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AUSTRALIA AND THE WORLD TRADE ORGANISATION

The WTO remains the primary vehicle for Australia to advance its interests in achieving greater market access and secure trading conditions for Australian exporters.[1]

2.1 It is often said that Australia has, thus far, managed to 'punch above its weight' in the World Trade Organisation. As a medium-sized trading nation, the WTO's rules-based system for multilateral trade is vital for Australia's exporters and the Australian economy.

2.2 We undertook this inquiry into Australia's relationship with the World Trade Organisation with the primary aim of examining Australia's current approach to WTO advocacy – could Australia approach WTO policy differently, should we be taking a more proactive approach?

2.3 The issues we examined included:

- development of Australia's WTO policies - including community consultation;
- engagement in the Dispute Settlement system;
- Australia's approach to risk management; and
- a whole-of-Government approach to WTO issues.

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1 DFAT, submission no. 222, p. 10.

2.4 This chapter covers each of these issues. Broader issues such as the WTO's transparency and accountability, the involvement of non-Government organisations with the WTO, and how the WTO fits with other multilateral and regional agreements, are explored in Chapter 3.

2.1 DEVELOPING AUSTRALIA'S WTO POLICY

Australia's trade policy: an historical overview

Importance of trade

2.5 Australia is unusual amongst developed countries in that its primary exports are raw commodities. Australia is one of the few commodity producers that is not considered to be a developing country. Australia's producer status has always separated it on trade issues from most OECD countries (which are often described as being commodity processors).[2]

2.6 Exports are of vital importance to the Australian economy – totalling $143 billion in 2000. Exports also provide, directly and indirectly, one in five jobs for Australians.[3]

2.7 Trade consultant Alan Oxley and academic Dr Ann Capling pointed out that Australia truly trades with the world whereas many other nations rely on major trading partnerships – for example, the US/Canada and internal EU trade relationships.[4]

Tariff reform

2.8 Tariffs are a tax on imports, intended to raise the price of imported goods to levels at which domestic products competing with imports can operate successfully.[5]

2.9 Until 30 years ago, Australia's tariff rate on imports was exceptionally high. The importance of the manufacturing sector to employment had been recognised through a series of tariffs designed to protect Australian industry from overseas competition. Agriculture was also highly protected.[6]

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2 International Trade Strategies Pty Ltd, submission no. 134, p. 3.

3 Department of Foreign Affairs and Trade, *Australia's Trade Outcomes and Objectives Statement 2001 – Trading into the Future*, Commonwealth of Australia, 2001, p. 3.

4 International Trade Strategies Pty Ltd, submission no. 124; Dr Ann Capling, submission no. 284.

5 Productivity Commission, *Review of Australia's General Tariff Arrangements*, December 2000, Commonwealth of Australia, 2000, p. 19. Available at: http://www.pc.gov.au/inquiry/tariff/finalreport/index.html.

6 The information in this section has been drawn from the following publications:

2.10 While talk of tariff reform began in the 1960s (when Alf Rattigan chaired the Tariff Board), political pressures meant that substantial reform did not begin until the 1970s. In 1971 the Government announced that the Tariff Board would review all tariffs, however it was careful to stress that the Government was not promising to implement any of the Board's recommendations. No timetable for the review was agreed to.

2.11 In 1973, in response to increasing inflation and a booming economy, Prime Minister Whitlam called for an urgent review of tariff arrangements. In July 1973 the Government implemented a 25 per cent across-the-board reduction in tariffs.

2.12 In the following decade, many tariffs were reduced even further. These declines would have represented a very substantial liberalisation overall had it not been for a trebling in the rates of protection for textiles, clothing, footwear (the TCF sector) and private motor vehicles (PMV sector), through import quotas.

2.13 In 1988 the Government announced a four-year program for phasing down tariffs in most industries (excluding the PMV and TCF sectors). Tariffs above 15 per cent were reduced to 15 per cent by 1992, and those between 10 to 15 per cent were reduced to 10 per cent by 1992.

2.14 In 1991 the Government announced a continuation of its tariff reduction program, lowering all tariffs to five per cent by 1996. Tariffs for the PMV sector were phased from 35 per cent to 15 per cent by 2000; and tariffs for TCF reduced to a maximum of 25 per cent by 2000. These levels have been frozen until 1 January 2005. A tariff review covering all sectors is planned for 2005.

