commitments that we have made are very clear. They are establishing a review and they are about transparency, and I do not think those sorts of process will require legislative change.

**Senator RIDGEWAY**—It is much more than hypothetical, though, isn't it? Given that parliament deals with legislation on a pretty regular basis, including bills to amend and bills to perhaps vary or reform existing arrangements, it is reasonable to expect that there will be changes in the future that may or may not breach any agreements under the free trade agreement.

**Mr Deady**—That is correct. The government is entering into binding commitments in key areas of the negotiations. The critical thing for the government, in part of the mandate that it gave us, was to ensure that in certain areas there would still be flexibility for the government and future governments. Where flexibility was considered necessary, that is built into the agreement. I will give the simple example of tariffs—perhaps again requiring changes to legislation. Under the trade agreement, we do bind tariffs at particular levels. In this FTA, it is zero for the United States. That is an ongoing treaty commitment for future Australian governments.

**Senator RIDGEWAY**—That probably leads into my next question about tariff revenue. I do not know whether you or someone from the trade analysis side in DFAT are able to provide a figure in relation to US goods now being able to enter the Australian market duty free. What is the current revenue that is earned on goods entering Australia and how will that figure change under the free trade agreement?

**Mr Deady**—In relation to the broad trade in goods and the tariff revenue across the board—

**Senator RIDGEWAY**—Essentially, what are they getting and what are we losing?

**Mr Deady**—In terms of tariff revenue forgone as part of these negotiations?

**Senator RIDGEWAY**—Yes.

**Mr Deady**—Within the RIS there are some numbers for the revenue forgone in Australia. It says:

The Treasury has estimated that the financial cost of the Agreement to the Commonwealth Government will amount to \$190 million in the first year (2004/05), \$400million in the second year (2005/06), \$420million in the third year (2006/07) and \$450million in the fourth year (2007/08). This estimate is based on the expected loss of tariff revenue from imports from the United States, which are assumed to grow steadily in line with the economy.

**Senator CONROY**—But that does not include the complete phase-down of autos on tariffs, because that takes a bit longer.

**Mr Deady**—Yes, as I understand it, that is a four-year—

**Senator CONROY**—Yes. So they are still quite high at the fourth year?

**Mr Deady**—No. These are Australian tariffs. As you know, not all of them go to zero on day one, but a lot of them do.

**Senator CONROY**—My point is that the two that are the highest take longer to phase out.

**Mr Deady**—They do.

**Senator CONROY**—Therefore the full loss of tariff in the year 2015, or whenever it is, is obviously not included in the first four years.

**Mr Deady**—It would not be. The phase-outs are on passenger motor vehicles and textiles, clothing and footwear, where you are right—it is phase-out over time. But the level of US imports in those items is not that large. So I do not think the revenue forgone—those numbers—would change significantly or in any substantial way.

**Senator CONROY**—I thought we did import a lot of cars now.

**Mr Deady**—We do—but these are from the United States.

**Senator CONROY**—Yes, and we import from Japan as well.

**Mr Deady**—That is right. The actual number of imports of passenger motor vehicles from the United States is not large. I do not have the equivalent numbers for the United States.

**Senator RIDGEWAY**—Could you provide those figures to the committee on notice?

**Senator BOSWELL**—But \$490 million seems a huge amount of tariffs. We have very low tariffs on everything now, other than cars and textiles, clothing and footwear. Where is the other money coming from? Everything else is down to five per cent, isn't it?

**Mr Deady**—Everything is on five per cent or lower. But of course we are talking about a very large volume of trade with the United States. Many of them are revenue tariffs—three or four per cent less than the five per cent on a range of chemicals, transport equipment and heavy machinery. Because the volume of trade in imports from the United States is large, those numbers are around that \$400 million.

**CHAIR**—Including an offset in revenue because—

**Mr Deady**—These numbers do not take account of the growth in the economy and the higher levels of income and taxation revenue et cetera that would generate from the high levels of activity. They are just a snapshot of the revenue forgone.

**Senator RIDGEWAY**—I have a question on the CIE report, which perhaps Mr Chester could answer. No doubt you would be aware that, on 25 March, I asked the minister a question on notice about the tender process for selecting a consultant. I was advised that a restricted tender process was put in place. They were invited to tender on 25 February, but the consequent decision was made not long after that, on 9 March. Can you inform the committee which other consultants were invited to tender?

**Mr Chester**—I am aware of your question on notice, but I will ask Mr Brown to answer this question.

**Mr Brown**—The short answer to your question is no—the other tenderers were commercial-in-confidence.

**Senator RIDGEWAY**—Given the range of media commentary made in relation to CIE—and certainly the comments to the effect of overstating the benefits, particularly against assumptions that may or may not have been wrong—did the department, in considering all those who had tendered, take those views into account, particularly given that, in a free trade agreement with the United States, one key factor would be the degree of confidence expected not just from the parliamentary processes but from the Australian community? Was that factor taken into account in considering the CIE's tender or, for that matter, any other tender?

**Mr Brown**—The CIE was chosen on the basis that it was a highly qualified and well credentialed organisation which had done a lot of modelling before; its results are open to public debate. I also point out to you the results of the study. There is a sensitivity analysis, in the rear part of the report, which gives a range of results. Of course, it states quite clearly that those results depend on the assumptions used. You can pick and choose according to your choice of assumptions but the overall result is very strongly in favour of the US FTA in terms of delivering benefits to the Australian economy.

