

From: Megan Davis [megan.davis@unsw.edu.au]
Sent: Wednesday, 14 April 2004 6:43 PM
To: Committee, Treaties (REPS)
Subject: FTA Sub Jumbunna Indigenous House of Learning Prof Behrendt

Importance: High



JIHL SUBMISSION SMH Behrendt
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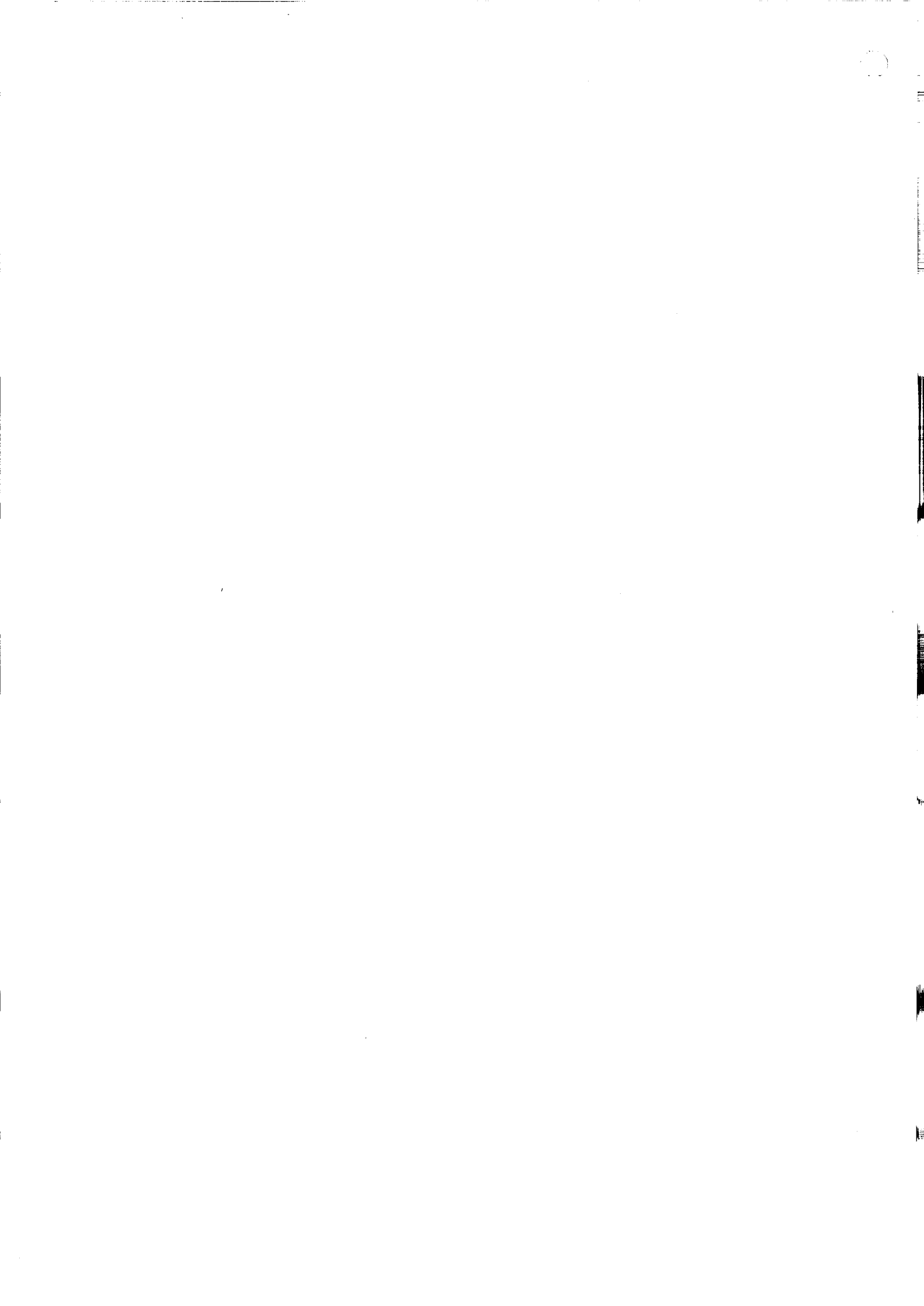
To Whom It May Concern

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BY:

Please find attached a submission to the FTA inquiry from UTS, Jumbunna Indigenous House of Learning.

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Megan Davis, Project Director 'International Trade Law and Indigenous Peoples' Robynne Quiggin,
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13 April 2004

The Secretary
Joint Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Secretary

Australia-United States of America Free-Trade Agreement

Thank you for the opportunity to make a submission on this issue. Our submission addresses issues concerning the Aboriginal and Torres Strait Islander communities of Australia and the potential negative impact of trade liberalisation upon Aboriginal and Torres Strait Islander communities.