2.15 In 1994, the Asia-Pacific Economic Cooperation (APEC), of which Australia is a member[7], made a commitment to zero tariffs by 2010 for industrialised countries and 2020 for developing countries.[8]As a result,

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- Kim Anderson and Ross Garnaut, *Australian Protectionism – Extent, Causes and Effects*, Allen & Unwin Australia Pty Ltd, 1987.
- Michael Emmery, Australian *Manufacturing: A Brief History of Industry Policy and Trade Liberalisation*, Parliamentary Library Research Paper no. 7, 1999-2000, at: http://www.aph.gov.au/library/pubs/rp/1999-2000/2000rp07.htm.
- Richard Pomfret (ed), *Australia's Trade Policies*, Oxford University Press Australia, 1995.
- Richard Snape, Lisa Gropp, Tas Luttrell, *Australian Trade Policy 1965-1997: a documentary history*, Monash University, 1998.

7 APEC membership includes: Australia; Brunei Darussalem; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; Phillipines; Russia; Singapore; Chinese Taipei; Thailand; United States of America; Vietnam.

8 'The Bogor Declaration', APEC Economic Leaders' Declaration of Common Resolve, Bogor

tariffs in APEC countries have reduced by one-third, from an average of 12 per cent in 1995 to eight per cent in 2000.[9]

2.16 Australia has affirmed its commitment to meeting the 2010 APEC trade liberalisation goal. The 1997 White Paper on Australia's Foreign and Trade Policies stated:

> The Government is committed to meeting the objective of free and open trade and investment by 2010 as set out in the Bogor Declaration.
>
> Like every other government, the Australian Government will take account of what other economies are doing in deciding future steps, but its position is a positive one, based on the assessment that liberalisation brings overall benefits to the economy.
>
> A priority for the Government will be to ensure that other APEC economies not only keep to the goal of free and open trade and investment by 2010/2020, but that they also deliver substantial trade and investment liberalisation and facilitation along the way.[10]

Current tariff status

2.17 In Australia there are over 5700 categories for different tariffs. The majority of Australian products now have a tariff level of 5 per cent or less. The PMV and TCF industries are scheduled for further tariff reductions in 2005 – PMV from 15 to 10 per cent, and TCF from 25 to 17. 5 per cent.

2.18 When discussing trade liberalisation it is important to distinguish between *bound* and *applied* tariff rates.

2.19 Bound tariff rates are those which a country has agreed to under an international treaty – for example, the WTO Agreements. Countries may not impose tariffs which exceed the bound rates to which they have agreed. More than 96 per cent of all of Australia's tariff categories are bound under WTO Agreements.

Indonesia, 15 November 1994, at: http://www.apecsec.org.sg/.

9 DFAT, *APEC Progress on Tariffs: implications for a new agenda*, prepared for the APEC Ministers Responsible for Trade Meeting, Shanghai China, June 2001, at: http://www.dfat.gov.au/apec/tariffs.pdf, accessed 16 July 2001.

10 Commonwealth Government, I*n the National Interest – Australia's Foreign and Trade Policy White Paper*, 1997, Chapter 3, at: http://www.dfat.gov.au/ini/whitepaper.pdf, accessed 16 July 2001.

2.20 Applied tariff rates are those which a country actually applies to imports. In Australia, the applied tariff rates are generally less than the bound rates under WTO Agreements. For example:

- for Agricultural products our average bound rate is 3.2 per cent, but our average applied rate is around 1 per cent;
- for Manufacturing our average bound rate is 11.3 per cent, but our applied rate averages at just over 5 per cent.[11]

2.21 Some argue that Australia is doing itself an injustice by applying tariffs at a lower rate than we are bound to do so. For example, the applied rate for sugar imports is zero per cent, but the WTO bound rate is a 7-cent tariff per kilogram.[12] DFAT's David Spencer told us the decision to apply lower tariffs has been taken by successive Australian Governments as an ongoing trade policy:

> The government has formed the view and has decided that there are two options. We can either live up to the maximum that we can get away with internationally, and that is what the Europeans and the Americans do, to a certain extent…or we can decide, as we have done here in Australia, that it is in our national interests not to have a high tariff or a tariff which is at our bound level, and not go to the maximum of our domestic support obligations, and not go to the maximum of our export subsidy disciplines.[13]

Australia's approach to multilateral trade reform

2.22 Australia now sees multilateral trade reform as the primary vehicle for advancing its interests in achieving export success. DFAT highlighted the WTO's 'most favoured nation' principle, and its strong dispute resolution system, as key for Australia's trading interests:

> These elements explain why support for a multilateral, rules-based trading system under the WTO will continue to be the fundamental basis of Australia's trade policy. Successive Australian governments have accepted that the multilateral trade

11 These figures were suppled by the Australian Customs Service and DFAT to the Productivity Commission in 2000 for its *Review of Australia's General Tariff Arrangements*, December 2000, Commonwealth of Australia, 2000, p. 12. Available at: http://www.pc.gov.au/inquiry/tariff/finalreport/index.html.

12 Australian Customs Service, Customs Working Tariff as at 13 September 2000, Section IV Chapter 17 – Sugars and Sugar Confectionary, supplied to the Committee by DFAT. Australia's WTO tariff schedule available on the DFAT internet site: http://www.dfat.gov.au/trade/negotiations/schedule/schedule.html, accessed 19 July 2001.

13 David Spencer, DFAT, Transcript of Evidence 18 June 2001, p. TR513.

> system under the WTO, and its predecessor the GATT, is the best way to deliver a more equitable, open and predictable trading environment and to secure greater market access and fairer market conditions for Australia's exports.[14]

2.23 Until the Uruguay Round, the GATT was a mixed success for Australia. Its exclusion of agricultural products meant a large part of our exports were not covered in GATT agreements. However, Australia's reliance on raw products – wool, coal, cotton, iron ore and other minerals benefited indirectly through trade liberalisation in manufacturing processing. If the countries which specialised in manufacturing processing found new markets, then our exports (the raw inputs for processing) also benefited.

2.24 Australia did not participate in the Dillon and Kennedy rounds of GATT talks in the 1950s and 1960s, mainly because agriculture was excluded from these talks. The NFF expressed its frustration at the exclusion of agriculture in previous trade rounds:

> In the years leading up to the Uruguay Round, the world's efficient agricultural exporters watched powerlessly as agriculture's second class status in GATT developed.[15]

2.25 The inclusion of agriculture in the Uruguay Round negotiations, and subsequent WTO Agreements, was a major breakthrough for Australia. While the WTO Agreements have resulted in major tariff reductions and breaking down of protection for many industrialised products, there is still a long way to go for agriculture. Australia, through the Cairns Group and in its own right, intends to use the WTO as the major forum for progressing agricultural trade reform. This issue is discussed in more detail in Chapter 2.3.

2.26 Because of the tariff reform program implemented in Australia from the 1970s, the bound tariff rates agreed to by Australia at the Uruguay Round were, in many instances, above the existing applied tariff rate. Therefore implementation of the Uruguay Round commitments was easier for many Australian industries than their overseas counterparts. DFAT's David Spencer commented:

> In the last round of negotiations we got payment, in effect, for decisions to reduce tariffs that had been made before the negotiations had even started.[16]

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14 DFAT, submission no. 222, p. 10.

15 National Farmers Federation, submission no. 223, p. .

16 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR 51.

2.27 However, if Australia is to meet the APEC goal of free trade by 2010, and commit to new tariff reductions as a result of a new WTO round of negotiations, this may impact on existing tariff barriers in Australia. Australian producers and industries may need to become yet more efficient and competitive in the international marketplace.