**Senator RIDGEWAY**—Can you provide to the committee, on a confidential basis, information in response to my question about the other tenderers that expressed an interest?

**Mr Brown**—My advice is that it is still commercial-in-confidence and that we are not at liberty to disclose who the other tenderers were.

**CHAIR**—Why not? Merely invoking the commercial-in-confidence rule is hardly an explanation. This is a public tender, about a matter of public importance, in which taxpayers' money is being spent.

**Mr Brown**—I understand that, but that is the advice I have.

**CHAIR**—From whom?

**Mr Brown**—It is advice that I have sought from within the department.

**Senator CONROY**—Was that independent advice?

**Mr Chester**—No.

**Senator CONROY**—Under this definition, it could have been.

**Senator RIDGEWAY**—Thank you, Mr Brown. I have what may be a question on notice in relation to copyright, and it may come up as part of the roundtable. I want to ask a question to Mr Deady—I do not know whether he can answer this—or to a representative of DCITA, with respect to the extension of the term of copyright from 50 years to 70 years. Has the department

done any studies or modelling on the effects that that is likely to have and, if so, can you provide the committee with a copy of any report or paper you might have on that topic? You would no doubt be well aware that one of the arguments that has been put forward—at least from an Australian perspective—is that, with changes to the copyright term, software consumers in particular will have to pay more for software, and they will have to pay over a longer period of time. The Australian perspective is essentially that we are consumers as opposed to producers. Have any studies or modelling been done on that, given that the issue of whether or not we add an extra 20 years has not been properly debated?

**Mr Deady**—We have not done any specific modelling of the extension of copyright from 50 to 70 years. We did ask the CIE. You will see that there is a section in their report which looked at that. We asked them to make some sort of economic assessment, if they could, of what would be some estimates of the impact of the copyright extension, and part of their report looked at that. Their conclusion was that it would probably not have a terribly significant impact on costs, given the discounted present value, as they estimate, of the copyright extension. So, in the work that they did, there was not a significant cost.

**Senator RIDGEWAY**—So you are not aware of any reports or papers that may have been done by the department?

**Mr Deady**—The department has not done any work looking at the economic impact of copyright extension that I am aware of.

**Senator RIDGEWAY**—What about DCITA?

**Mr Deady**—My DCITA colleague can assist.

**Mr Cordina**—As Mr Deady indicated, the CIE did some analysis on this, having the benefit of the final terms of the agreement. CIE's analysis was that overall there may be some cost to consumers but the actual costs were difficult to quantify.

**Senator RIDGEWAY**—So you are not able to quantify that by any means from discussions with the software industry?

**Mr Cordina**—No, not from discussions with the software industry. One would think in relation to a product like software that the extension of the term really would not cause a huge impact, because software has quite a limited useful life cycle. If we are talking about the life of the author plus 70 years, you would think that technologies and products would have moved on so that after that period the commercial value of the software would be quite low if not nothing at all.

**Mr Deady**—This goes to the open source software industry and some of the representations or submissions that they have made. There are people here who are more expert than I am, but we believe that those concerns are unfounded. There is nothing in the FTA that would lead to that sort of result for the open source software industry. I know there was some press comment even this morning about a submission that they put forward.

**Senator RIDGEWAY**—As a follow-on to that and again in relation to the IT industry, can you comment on the provisions in the IP chapter that relate to the criminalisation of the circumvention of effective technological measures? There were two recent examples. One involved a young Norwegian programmer who developed a decrypting device that I understand did not breach copyright, but the device itself may be illegal in respect of the Australia-US free trade agreement. Another involved a Russian programmer who had also designed a similar program. He went to a conference in the United States, and as soon as he set foot on American soil he was arrested.

**Mr Deady**—I cannot answer specifically on those two cases. On the broader question of the commitments that we have entered into with the FTA, with regard to Australia's copyright regime—including penalties or enforcement type issues—there are some additional commitments that we have entered into. We are going through the process of looking at those and seeing what, if any, changes will be required of Australian copyright to give effect to those commitments that we have entered into.

There is nothing in this agreement that would require that. There is flexibility and there are exceptions that would allow us to meet the obligations that we have gone into. We have included in the agreement some specific language that talked about decriminalisation. Providing that this is not for commercial benefit or financial gain, there are exceptions which we believe will allow us to make those changes without having a draconian impact on those sorts of things. However, I cannot comment on those two specific examples.

**Senator RIDGEWAY**—Would you agree that it may cut across any innovation in our own software or hardware industry—in relation to ETMs, at least? Where devices are built that do not necessarily infringe on the law, particularly copyright law, the existence of the Australia-US free trade agreement may put individuals or small- or medium-sized Australian companies at risk of acting illegally by building technology that may breach what the agreement talks about.

**Mr Deady**—No, I am not aware of any of the commitments that we have entered into in the IP chapter that would lead to that sort of outcome. Again, I defer to some experts if they would like to add anything there, but that has not been raised as a concern in all the discussions we have had with Australian industry in advance of this. We already have a very strong IP protection regime in this country. It is a balance between IP property right holders and consumers, and that is the sort of balance that we have continued to try to ensure that we achieve as part of this agreement. I am not aware of those sorts of outcomes resulting from anything we have agreed to in the—

**Senator RIDGEWAY**—I do not know whether you are familiar with the example of the Russian programmer. That was in relation to a device designed to assist blind people being able to access e-books. He was arrested in that context because of the device that had been created to assist these people in being able to access that sort of information on the Net.

