INTRODUCTION

In this submission to the Joint Standing Committee on Treaties' inquiry into 'Australia's relationship with the World Trade Organisation'(WTO), the role of corporations at the WTO is examined in the light of the Howe Automotive Leather case. In such a large and complex area of debate as that surrounding the WTO and the Bretton Woods institutions in whose company it operates,[1] definitive conclusions are elusive. For this reason I have confined my comments to observations arising from an analysis of the role of one corporation at the WTO and I shall draw three general conclusions only. I argue that the WTO is unduly protected from public scrutiny and involvement, that it's jurisprudence denies certain basic premises of natural justice and the modern Australian administrative law precept of procedural fairness and lastly that on top of these criticisms the WTO fails to deliver on its promise to provide a fair and independent international trade dispute resolution body.

Characterisations of the legal nature and status of the WTO vary, but in broad terms it is difficult to avoid the similarities in structure between the WTO administering multilateral trade agreements, and national governments administering legislation. Statutory provisions in Australia remain indeterminate until case law interprets the effect of particular provisions. Only through a combined common law and statutory analysis can the full practical effect of an enactment be understood. In a similar sense, the documents in which the WTO is constituted, the Multilateral Trade Agreements it administers and its Dispute Settlement Understanding, permit of comprehension only when seen in operation in what passes for case law at the WTO: Panel decisions - Report(s) of the Panel - and Appellate Body determinations.

Much writing on the WTO goes no further than textual analysis of WTO documents, failing to contextualise those documents with reference to 'case law'. In this submission I leave the well covered area of specific WTO mechanisms and provisions, in preference to an analysis of one Australian company's experiences at the hands of the WTO. It has been observed that the Howe case is anomalous in that it involves the interests of one Australian company only, rather than an entire industry sector[2]. Rather than setting Howe aside as an aberration, I contest that the Howe case provides an unique opportunity to observe the direct and indirect action of the WTO on a corporate economic actor. The conclusions reached with respect to Howe offer a simplified insight into the experiences of companies in an industry sector subject to a WTO dispute.

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[1] That these institutions see each other as related is made clear in the text of the WTO agreements: "With a view to achieving greater coherence in global economic policy making, the MTO shall cooperate, as appropriate, with the International Monetary Fund, and with the International Bank for Reconstruction and Development and its affiliated agencies." Article III, Placitum 5, *Functions of the MTO* Part II, Agreement Establishing the Multilateral trade Organisation, of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act). Office of the US Trade Representative, Executive Office of the President, Washington, DC Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Version of 15 December 1993), Collected and Edited by The Institute for International Legal Information, Nashville, USA, Reprinted by William S. Hein & Co. Inc., New York, 1994

[2] See for example John Zaracostas in The Australian, 14/2/00, "Australia: WTO leather ruling Raises Hackles.".

THE HOWE LEATHER CASE

Based in Victoria, Howe and Company Pty. Ltd.(Howe), is a subsidiary of Australian Leather Holdings Pty. Ltd. (ALH). Howe's activities focus around the treatment of leather for export to the American 'automotive leather' market where the leather winds up as car seats, dashboards and door trim.[3] The following is a point form chronology of Howe's experience at the hands of the WTO.

1. **PRIOR TO APRIL 1ST 1997** - Howe was a benefactor of two related Government of Australia (GOA) trade promotion schemes; the 'Textiles Clothing and Footwear Import Credit Scheme' (ICS) and the 'Export Facilitation Scheme for Automotive Products' (EFS). These schemes exempted Australian exporters from paying import duties on products used in the manufacture of exports, the exact quantum of import credit being a function of total exports.
2. **NOVEMBER 25TH 1996 -** Leather Industries of America (LIA), a consortium of domestic US leather processors, lobbied the United States Trade Representative (USTR) eventually convincing the USTR to call the GOA to 'consultations'; the first stage of dispute settlement at the WTO. The USTR argued that support of Howe through the ICS and EFS was directly responsible for Howe's competitiveness in the American market resulting in Howe winning a $125 Million AUD contract with General Motors. The response of the Australian administration to the charge that the ICS and EFS were contra WTO obligations was simply to remove automotive leather from the schemes. One can only presume that the Australian trade representative felt the USTR case so strong as to simply submit. The removal of leather from the ICS and EFS was to take effect on April 1st 1997.
3. **MARCH 9TH, 1997** - Prior to April 1st 1997 Howe and the GOA had signed two contracts; a grant contract and a loan contract.[4] In argument before the Panel, Australia later submitted that the loan and grant made to Howe were supported under Australian law by the *'1996/97 Portfolio Additional Estimates Statement for the Industry Science and Tourism Portfolio of the Australian Government',* especially the *'Explanation of Additional Estimates 96/97'.* Australia added that the decisions to supply both the grant and the loan were at no point discussed in Parliament. [5] Specifically the grant was for $30 million AUD and available in staggered payments conditional on the meeting of certain export targets, the non-commercial loan for $25 million AUD subject only to a low rate of interest with neither interest nor principal repayments due for a five year period.