2.28 Professor Kym Anderson, Director of the Centre for International Economic Studies at the University of Adelaide, commented in 1999:

> Australia is now considered a very responsible WTO member, particularly with the substantial amount of unilateral economic reform it has undertaken in the past 15 or so years. To keep building on that reputation, and the disproportionately large influence that allows Australia to have in shaping the WTO's future path, the remaining vestiges of our protectionist past need to be removed.
>
> If Australia wishes to again take a leading role in the next round of WTO negotiations, accelerating the reforms it has begun in [motor vehicles, textiles and clothing and quarantine] would also be wise.[17]

Current WTO policies

2.29 The Australian Government does not make public the detail of its WTO negotiation position. However, it is open about the general direction of trade policy. In April 2001 DFAT released a discussion paper outlining the Australian Government's interests for the November 2001 WTO Ministerial meeting in Doha, Qatar. The paper stated that Australia supports the launch of a new round of trade negotiations to be conducted over a relatively short period – around three years. Australia would prefer that the new round focus on trade liberalisation in agriculture, services and industrialised products:

> Progress on agriculture is a key objective for Australia. The Australian position is that any decision at Qatar on the conduct of the agriculture negotiations must be ambitious and balanced.[18]

17 Professor Kym Anderson, *The WTO Agenda for the New Millennium*, Centre for International Economic Studies, Seminar Paper 99-01, January 1999.

18 DFAT, Discussion Paper: *Preparations for the Fourth WTO Ministerial Conference Doha, Qatar, on 9-13 November 2001*, prepared 27 April 2001.

The Cairns Group

2.30 Australia has maximised its influence within the WTO through participation in coalitions of like-minded countries, particularly the Cairns Group.

2.31 The Cairns Group comprises 18 nations in which the agricultural sector is a significant part of the economy.[19] The Group is chaired by the Australian Trade Minister. The Cairns Group was formed in 1986 when a group of trade ministers (meeting in Cairns, Australia) agreed to form an alliance with the aim of ensuring that agricultural trade reform was given a high priority in multilateral trade negotiations.

2.32 The Cairns Group is significantly different from other major trade coalitions such as the G7 group, as it includes many developing countries who, by themselves, would not be a powerful influence on the world trade agenda.[20] It also breaks the traditional trade 'north/south' divide by including nations from both hemispheres. As a bloc, the Cairns Group accounts for more than one-third of world agricultural trade.[21]

2.33 The members of the Cairns Group negotiated as a bloc in the Uruguay Round to achieve substantial reductions in agricultural trade barriers, including the mandated ongoing negotiations which began in 2000 (outlined below). The Cairns Group Vision Statement clearly sets out its targets for the next round of WTO negotiations:

> …the Cairns Group is united in its resolve to ensure that the next WTO agriculture negotiations achieve fundamental reform which will put trade in agricultural goods on the same basis as trade in other goods. All trade distorting subsidies must be eliminated and market access must be substantially improved so that agricultural trade can proceed on the basis of market forces.[22]

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19 The Cairns Group comprises: Argentina; Australia; Bolivia; Brazil; Canada; Chile; Colombia; Costa Rica; Fiji; Guatemala; Indonesia; Malaysia; New Zealand; Paraguay; the Philippines; South Africa; Thailand and Uruguay.

20 The G7 group includes France, the United States, Britain, Germany, Japan, Italy and Canada. In 1998 Russia joined as a full participant, making the group officially known as the 'G8' group.

21 Cairns Group internet site: http://www.cairnsgroup.org/introduction.html, accessed 29 May 2001.

22 Cairns Group, *Vision for the WTO Agriculture Negotiations*, at: http://www.cairnsgroup.org/vision_statement.html, accessed 29 May 2001.

Ongoing negotiations

2.34 The 1994 Uruguay Round included 'inbuilt negotiations' for the Agriculture Agreement and the General Agreement on Trade in Services (GATS). This meant that whether a new round was launched or not (as it turned out, a new round was not launched at Seattle 1999), negotiations in Agriculture and Services could continue. The negotiations for both sectors began in early 2000.

2.35 For GATS, Australia lodged negotiating proposals for specific services sectors in March 2001. According to DFAT, the proposals were developed after consultations with relevant industry bodies and Government agencies. The services under negotiation are:

- accountancy;
- architecture;
- construction;
- engineering;
- financial services;
- legal services; and
- telecommunications services.[23]

2.36 For the Agriculture Agreement, Australia is participating in negotiations via the Cairns Group, which has put four proposals on the table, regarding export restrictions, market access, domestic support, and export competition.[24]

WTO impact on specific industry sectors

2.37 Throughout the inquiry we heard a number of arguments regarding the impact of the WTO on specific industry sectors, and some requests for exemption from further trade liberalisation. These are outlined briefly below.