**Mr Cordina**—I might also be able to help out, Senator. The FTA does provide obligations for the tightening of measures in relation to circumvention devices. But, importantly, it also allows for Australia to implement exceptions, which will reflect that balance between owners and users. In addition to implementing exceptions, there are also exceptions that we have actually already recognised in the agreement, particularly in relation to, say, innovation and software products.

There is one in relation to allowing reverse engineering to develop interoperable products. So the system does allow for that balance that we have under our current copyright system to continue.

**CHAIR**—Before I call Senator Ferris, I would say to you, Mr Brown, I have just obtained some advice from the secretariat about commercial-in-confidence. I would like to read to you, and for the record of our hearing, a resolution of the Senate dated 30 October 2003. It might be the case that you need to refer back to your principles on this. The resolution of the Senate on commercial-in-confidence was:

That the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is ... accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.

I do not intend to do any more about it at this point other than to simply draw your attention to that resolution of the Senate, but it may be that, in view of that, you need to refer back.

**Mr Brown**—Thank you, Senator. I would also add that I was asked by the unsuccessful tenderers not to disclose their identity.

**CHAIR**—That may be so, but what this resolution requires, as I read it, is an indication of what possible commercial harm there would be in disclosing information to a Senate inquiry.

**Senator FERRIS**—I would like to follow up a question that I believe was asked by Senator Brandis in relation to some evidence given by Dr Thomas Faunce. I do apologise that the *Hansard* is not available yet. Although Dr Faunce did give us some material, unfortunately our questions to him are not available, so I will understand if some of this evidence is something that you have not had the opportunity to peruse in detail.

One of the things that Dr Faunce raised, which did receive some publicity so you may be aware of it that way, was his argument that as a result of the wording of the free trade agreements—in particular in relation to the independent review process, which other people have explored—Australia would face likely sanctions under the dispute resolution and enforcement provisions of the agreement. He then went on to argue quite strongly that the full effect of the free trade agreement on the pharmaceutical industry would not be felt for around five years, but ultimately Australians would end up paying at least one-third more for their drugs under the free trade agreement than they do today. I think this evidence was of great concern to most members of the committee, and I would appreciate it if you could give us a response to that. Perhaps some departmental officers from Health might like to do the same as well.

**Mr Deady**—Just on these claims about what the impact of the commitments in the agreement might be on pricing for the PBS, we had very clear instructions and right through the negotiations made it very clear that we were negotiating with the Americans in this area in a way that would not lead to any fundamental undermining of the Pharmaceutical Benefits Scheme, that would not impact on the pricing and listing processes under the PBS. We have committed, in terms of improved transparency in certain areas, to the establishment of this review mechanism which we have been discussing, but I do not see anything in this agreement that could lead to that sort of claim—that somehow this is going to lead to those sorts of prices as a result of any

commitments on the PBS entered into by the government. Some of those claims were made throughout last year—that somehow we were going to negotiate an outcome that would lead to these huge increases in prices for drugs under the PBS. As I say, that was something we were never negotiating on; it is not something that we have negotiated as part of this deal. There is nothing in this agreement that leads to that outcome, in my view.

**Ms Smith**—The Department of Health and Ageing would endorse those comments. I have only seen the media commentary on what Dr Faunce presented to the committee, but we cannot see any substance for the claim that prices would rise as a result of this agreement.

**Dr Lopert**—I concur with Ms Smith on that.

**Senator FERRIS**—One of the things that Dr Faunce referred to was institutionalising pressure on the PBS. He also referred to what I found to be quite an unusual set of words. He talked about ‘constructive textual ambiguities’. He said that these would be used to resolve intractable issues that arose during negotiations, which he claimed would eventually undermine Australia’s PBS and the cost of drugs would increase. So when you—or perhaps Health—were looking at the words of the free trade agreement, did you see any constructive textual ambiguities that you feel may arise and disadvantage the PBS as we understand it?

**Mr Deady**—No. The language that is in the annex and the exchange of letters—the sideletter that we attached here—was very heavily negotiated between us and the United States. We were very conscious, as I say, of the mandate that the government gave us in relation to this and of what we could and could not do in relation to the PBS. I think the language in those annexes and the exchange of letters is quite clear as to what we have agreed with the United States and what we have not. I believe the language is very clear, despite the claims that may have been made before you, where the precise examples were given of this so-called ambiguity. The commitments are pretty clear. We have made commitments on transparency, we have made a commitment to establish this review, and I think that language is very clear in the agreement. We have a sideletter that does elaborate in more detail precisely what Australia is going to do. That was part of the negotiated outcome. The Americans have seen that letter, and they understand what we have committed to and what we have not. I am not sure precisely what Dr Faunce means, but the language is there and I think it is precise and clear as to what we have agreed to as part of these negotiations and what we have not.

**Dr Lopert**—I would just like to add to what Mr Deady said. I believe Dr Faunce may be referring to the commitment in relation to the review mechanism, which does not articulate the precise manner in which we will implement that review mechanism. I would argue that that actually provides us with flexibility in how we will address the commitment contained in that provision. That is appropriate, because it is a matter for us to progress in a domestic context in consultation with our stakeholders. It is not appropriate to provide that commitment in a very detailed way in this context. Rather than ambiguity, I would argue that that is flexibility in how we implement that provision.