It is written from the perspective of indigenous lawyers at Jumbunna, Indigenous House of Learning. In our submission we have also attached an opinion piece, 'Adverse effects of free-trade deal will hit indigenous groups hard' printed in the *Sydney Morning Herald* 8 March 2004 regarding our concerns about the impact of any potential FTA on indigenous communities in Australia. Our research unit also conducts a research project specifically involving 'International Trade Law and indigenous peoples'.

Our submission does not focus on estimations of the wealth and benefits that may flow to indigenous individuals and communities. Our submission focuses on our primary concerns about the disproportionate disadvantage of Indigenous peoples that may arise as a result of any potential changes to the PBS and Intellectual Property laws.

Our key conclusions are predicated upon the belief that 'As a poorer socio-economic group, indigenous people are vulnerable to economic shifts'.¹ Therefore there must be progressive and ongoing assessment and monitoring of the *Australia-United States of*

¹ Professor Larissa Behrendt and Megan Davis, 'Adverse effects of free-trade deal will hit indigenous groups hard' *Sydney Morning Herald* (March 8, 2004)

America Free-Trade Agreement (hereafter 'FTA') impact upon indigenous communities not excluding ongoing assessment of the two specific exemptions related to indigenous peoples in the text of the agreement.

Pharmaceutical Benefits Scheme

We would like to express our deep concern about any potential changes to the Pharmaceutical Benefits Scheme (PBS). Health in Aboriginal and Torres Strait Islander communities is in a state of crisis.

Recently compiled statistics by the Fred Hollows Foundation has found that indigenous peoples have a life expectancy of twenty years less than white Australia and a median age of death at 53.² In some areas of Australia that median age is 47.

Our infants die at a rate comparable with the babies of the most developing countries. In remote areas, indigenous children are three times as likely to die before the age of one as white Australian babies. Our children have a rate of rheumatic heart disease that is 6-8 times higher than white Australian children and a rate for diseases of the circulatory system three times higher than white Australian children.

Even more disturbing is the statistic that Aboriginal children in remote communities in the Northern Territory suffer so many middle ear infections in early childhood that only 7% have normal healthy ears.

By two and a half years old, 25% have perforated eardrums and it is estimated that up to half of Aboriginal children in remote communities have hearing loss. The current rate of ear infections in remote NT communities ranges from 8% to over 50%.

This rate is chilling when considered in the context of the World Health Organization standards that regard a rate of 4% as a '*massive public health problem*'.

The appalling state of indigenous health in Australia is a perennial political issue and indigenous communities are concerned that any potential changes to the PBS may have a disproportionately worse impact upon our health.

Given that the PBS was established to ensure the affordability of medicines to all Australians coupled with the above statistics that display a horrific picture of the serious health emergency in Indigenous health, we must register our concern about any changes.

Though the Commonwealth government has given assurances that the price of medicines will not rise as a result of these changes we would advocate that there must be an ongoing Parliamentary assessment of the impact of any changes to the PBS upon Australia's first peoples.

² The Statistics used in this section are taken from The Fred Hollows Foundation Information briefings 'Indigenous Health in Australia', The Health Emergency http://www.hollows.org/australia/ihia_briefings.htm

Intellectual Property

Australian intellectual property laws are an important source of legal protection of the rights of indigenous peoples to their cultural expression and traditional knowledge.

The *Copyright Act 1968 (Cth)* has been particularly effective insuring that indigenous artists are able to exercise control over uses of their works.

The strengths and weaknesses of the regime of intellectual property laws has been the subject of substantial research and comment. Issues such as recognition of collective rights in relation to works, duration of copyright in relation to cultural expression, access to traditional knowledge and sharing in the benefits arising from research, development and patenting of products and processes based on traditional knowledge, a resale royalty and breach of confidence in relation to indigenous knowledge or cultural expressions which acquires the characteristics of confidentiality have been canvassed as vital areas in need of reform.

Discussion about Australia's intellectual property laws and indigenous Australia has centred on development of specific measures which adapt current intellectual property laws to provide protection for the unique features of indigenous cultural expression and traditional knowledge.

Australian indigenous art generates \$200 million annually. Australian government Ministers have recently stated their commitment to strengthening the indigenous arts sector through capacity building. One aspect of this policy is legislation to introduce communal moral rights for indigenous producers of cultural expression.