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23 There are 12 broad categories of services covered by the GATS (see footnote no. 36). At June 2001, Australia had lodged detailed negotiating proposals only for the services listed above. Australia's negotiating proposals are available on the DFAT internet site, at: http://www.dfat.gov.au/trade/negotiations/services/wtopro0301.html, accessed 7 May 2001.

24 Cairns Group internet site: http://www.cairnsgroup.org/proposals/index.html, accessed 7 May 2001.

Cultural content

2.38 A number of arts organisations called for cultural industries to be exempt from free trade agreements. The current level of local (Australian) content required to be broadcast by commercial television stations is 55 per cent for free-to-air stations, and 10 per cent for pay-tv stations. Arts organisations are concerned that when negotiating trade agreements, the Government may agree to lower or drop these local content provisions in exchange for other countries opening up their markets (in television or other markets).

2.39 The Media, Entertainment and Arts Alliance (MEAA) stated:

> If there is any credibility in the concept of Australia becoming a knowledge nation and building wealth in that way, then protection of intellectual property is absolutely key.
>
> What we are arguing is that special consideration be given to arts, entertainment and audiovisual industries on the basis that they are the industries that are key to the development of a national identity, and on the basis that each nation state has a right to be able to develop and foster its own national sense of identity and its own culture.[25]

2.40 The Screen Producers Association of Australia (SPAA) and the Australian Writers' Guild argued that the most powerful and persuasive way of sharing Australian culture and stories is now through the audiovisual sector (television and films). They said that if there were no Australian Content rules for Australian television, we would be swamped by American product.

> …to make a half-hour episode of *Friends* cost more than A$10 million and that sells to a network here for approximately $30,000. So you could purchase half an hour of a show that has been heavily promoted around the world, whose stars are all household names and are on the covers of magazines…or you could spend 10 times that to make an Australian show. It is much easier to buy *Friends*.[26]

2.41 However the Department of Communications, IT and the Arts told us:

> …the Government does not support a cultural exclusion clause in international trade agreements. A uniform approach to cultural aspects of trade agreements would be a major negotiating

25 Lynn Gailey, MEAA, Transcript of Evidence 9 March 2001, p. TR241.

26 Susanne Larson, SPAA, Transcript of Evidence 12 February 2001, p. TR183.

> disadvantage and would work against the national interest in future negotiations.[27]

2.42 We understand the Government's policy is that no sector should be excluded from trade negotiations, as a matter of principle. However, while it has not promised to exclude the audio-visual sector from trade negotiations, the Government has stated its broad commitment to maintaining cultural content in Australian broadcasting. In 1999 the Trade Minister told a gathering at the National Press Club:

> We support a comprehensive approach to services negotiations. But any offers we make of further opening any specific markets will take full account of our specific national interests, including such areas as audiovisual and health. In particular, I shall ensure that any negotiations in the audio-visual sector take account of Australia's cultural policy objectives.[28]

2.43 In May 2001 a group of Australian actors wrote to the Prime Minister and visited Canberra in an effort to ensure that the local content rules for Australian television would not be changed as a result of any free trade agreement with the United States or any other trade agreement. We note that the Trade Minister stated that retaining the local content provision of 55 per cent was the Government's ongoing position. The Opposition also made a statement quarantining local content levels from any future trade negotiations.[29]

Education and health services

2.44 A number of organisations expressed concerns about negotiations currently underway for the General Agreement on Trade in Services (GATS), which they believe will widen the scope for competition in public health, education and other services. The Rev. Wansbrough from UnitingCare told us:

> While there are a number of services that can be treated in much the same way as, for instance, merely commercial activity, this is not true of all services. Transport, communication, water, electricity and gas are not merely inputs to industry but crucial aspects of human life that need to be accessible to all people, including those on low incomes.

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27 Megan Morris, DCITA, Transcript of Evidence 9 March 2001, p. TR244.

28 Hon. Mark Vaile MP, Minister for Trade, Speech to the National Press Club 26 November 1999, at: http://www.dfat.gov.au/media/speeches/trade/1999/991126_seattle_npr.html, accessed 29 May 2001.