**Senator FERRIS**—I suppose that depends on the eye of the beholder. I suspect that is what Dr Faunce was arguing from. I just wonder if during the negotiations there was more pressure on the PBS than might have been obvious now that the agreement has been finalised, or was it the

case that the United States always accepted that this was one of the issues on which there was not a bargaining position?

**Mr Deady**—This was an issue that was discussed at some length in the negotiations; in fact, the majority of the time last year was spent in discussion with the United States explaining the operation of the PBS—what it did and did not do. There were a lot of exaggerated claims about the PBS—claims that it was very much a black box. Through the help of our Health colleagues and Dr Lopert in particular, I think we were able to explain to the United States more precisely what the PBS is and is not. That certainly very much helped the process.

The Americans certainly did have a level of ambition in the PBS. There was a big debate in the United States last year over pharmaceuticals, which I am sure you are aware of, so it was an important issue for the United States in the negotiations. I think the lead US negotiator was on the record saying that the US was not looking to destroy the PBS—which were some of the exaggerated claims that were being made—but certainly some of the proposals and propositions that were put to us at the end of the last stage of the processes in Washington were ones that we very much pushed back and did not accept. In our view and the Australian government's view, they potentially did get to the fundamentals of the scheme, which we were not prepared to agree to. In the end, the negotiated outcome is the one that is before you. It sets out clearly the commitments that the government of Australia has made to the United States in relation to the Pharmaceutical Benefits Scheme, and those commitments do not undermine these fundamentals. Pricing and listing have not been undermined as a result of anything we have agreed to in this agreement.

**Senator FERRIS**—If Dr Faunce is arguing that the full effect of the agreement in relation to the PBS would not be known for at least five years, he is presumably working on the basis that institutionalised pressure, as he called it, will unravel some aspect of the independent review process. How else could he reach that conclusion of it being a five-year lead-in to higher costs for pharmaceuticals in Australia?

**Mr Deady**—I do not know. I cannot really answer that other than to say that you have to look at what we have agreed to with the United States. This did go through a very detailed negotiating process. As I said, at the end the Americans were putting things to us. They did want more in this area than we were prepared to agree to. This is as much as the Australian government was prepared to commit to in this area, and that was the outcome of the negotiations. As I say, the pressure that the Americans could bring to bear in that final stage of the negotiations is part of the negotiating dynamic, and they certainly did press things. Nonetheless, this is the outcome we were prepared to agree to. What you see is the hard facts of the outcome, not speculation on what may be the case five years down the track. Frankly, I do not know what that means, because the negotiated outcome is the one that the government negotiated sitting across the table from the US in February.

**Senator FERRIS**—I think the view that he was putting and the argument that he builds is that a review mechanism that cannot overturn a PBAC recommendation is inadequate to meet the terms of the agreement and that the US will then invoke the dispute resolution mechanisms of the agreement. He argued that that would then leave Australia vulnerable to penalty and that might flow back into the drug prices.

**Mr Deady**—I disagree with that. There is nothing in the agreement that leads to that result. We have agreed to establish an independent review to look at recommendations not to list. That is what the agreement says and that is what the government of Australia is committed to. I think that really is completely speculative. I cannot see how that commitment would lead to a dispute settlement case coming out the way that Dr Faunce is speculating.

**Senator FERRIS**—Do the health department officials want to make any comment?

**Ms Smith**—We completely endorse what Mr Deady says. I cannot see any basis for that claim whatsoever.

**Senator FERRIS**—So the Minister for Health and Ageing, after receiving the recommendation of the PBAC, will remain the final decision maker on whether or not to list a drug on the PBS?

**Ms Smith**—Yes; that is correct.

**Senator FERRIS**—Mr Deady, could you look at Dr Faunce's evidence and then make further comment? It was quite alarming and some of his apparently well reasoned arguments might need to be addressed in greater detail than we have the opportunity to do here when we do not have the *Hansard* in front of us. I feel it is quite difficult for you to know exactly what he said without having had that benefit.

**Senator BRANDIS**—Senator Ferris, could I just jump in here? I understand informally from the chair that it is expected that you, Mr Deady, and other relevant persons who were involved in negotiating the agreement will come back to this committee for at least one more hearing after this evening.

**CHAIR**—Yes; I do not think we can conclude our questions in three hours.

**Senator BRANDIS**—I think that is right. With respect, Senator Ferris, rather than asking you globally to read what Dr Faunce and the others have said and then asking for a response, perhaps we might at the subsequent hearing put to you, Mr Deady, a series of particular matters of concern—not only arising out of Dr Faunce's evidence but arising out of the evidence of a variety of witnesses and invite you to respond either straight away or by taking the questions on notice.

**Mr Deady**—Yes.

**Senator FERRIS**—It is just unfortunate that the *Hansard* is not available at this stage. Did the department receive advice, including legal advice, from other government departments or agencies on the likely impact or effect of the pharmaceuticals annex on the PBS?

**Mr Deady**—The process of the negotiations was very much a whole-of-government one. My colleague Ms Smith was involved; she was seconded to DFAT right through the process, so she contributed to the negotiations right through. Dr Lopert was involved right from the beginning of the negotiations. So that was the expertise certainly that we drew on from the health department.

We have lawyers as part of the team; we have Attorney-General's as part of the team. I do not know whether that answers your question.