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[3] **WT/DS126/R, para 2.1.** Except where otherwise referenced, these facts are drawn from; Australia subsidies provided to producers and exporters of automotive leather REPORT OF THE PANEL. This document is the official WTO published record of the case and is identifiable by its WTO document code: WT/DS126/R, 25 May 1999, and available from the WTO website at: <www.wto.org>. In the text below such documents shall be referenced by the WTO document code and, where relevant, paragraph or page number.

[4] Anon, "USA: SECRETS OF SUCCESS", in; LEATHER 08/1999 at p18 Copyright Miller Freeman 1999.

[5] WT/DS126/R, para 6.12.

4. **April 1st 1997** - Automotive leather excluded from both the ICS and the EFS.
5. **June 4th 1998 -** LIA's counsel, Ms. Lauren Howard, subsequently employed by another lobby group, Coalition Against Australian Leather Subsidies (CAALS) asserted that the GOA's alternate support of Howe via the loan and grant contracts was also a violation of WTO agreements. The USTR was again prevailed upon by a US leather industry coalition to call the GOA to consultations before the WTO, this time to consider the grant and loan package's compliance with Articles 3.1 and 4 of the Agreement on Subsidies and Countervailing Measures (SCM), which provides at 3.1(a) for the prohibition of, "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I".[6] Noting that initial consultations between the US and GOA on June 4th 1998 were without satisfactory resolution, the Dispute Resolution Body (DSB) of the WTO established a Panel to determine the matter.
6. **December 9th to 14th 1998 -** After a certain amount of procedural palaver the Panel convened to hear initial submissions from the US and the GOA.[7] Interim submissions were accepted by the Panel following the tabling of an Interim Report of the Panel.
7. **May 25th 1999 -** Final Report of the Panel published. The Panel found that the loan and grant contracts contravened the SCM agreement and ordered that Australia withdraw the impugned subsidies 'without delay'.
8. **16 June 1999 -** The DSB formally adopted the report and recommendations of the Panel agreeing that 90 days[8] from June 16th 1999, Australia was to implement the terms of the settlement.
9. **17 September 1999** - Australia submits a 'Status Report by Australia', stating that on 14 September 1999, Howe had repaid the GOA $8.065 million AUD. Australia further stated that it had also terminated all subsisting obligations under the grant contract concluding that this implemented the recommendations and rulings in the dispute to withdraw the measures within 90 days.
10. **October 1st 1999 -** US and the GOA mutually agreed that they both will unconditionally accept the final Panel report made subject to the USTR's

[6] The SCM is contained in Chapter 13 of Part II, Agreement Establishing the Multilateral trade Organisation, Annex 1A, Agreement on Trade in Goods, of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act). References omitted. See bibliography for full publication details.

[7] WT/DS126/R paras 1.1 to 1.7. The establishment of this Panel raised certain procedural questions which the GOA attempted to characterise as significant beyond this case and in fact determinative of the case at hand. Whatever conclusion you reach about this question of law the procedural questions take a considerable amount of the Panel's time and illustrate a large scope for strategic legal obfuscation and prevarication. Given the complexity of legal issues considered, it is to be expected that substantial outcomes of WTO Panel disputes will be as much a function of the quality of legal representation as of the actual legal question at issue. This being the case there is at the WTO, as in many domestic legal systems, a marked inequality between wealthy repeat litigants and one time players with poor legal representation. There are no prizes for guessing which nations have the best legal teams at the WTO.