A bill to introduce communal moral rights is currently being finalised for introduction to parliament. The proposed legislation builds upon the moral right of integrity provided to all individual creators of works, and provides for indigenous communities to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material.

The collective nature of many indigenous intellectual property claims conflicts with the individualised Western notions of intellectual property protection. Therefore this bill is one example of innovative legislative reform reflecting an increasing recognition of the importance of the contribution of indigenous cultural expression, traditional knowledge to the indigenous and wider Australian economy.

We are concerned that no mention of indigenous peoples has been made in the intellectual property chapter. This is particularly concerning given that intellectual property rights is one mechanism that ensures indigenous communities benefit from the financial rewards of their culture and creativity.

We are concerned at how major changes to the intellectual property regime may prevent or restrict the capacity of Australia to increase legislative protection and promotion of Indigenous cultural expression and traditional knowledge.

Exemptions

We acknowledge the existence of two exemptions in the FTA relating to government contracts for the health and welfare of indigenous people and measures for their economic and social advancement and the second exemption that allows for 'the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organisation or provides for the favourable treatment of any indigenous person or organisation'.

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

Summary

1. Our position is that the impact of further trade liberalisation may potentially disproportionately impact upon indigenous communities.
2. Our conclusions (based upon the available text of the FTA) is that it may be many years before the impact of the FTA upon the health and welfare of indigenous communities can be accurately gauged. Nevertheless we believe it is important that there is ongoing monitoring of its impact
3. While applauding the exemptions within the text, we would like to see ongoing monitoring of the operation of those exemptions.
4. Though the Commonwealth government has given assurances that the price of medicines will not rise as a result of these changes in FTA text we would advocate the establishment of an ongoing monitoring mechanism to assess the impact of any changes to the PBS upon indigenous Australia given the well established health crisis in Aboriginal and Torres Strait Islander communities.
5. Given that the Federal Parliament has capacity to pass legislation to improve the protection of indigenous intellectual property rights such as the example of moral rights used above, we express our concern that the FTA pertaining to intellectual property may limit or discourage Australian parliamentary capacity to increase legislative protection and promotion of Indigenous cultural expression and traditional knowledge.

Yours sincerely

Professor Larissa Behrendt
Director

Megan Davis
Research Fellow

Robynne Quiggin
Research Fellow

Sydney Morning Herald

Adverse effects of free-trade deal will hit indigenous groups hard

March 8, 2004

Stakeholders not consulted on the agreement may now have an idea of how Aborigines have felt, write Larissa Behrendt and Megan Davis.

Now the terms of the free trade agreement with the United States are available, any concerns from Australian citizens will be effectively moot. The substance of the agreement has been negotiated and Australia is in a process of ratification.

In the nervous scurrying to conclude the agreement, many key stakeholders were not consulted. This is an agreement that, at various moments, can deprive the Australian Government of the ability to enforce policy decisions that will impact on trade. The decision to abandon Australia's sovereignty should have been the subject of wider community debate and deliberation.

Given the deal's likely impact on the community, the lack of opportunity to have input into the negotiations is of great concern. Despite Canberra's rhetoric that "this means more jobs and freer markets", sectors of the community have expressed unease on the impact of further economic liberalisation. In particular, Aboriginal and Torres Strait Islander communities remain sceptical that benefits will flow to them, despite some exemptions under the agreement

One relates to government contracts for the health and welfare of indigenous people and measures for their economic and social advancement. The other is an exemption that allows for "the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organisation or provides for the favourable treatment of any indigenous person or organisation". These exemptions relate to goods and services; they do not ensure the protection of cultural, intellectual property and other rights.

Another issue that is cause for concern is the ability for US companies to challenge prices under the Pharmaceutical Benefits Scheme and force up prices of medicine.

This will have an impact on all Australians but indigenous people, with their plethora of health problems, will feel it acutely.

The decreased capacity to impose future local content restrictions is also a negative outcome for Australian culture in general and indigenous culture in particular.

The caution expressed by Aboriginal and Torres Strait Islander communities about trade agreements has been generated in part because of the experiences of indigenous people in North America. Mexico, the US and Canada each have significant indigenous populations and their experiences under the North American Free Trade Agreement (NAFTA) provide some insight.

As a poorer socio-economic group, indigenous people are vulnerable to economic shifts. The creation of low-waged employment in Mexico has been heralded as one of the achievements of NAFTA, but this is hardly a situation indigenous communities want replicated in Australia, particularly given the prevalence of work for the dole schemes over real employment opportunities in Aboriginal communities.

The Labor Party and the Greens have identified the lack of clarity about environmental and social issues in the document.