**Senator FERRIS**—Is there any written advice, any legal opinion, that could be made available to the committee?

**Mr Deady**—No, we do not have anything like that. Again, picking up on Senator Brandis's question, if specific issues about particular language in the agreement taken from various submissions are put to us, then we are certainly happy to try and answer them. But, as I have tried to say, our very strong view is that we have worked very hard to ensure that the language in the annex and in the side letter reflect the commitments that Australia was prepared to make to the United States in relation to the PBS and that they are meaningful and they are about transparency. The government does not back away from that. This review mechanism is a new commitment from the government as part of this PBS language. But we are very confident that the language we have negotiated in this annex reflects the commitments that the Australian government is prepared to take with the PBS and that they do not get to those fundamentals of the scheme.

**Senator BRANDIS**—Certainly Dr Faunce's critique of the agreement from the point of view of its perceived threat to the PBS seems largely to be based on article 21.2, which is why I asked you that question earlier on. If I may say so, you seem to have very comprehensively met the objection.

**CHAIR**—That is not my recollection of the argument he has made.

**Senator BRANDIS**—It was certainly a substantial part of it.

**Senator FERRIS**—One of the great benefits of having many of these officers back is that they will have had the opportunity to not only read Dr Faunce's evidence but also look at the papers that he submitted to the inquiry at the same time. One thing that came through in our hearings last week about this agreement is the question of the price of drugs in the future. It is very clearly an issue of great community concern. Evidence such as Dr Faunce's evidence raises that concern in a wider context. I would just like for you to say to me again that there was no advice that you received and no advice that the department of health either received or offered that suggested that this agreement would, in any way, establish a mechanism which in the future could increase the price of drugs under the PBS to Australians.

**Mr Deady**—I will say very clearly that there is nothing in this agreement or the commitments we have made to the United States in the PBS area that undermine the fundamentals of the PBS pricing and listing. Yes, we have taken on commitments in relation to transparency in the process and we have established this review which will look at negative findings and recommendations as we have discussed, but there is nothing in this agreement that would result directly in prices being increased. The review mechanism is just that: a review mechanism.

**Dr Lopert**—There is only one provision in the entire text which relates to prices in any way and that is paragraph 4 of the side letter entitled 'Exchange of letters on Pharmaceuticals', which says that Australia will provide opportunities to apply for an adjustment to a reimbursement amount for pharmaceuticals. It is important to recognise that that reflects existing process and

existing procedures. It is clearly stated in the procedures manual of the Pharmaceutical Benefits Pricing Authority that companies may apply for an adjustment to the listed price of pharmaceuticals on the PBS. There is a list of conditions under which the PBPA will consider that application and the grounds. There was something like 500 such applications in 2003 of which a small percentage were granted.

**CHAIR**—Could you give us the reference again?

**Dr Lopert**—The reference is to paragraph 4 of the side letter that says Australia will provide opportunities for companies to apply for an adjustment to the price. My point is that that reflects existing process.

**CHAIR**—Yes, I just did not get the reference; I heard your answer.

**Senator BRANDIS**—So your point is that there is nothing in paragraph 4 of the side letter which, in any respect, changes the review mechanisms that currently exist.

**Dr Lopert**—That is correct.

**Senator FERRIS**—I think Dr Faunce was arguing that the US drug companies are so large, so experienced as lobbyists, so well resourced and so wealthy in terms of the profits that they are able to make, that Australia would always lose out in an argument with a group as large and as effective as lobbyists as that group. But the point that was made before is that the minister for health would always have the final decision and, therefore, no matter how powerful the lobbyists are on either side, the final decision comes back to the minister.

**Dr Lopert**—And, furthermore, the minister can only list a drug on the PBS which has received a positive recommendation from the PBAC.

**Senator BRANDIS**—Can I take you back to paragraph 4 of the side letter which I now have open?

**Dr Lopert**—Certainly.

**Senator BRANDIS**—I think it is very important that we make this as clear as can be. Paragraph 4 merely says:

Australia shall provide opportunities to apply for an adjustment to a reimbursement amount.

**Dr Lopert**—That is correct.

**Senator BRANDIS**—That is the whole of it. Your evidence is that that is the only thing in the entire FTA that bears upon the question of price reviews under the PBS.

**Dr Lopert**—That is correct.

**Senator BRANDIS**—Do I understand you to be saying that the operation of paragraph 4 of the side letter merely means that the already existing mechanism for price reviews is unaltered—that what paragraph 4 is talking about is the pre-existing mechanism for price reviews?

**Dr Lopert**—That is correct. It would continue to make that available.

**Senator BRANDIS**—So that neither the criteria according to which prices may be reviewed or the procedures whereby that review process may be invoked or any other material circumstance concerning price reviews is affected by the FTA?

**Dr Lopert**—That is correct.

**Senator BRANDIS**—Thank you.

**CHAIR**—Why can't that be spelt out in the letter?

**Senator BRANDIS**—Maybe it does not have to be.

**Senator FERRIS**—I am sorry; I thought I was asking the questions.

**CHAIR**—Yes, but Senator Brandis intervened. And he did on me too, Senator.

**Senator FERRIS**—Yes, but I allowed Senator Brandis to intervene because Senator Brandis is also a government senator.

**CHAIR**—I am also the chairman, Senator.

**Senator FERRIS**—I understand you are the chairman, but I have waited patiently for almost two hours to ask my questions.

**CHAIR**—We can come back to this point, but it might just be that we can clear it up now. Why wouldn't that detail that Senator Brandis has referred to—which, in his version of it, would provide comfort to Australians—not be spelt out in the letter?