[8] WT/DS126/R, para 10.7

recourse to Article 21.5[9] of the Dispute Settlement Understanding (DSU) and that there will be no appeal of that report to the Appellate Body.[10]

11. **4 OCTOBER 1999 -** US seeks recourse to Article 21.5 of the DSU arguing that Australia's withdrawal of only $A8.065 million of the $A30 million grant and provision of a new $A13.65 million loan on non-commercial terms to Howe's parent company, ALH, were inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement.
12. **JULY 24TH 2000 -** The permanent missions of both the US and the GOA announced to the DSB that they had reached a mutually acceptable solution involving additional repayments by Howe, suspension of either direct or indirect support of automotive leather and the suspension of certain Australian import duties; a sort of retaliatory trade counter-measure.[11]

CONCLUSIONS

The comments below are arranged under three different headings yet have one aspect in common. Al the conclusions I wish to support involve some degree of comparison between Australian domestic law and the international customary and treaty law of which the WTO is a creature. While to some legal theorists this conflation of distinct legal arenas would seem incongruous, I contend that it is essential to an Australian understanding of the WTO and to the formulation of normative comments on the future role of Australian participation at the WTO.

CORPORATE ACCESS TO THE WTO - NATURAL JUSTICE DENIED?

It is striking that somehow this case is really a dispute between Howe and LIA and CAALS. Putting aside for a moment the WTO and international treaty law conceit that WTO rulings are effective on the rights and duties of Nation States only, the role of corporations emerges. In substantive terms, Howe was represented at the WTO, free of charge, by the GOA. LIA and CAALS were jointly represented by the USTR, also operating *pro bono*, with contracted support from Ms. Lauren Howard. Howe enjoys not only corporate welfare under the ICS and EFS, and then under the grant and loan contracts, it also receives a form of corporate legal aid.

This thought experiment may be a little overstated and ultimately contrary to international law, but it is certainly illuminating. It is impossible to avoid the conclusion that Howe's legal rights under Australian law changed over the duration of the WTO dispute. In formal legal terms Howe was affected by a domestic Australian administrative decision. Yet having just reviewed the facts, it would run contrary to common sense to deny that, if not the effective and operative decision affecting Howe's rights, then a conclusion reached as a step

[9] Article 21.5 allows that a party to a dispute may call on the panel of original jurisdiction to again consider a case where the complainant feels that the measures taken by a respondent Member to implement a DSB finding are not consistent with that finding.
[10] WT/DS126/RW, page 130, footnote 1.
[11] WT/DS126/11 G/SCM/D20/2

along the way to reaching a decision affecting Howe's rights was taken at the WTO and NOT at the Australian domestic level.

The fact that Howe is afforded no standing before the WTO is a denial of standing to an affected party and an affront to natural justice. In an oft quoted passage from *Kioa v West,* Justice Mason (as he then was) elucidates the Australian concept of natural justice,

> "...it is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he (sic) is entitled to know the case sought to be made against him and to be given an opportunity to reply to it..."[12]

At international law the WTO is certainly not subject to common law principals and will not permit of Australian judicial review. While this is unsurprising it does support the conclusion that the administrative mechanisms of the WTO are less open to curial scrutiny than are Australian administrative bodies. In formal terms the WTO determination is effected by an Australian administrative act and it is to this that I shall turn next.

Before continuing it is also noteworthy that while the WTO exercises some power in accessing information, this data is available only to the WTO DSB and protected by regulations governing business confidentiality. Compared to domestic Australian freedom of information regulations this WTO function is closed and unaccountable. The WTO rules relating to access to information needed in the settlement of disputes acts to curtail public access to decision making, rather than to grant access to the public in whose interest the WTO purportedly acts

GOA AS WTO MEDIATOR - AUSTRALIAN ADMINISTRATIVE ACTION ON HOWE

The ultimate determination of the GOA to adopt the final 'mutually acceptable solution' is made either to honour an international commitment to the USA; the mutually acceptable solution, or to honor Australia's commitment to the WTO. In either case the ultimate legislative act granting this power to the GOA is the *World Trade Organization (Privileges and Immunities)* Regulations[13] made pursuant to the *International Organizations (Privileges and Immunities) Act* (Cth), 1963. While there is no case law on the legality of this action or the effect it has on the rights to judicial review of affected parties, a parallel with the Peko-Wallsend[14] case seems clear. In that case a cabinet decision affecting Peko-Wallsend was found beyond review for the reasons that it was made subject to Australian commitments to international obligations and subject to a consideration of many competing interests which was basically political rather than administrative in character.

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[12] Per Mason J., in *Kioa v West* (1985) 159 CLR 550 at 582

[13] Commonwealth Government, Statutory Rule No. 24, 1996.