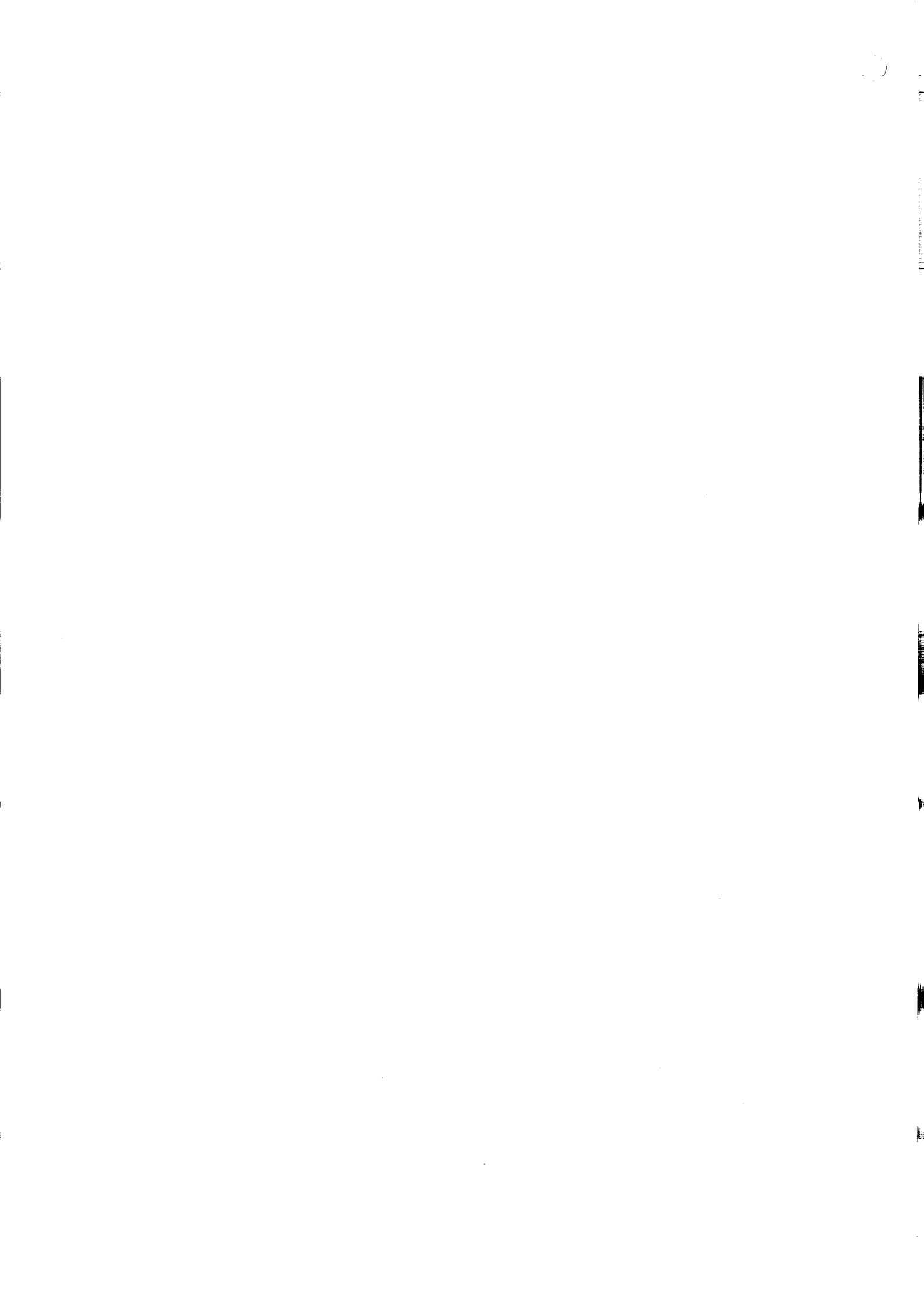
There is cause for concern about the environment when trade agreements operate to impede government capacity to regulate issues such as environmental degradation, water, fishing stocks and quarantine. For example, strategies to rejuvenate fish stocks or redirect water interests may breach the terms of the agreement and thus not be implemented.

It is in the months and years ahead, as the impact of the agreement is better understood and beginning to be felt, community debates will rage about its effect on financial services, environmental protection, intellectual property and government procurement.

Powerlessness, lack of transparency, failure to be consulted, loss of control, loss of decision-making power - these are the matters that will dominate grassroots

discussion on the agreement with the US. It is a position indigenous Australians know only too well.

Professor Larissa Behrendt and Megan Davis are legal researchers at the Jumbunna Indigenous House of Learning at the University of Technology, Sydney.



Sydney Morning Herald

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