**Mr Deady**—I think the point here is that the commitment that we are making to the United States is that we will provide an opportunity for them to apply for an adjustment to the reinvestment amount. That is the binding commitment that we are giving. That is an existing arrangement that we have in place. It does not say anything about—we do not believe you need to go into that sort of additional detail there. That is the commitment that we are making—that we will provide this opportunity to apply for adjustments. We meet that obligation by our existing circumstances.

**Senator BRANDIS**—Could it simply be that no extra words need be used, because you are not changing anything?

**Mr Deady**—We are not changing anything; we are giving a commitment to maintain an arrangement and opportunity that we already have in place. That is the reality.

**Senator FERRIS**—And that 500 applications were made in the last year under those existing terms of the agreement.

**CHAIR**—I just note that, notwithstanding all of that, the Faunce argument still has standing. Having noted that, I call Senator Ferris.

**Senator FERRIS**—One of the other arguments that Dr Faunce used was that the text of the agreement was, as he put it, unbalanced, and increased the pricing power and leverage of US drug companies already operating in Australia. How do you respond to that claim?

**Mr Deady**—Again I disagree. I do not think there is anything that I can see that we have agreed to here that would lead to that conclusion. I just do not agree with that claim. There is no basis on the facts of the text. As I say, I have not seen precisely what the doctor has said and whether he has cited any particular references to lead to that conclusion, but I do not believe there is anything in this agreement that leads to that claim.

**Senator FERRIS**—Would you agree, Dr Lopert?

**Dr Lopert**—Yes. I am not clear what he is specifically referring to when he is referring to lack of balance. I would like to see the transcript of what he said in order to—

**Senator FERRIS**—When you have the opportunity to do that, perhaps you can do that.

**CHAIR**—We are intending to have a roundtable on this.

**Senator FERRIS**—I understand that. I want to ask some questions that relate to some evidence that came from Professor Garnaut and Professor Drysdale. It refers to an in-principle comment that was made by them. They are both, I think it is fair to say, critics of preferential trade deals in general, and this free trade agreement in particular. But in the past both of them have described the passage of the NAFTA through Congress as a brilliant piece of trade policy. Can you explain to me what is so different between the free trade agreement and the NAFTA agreement in terms of the preferential arrangements?

**Mr Deady**—They are both preferential trade agreements.

**Senator FERRIS**—Each of them surely is.

**Mr Deady**—Yes, that is right. They are free trade agreements covered by the rules of the WTO.

**Senator BOSWELL**—Mr Chair, it looks as though I am out for the count tonight.

**Senator FERRIS**—I did not think we were committed to stopping at seven o'clock.

**CHAIR**—I think we are. Can I indicate, for the record, that you will certainly get your opportunity to ask all the questions you wish to, Senator Boswell.

**Senator FERRIS**—I am somewhat puzzled as to why the NAFTA agreement should be described as brilliant trade policy—I think they called it ‘triple play’, but that was in relation to the fact that Canada and Mexico were involved—and yet they were both, I think it is fair to say, particularly critical of this free trade agreement as being a preferential arrangement that they disagreed with. I am puzzled as to why one is brilliant and the other is not. Do you have a view on that?

**Mr Deady**—If that is the case, it is pretty hard for me to comment on why Professor Garnaut and Professor Drysdale made those comments about NAFTA. I do not know about those comments.

**Senator FERRIS**—They did not make those comments the other day; they made them in a publication that I happen to have. They certainly made the critical comment of this agreement being part of a preferential agreement that they disagreed with in principle. I am just somewhat puzzled by that.

**Mr Deady**—Certainly in terms of the coverage of the agreements, the FTA that we have negotiated with the United States is really the first FTA that the United States has negotiated with a developed economy like Australia since the NAFTA agreements. It is a fully comprehensive agreement covering the 23 chapters that Senator Conroy mentioned before and is between two very sophisticated economies. In that sense I think it is a very big deal. As I said, it has to be consistent with the WTO rules—both the rules of the GATT and of the GATS—and we believe it passes all those tests. In that sense it is a bilateral free trade agreement that is consistent with the WTO rules. NAFTA is also a very big deal. As I said, I am not sure what particular point was being referred to.

**Senator FERRIS**—When you have an opportunity to look at that evidence, you might like to make a comment on it. Another question that was raised in my mind last week was about the criticism—and, again, I raised it with Mr Oxley, who disagreed with this criticism—that this free trade agreement undermined the negotiating power of the Cairns Group and the perception of the Cairns Group as a powerful lobby group. Notwithstanding the fact that at least one member of the Cairns Group is negotiating a similar agreement with the United States, does anybody have a comment in principle about the way in which this agreement is operating in relation to the perception of the Cairns Group and its credibility by member countries?

**Mr Gosper**—It is not a factor. I cannot think off the top of my head of any Cairns Group member that is not part of a preferential trade arrangement or negotiating one—most of them are negotiating several. The Cairns Group continues to operate very effectively. It had a very successful meeting in February this year in Costa Rica at which this issue was not raised, either directly or indirectly.

**Senator FERRIS**—It was not raised at all by any member country?

**Mr Gosper**—Not that I am aware of. The Cairns Group continues to operate in Geneva and at ministerial level with focus on the WTO. So I think it has no relevance whatsoever.

**Senator FERRIS**—A secondary criticism was that this free trade agreement was distracting us from the WTO processes. Do you have any comment on that, Mr Gosper?