[14] *Minister for Arts, Heritage and Environment and Others v Peko-Wallsend Ltd and Others* (1987) 75ALR 218. See especially Wilcox J., at 244

It seems possible that resort by Howe to judicial review of the decision to implement the DSB determination would be met in the same way. That being the case, the arguments and evidence presented to the WTO and the reasoning of the Panel are rendered legally invisible to Howe and to the Australian courts. While the effective and operative decision was substantively taken at the WTO, from the Australian administrative law perspective the decision starts and finishes with an executive act made pursuant to a prerogative power that is beyond judicial review.

Of course the GOA does have an alternative to adopting the DSB determination. It can refuse. The result would be WTO sanction of unilateral imposition of trade counter-measures by the US - *at US discretion.* In this case it would again be a non-reviewable executive decision of the Australian Government that was at issue, but with the interesting twist that rather than Howe alone being affected, so too would be the interests of all the industries targeted by the US counter-measures. In either case the GOA decision is reviewable and the affected parties are denied standing at the WTO. The alarming alternative presented here is that a group of Australian companies totally unrelated to Howe, to leather or to the Howe dispute stand to be affected by the WTO decision. Indeed the mutually acceptable solution finally agreed between the GOA and USR did provide for substantial co-lateral counter-measures as compensation for the unrecoverable monies disbursed to Howe in contravention of the SCM.

It is not impossible to conceive of a domestic statutory instrument that would formalise the process of WTO dispute determination ratification, or even allow that Australian courts measure the compliance of Australian regulations with WTO agreements in much the same way as legislation can be impugned as unconstitutional. One result of the current system is that the jurisdiction of the courts is ousted and Howe are left with no right of reply. The current GOA - WTO legal relationship results in a marked diminution of the efficacy of the Australian administrative law system.

The Australian democracy considers, as the court articulated in *Peko-Wallsend,* that the proper place for determination of political questions such as Australia's involvement at the WTO, or a specific decision to implement a WTO ruling, is the Parliament. Yet the Australian Parliament has played no role in the Howe case that my research has shown up. The essentially administrative determination made at the WTO becomes effective in Australia subject to exercise of a common law prerogative power and any right to review that might have availed Howe or a third party slips through the cracks between the executive and legislative functions of the Australian government.

WTO AND GOA COMPARED - AN INDEPENDANT AUTHORITY?

The final point to make about the Howe case is that it reveals the ultimate weakness of the WTO. So much of the rhetoric surrounding, and regulatory language of, the WTO depict it as a powerful body with authority to resolve trade

disputes. After years of WTO mediated disputes, the US and the GOA in the Howe case eventually arrived at a bilateral settlement. While the DSB determination was indubitably a factor, the weakness and dependence of the WTO on unilateral countermeasures for its coercive enforcement leave Members vast scope and independence to bargain on the basis of their respective trade strengths. The US has never implemented a DSB ruling, managing rather to settle 'out of court' in each case. Australia has been before the WTO twice, once implementing the determination, once accepting bilateral settlement. Far from providing an independent, authoritative, democratic and binding trade regulator, the WTO has served only to preserve and legitimate the inequalities of the post-colonial world with all its historical trade iniquities.

HOWE NOW BROWN COW?

This brief analysis of the experiences of an Australian company at the hands of the WTO has proved a complex affair in which a full picture emerges only from a review of journalistic, governmental and WTO documents. Even spreading the research base this wide there remain areas of the relations between corporations and their host nations that are difficult to penetrate. The international governance and economic issues at stake are no less complex. In concluding I can only hope to leave the reader with a broad feeling that the WTO is somehow less than the impartial authoritative regulator needed to keep international traders honest; that its functions are less open to public scrutiny than are those of the domestic states who constitute its Membership; and that in enforcing decisions via unilateral application of trade counter-measures the WTO really advances international trade no real distance from a simple retaliatory 'state of nature'.

In some form, economic globalisation seems either to be a unconditional good or unavoidable and there can be no doubt that as citizens of the world we need a regulatory framework to monitor international trading activities. But to be democratic and participatory, the WTO has a long way to go in opening its procedures, granting assurances that the regulations administered are the consequence of genuinely open international debate, and enforcing independent decision without recourse to unilateral sanctions. As matters stand we have a body that functions more perpetuate the semblance of a system of free and fair trade than to actually develop one.