**Mr Gosper**—No, I do not see that it is any distraction at all. Australia continues to put in as much effort as ever—in fact, more than ever, I would argue—over the last few months as we have sought to restore some momentum in these negotiations. I think the successful meeting in February is an example of that, together with the meetings that Mr Vaile is attending this week in Paris, including a series of ministerial meetings and informal negotiations on parts of the agricultural text that is being addressed as part of the Doha round. So any way you look at it—the specific initiatives that have been put forward, the breadth of our coverage and interest in the Doha round and the energy and activity we have put into the Cairns Group and into the overall negotiations—I cannot see how you could present this as a distraction.

**Senator FERRIS**—I think the Cairns Group is almost 20 years old now.

**Mr Gosper**—It was formed in 1986.

**Senator FERRIS**—When the Cairns Group meets as a group, would those individual members normally talk about arrangements or preferential trade deals they might be negotiating with other parties?

**Mr Gosper**—The Cairns Group is a coalition of fair traders, focused on getting some better trade regime through multilateral negotiations in the WTO. So that is what it talks about. It meets very regularly—daily or weekly—in Geneva, at officials level to talk about the agriculture negotiations. It meets regularly, at least annually, and often more frequently informally, at ministerial level. But the focus is on just the agriculture negotiations as part of the multilateral process.

**Senator FERRIS**—Given how often they meet, would it be fair to say that, if any of those countries were worried about the effect of the free trade agreement on their individual bargaining power or on the perception of the group as a whole, it would have been raised by any country?

**Mr Gosper**—I do not think you would expect that sort of discussion to be part of the group discussions. Of course, the fact that ministers and officials meet from time to time provides opportunities for discussion about bilateral issues of one sort or another, but again I am not aware that this issue has been raised with us by anyone.

**Senator FERRIS**—So the suggestion that in some way this free trade agreement has undermined multilateralism is an unfounded fear?

**Mr Gosper**—I believe so.

**Senator FERRIS**—And the suggestion that it has undermined the status of Australia as one of the lead nations, in fact a founding nation, of the Cairns Group is also unfounded?

**Mr Gosper**—I do not see that it has detracted in any way from our Cairns Group role.

**Senator FERRIS**—How successful has the WTO been in liberalising agricultural trade?

**Mr Gosper**—Would you like a short answer or a long answer?

**Senator CONROY**—Take your time!

**Senator FERRIS**—I think it is an important issue because it was raised at the roundtable by a number of individuals last week. I put these questions to Mr Oxley and he dismissed them almost out of hand. I think it is important to answer them from an official's point of view.

**Mr Gosper**—I think, in essence, the Uruguay round negotiations on agriculture represented an important development for the way in which agricultural trade and agricultural subsidies are addressed in the trading system, because it did create a framework which provided for disciplines on export subsidies and domestic support as well as some increases in market access. However, you only have to look at the current attention being given by all members to furthering that reform process of moving towards the complete elimination of export subsidies and much deeper cuts in domestic support and improvements in market access and look at what has happened over the past half a dozen years with high levels of agricultural support still being provided by the major northern hemisphere subsidisers to know that there is still a very large job ahead of us in agricultural trade reform. It is the critical issue for the Doha round. I think everyone acknowledges that unless there is some substantial outcome on agriculture it is difficult to see the global trade round moving forward. So it is the key to the whole trading system; it is an area, like a couple of other areas such as textiles, where big gains need to be made.

**Senator FERRIS**—Thank you for that very good answer. One comment that was made last week in the roundtable was that, if Australia did not sign this agreement, we would be considered a laughing stock internationally. That comment was made by Mr Oxley and it was also—

**Senator BRANDIS**—The most bizarre country in the world, they think.

**CHAIR**—That was a made-for-media comment.

**Senator FERRIS**—Just a minute—can I just finish my question? It was also made by Dr Stoeckel. I wonder if you have any comment on those remarks.

**Mr Gosper**—I did not hear the discussion or his comments, so I do not really have any particular comment to make.

**Senator FERRIS**—But how do you think Australia might be considered if we were to walk away from this opportunity?

**Mr Gosper**—Obviously many countries are seeking to negotiate improved trade with the United States. Countries in the western hemisphere and some countries in the Asian region are all seeking to negotiate much better access. We have been able to successfully do that, so I think that some would think that we would be in a good position to take advantage of the successful outcome to the negotiation.

**Senator FERRIS**—Some members of this committee have suggested that Australia should be laughed at for what we achieved in the free trade agreement and that other countries who observed the negotiations have said that they expected Australia would have been able to achieve more.

**Mr Gosper**—I do not think it is any secret that we would have liked to achieve a little more in agriculture, but I think the results stack up. I do not know that anyone else has been able to do any better in negotiating real improvements to our agricultural sector.

**Senator BRANDIS**—Are you satisfied—and perhaps you could respond to this too, Mr Deady—that the agreement as it was ultimately negotiated was the best agreement that Australia could have achieved?

**Senator CONROY**—No, they recommended signing when they did not pick that up.

**Senator FERRIS**—Senator Conroy, are you in the peanut gallery?

**CHAIR**—Order! We are almost out of time. Mr Deady?

**Senator BRANDIS**—Are you satisfied, Mr Deady, that the agreement in the form that it ultimately took was the best deal Australia could have gotten?

**Mr Deady**—There is no doubt that it is the best deal we could have negotiated with the United States, and that it is a very big outcome. That is the point I would make. As Mr Gosper has said—and it is well known—there are aspects, particularly in agriculture, where the government is disappointed with the outcomes. But even in agriculture it is a big deal. Across the board—in manufacturing, services and investment—it is a huge deal, and that is certainly the package that was negotiated. It is a balanced package. As I have said before—and I think it is worth saying again—like any negotiations, we did not get everything we wanted, and neither did the United States. It is a big deal, and it is one that both governments believe is a substantial outcome for both their economies. That is what the governments have taken the decision on.

**Senator FERRIS**—Mr Gosper, it has also been suggested that, because we are such a small economy and America is such a large economy, we will have very little leverage in the outcomes from this agreement—that, as the small nation, we are at the mercy of the large nation. Could you comment on that principle, as it relates to the CER agreement with New Zealand? Mr Deady might like to comment as well. When that agreement was struck, I seem to remember it being suggested that New Zealand, being such a small economy, would always be at the mercy of Australia, the larger economy. Yet that does not seem to have been the case. Can you comment on the principle of the small and the large and the question of leverage?

**Mr Deady**—I think we negotiate balanced deals. We are the small economy—everyone is small in relation to the United States—but we have gained access to 300 million of the richest consumers in the world. That is the outcome we have negotiated. It is certainly up to Australian businesses to take advantage of those opportunities. But that is the market access package—that is the deal we have negotiated with the biggest economy in the world. Two of us in this room negotiated what I believe is a very comprehensive outcome.

Going back 20 years in history to the CER with New Zealand, I think it is fair to say that there was debate on both sides of the Tasman about what that deal might lead to. It is very clear in my mind that both countries have benefited from the trade liberalisation and deregulation that came out of it. My personal view is that, if we had a debate now about the CER with New Zealand, people would probably ask: ‘What was the debate 20 years ago about? Why did people not think

that was a good idea?’ I really believe that. That agreement has led to deregulation and further liberalisation and reform in both economies which has been to the benefit of both economies. Two-way trade has grown enormously. Dairy is one example in Australia. The adjustments that have been forced on the dairy industry in Australia as part of the increased competition, over time, from New Zealand, have strengthened that industry and made it least the equivalent, in competitive terms, of the New Zealand dairy industry.

**Senator FERRIS**—Interestingly enough, New Zealand is one of the principal beneficiaries of the free trade agreement with the United States. Mr Gosper, did you want to add to that?

**Mr Gosper**—No.

**Senator BRANDIS**—Mr Deady, following on from that, you could even make a case for saying that, where you have an agreement between a small to medium-sized economy like Australia and an economy as big as the United States, it is the smaller economy that is going to get the greater relative advantage because it gets greater access to the larger market, and the relative impact on our economy is going to be greater than the impact on the American economy. What would you say about that?

**Mr Deady**—It is certainly true that small access gains to the US market deliver potentially very substantial benefits for industries the size of Australia’s industries. Again, the dairy industry is a good example. We have very limited access for dairy now. We wanted a better deal than we got, but nonetheless the dairy industry, having come back and reviewed the deal, have made it clear that they see the access gains that we have got. They are not as great as they would have liked, but they are significant for the scale of the Australian dairy industry as it looks forward to taking investment decisions and other things over time.

**Senator FERRIS**—And that was the evidence they gave to this committee last week.

**Senator BRANDIS**—So, far from the rather unsophisticated view we have heard from some people that, because America is a big player and Australia is a small player, Australia would run the risk of suffering a disadvantage, it seems that the opposite is true: a small player like Australia will multiply its benefits by getting access to the larger market.

**Mr Deady**—I believe that is the case. I also think that in areas like services and investment—again, this is perhaps an issue that will be taken up at a subsequent discussion—the big outcome we got from the United States is that Australian service providers and Australian investors will not be discriminated against in the United States. I believe that is a very substantial outcome for Australian service providers and investors because in that third of the world economy—that is what we are talking about—we have those commitments for Australian investment, which is significant now in the United States, and for Australian service providers. We export \$6 billion worth of services to the United States now. We will not be discriminated against in government regulation at the federal and state level in the United States. I think that is very substantial. We make the same commitment to the United States here.

**Senator FERRIS**—Thank you.

**CHAIR**—We are a bit over time. I have a set of questions which, had we more time, I would have asked you. They are my folder. If I put them on notice, could you provide answers for them? It might be that it would be better for me to give them to you tomorrow morning, after I have put them in a more appropriate form.

**Mr Deady**—Thanks.

**CHAIR**—The thing that I did foreshadow earlier is that I had a return to order type series of questions about what documentation, analysis and advice you undertook and what the various feeder departments into your negotiating committee undertook. I will put that in writing and provide it to you as well. I do indicate for the record that Senator Boswell has been unable to ask questions tonight, and he will get the call first thing at the resumption of these hearings. As a former chairman of the Cairns Group, I am happy to advise you further if you wish, Senator Ferris, about how the Cairns Group functions.

**Senator FERRIS**—As a member of the National Farmers Federation when the Cairns Group was established, I do not think I need that advice. Thank you, anyway.

**CHAIR**—I thought you were asking for some advice from Mr Gosper.

**Senator FERRIS**—I was not asking for any at all, and I think you are being unnecessarily offensive in that remark. Nevertheless, because of the time, I will not—

**CHAIR**—Probably unnecessarily sarcastic is a fairer description of what I have just done.

**Senator FERRIS**—Silly, I would have thought.

**CHAIR**—On that basis, we regretfully look forward to seeing you again, and I mean that in the kindest possible way. We are now adjourned until a time to be fixed.

**Committee adjourned at 7.07 p.m.**