29 'Actors in push for local TV content', *The Age* newspaper, 22 May 2001, p. 3.

> Even more importantly, housing, health, education and social services involve fundamental human rights. While at the present time Governments can exempt such services as an exercise of Government responsibility, the WTO papers on trade in services seem to be seeking to keep this exemption as narrow as possible.[30]

2.45 Similarly the Australian Education Union was concerned that public education services are being targeted by international private education firms:

> Publicly-funded school education services are seen as a $22 billion 'market opportunity' representing the costs of 300,000 teachers, 4 million students and 10,000 schools throughout Australia. In global terms, the sector involves a thousand billion dollars, more than 50 million teachers and a billion students.[31]

2.46 The Australian Fair Trade and Investment Network (AFTINET) expressed concern that the current GATS negotiations are looking at changing the definition of Government regulation, applying the 'least trade restrictive' test, which would limit the Government's ability to regulate in a number of 'public' services. AFTINET called for the Government to oppose the inclusion of the following services in the GATS agreement:

- cultural and land rights of indigenous peoples;
- national cultural activities;
- public health;
- social security;
- public education; and
- essential services such as water and electricity.[32]

2.47 OXFAM/Community Aid Abroad was concerned that the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) will allow for an increase in the price of drugs, making them even less affordable for poorer communities. OXFAM/CAA argued that prior to TRIPS, developing countries were able to domestically produce cheap copies of overseas drugs (or import them), thereby greatly reducing their cost to the local

30 Rev. Anne Wansbrough, UnitingCare, Transcript of Evidence 12 February 2001, p. TR195.

31 Australian Education Union, submission no. 66.1, p. 5.

32 Dr Pat Ranald, AFTINET, Transcript of Evidence 12 February 2001, p. TR142.

population. The recent South African Aids drug case illustrated this argument.[33]

2.48 OXFAM/CAA recommended:

> The public interest must take precedence over commercial interests in the implementation of the [TRIPS] Agreement. The length and scope of patent protection should be reduced. The Agreement should also allow Governments to use policy options such as parallel importing and compulsory licensing for the provision of affordable essential drugs, particularly for serious diseases that cause high mortality and/or morbidity.[34]

2.49 Organisations and individuals concerned about WTO Agreements limiting the protection of public services called for the Australian Government advocate changes to the GATS and TRIPS Agreements. Dr Tim Anderson (University of Sydney) asked the Government to push for the establishment of a 'global commons' –

> …whereby essential resources, such as fresh water supplies, are identified and added to a 'not for profit' international list. In the development of global democracy, there must be limits to development based on private profit.[35]

2.50 The Government's position on the broad services sector is much as it is for Australian cultural content provisions – it supports negotiations across all 12 services sectors, and does not want to rule out any service as being exempt from the negotiating table.[36] DFAT's submission stated that Australia wants negotiation in all services because:

> …only comprehensive services negotiations will give us the critical mass necessary for trade-offs and for a substantial result.

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33 A group of multinational pharmaceutical companies sued the South African Government for introducing a new law which allowed the Government to import cheap versions of patented AIDS drugs. Despite South Africa's recognition of international patent laws, the South African Medicines Act aimed to bypass these international laws because of a national emergency – South Africa has a biggest HIV-positive population in the world. Under intense public pressure, particularly from US-based AIDS activists, the pharmaceutical companies dropped the case (ABC Radio: *Background Briefing – Pharmaceuticals on Trial*, 18 March 2001).

34 OXFAM/Community Aid Abroad, submission no. 187, p. 17.

35 Dr Tim Anderson, submission no. 89, p. 2.

36 The 12 services sectors covered by the GATS are: business; communication; construction and engineering; distribution; education; environmental services; financial services; health-related and social services; tourism and travel; recreational services; cultural and sporting services; transport, and 'other services'.

> This does not imply that Australia will make concessions in each and every area.[37]

Manufacturing and fabrication

2.51 The Australian Steel Construction Industry (ASCI) asked for an 'Australian content' provision for major new infrastructure projects in Australia:

> For those projects that are getting Government subsidies or incentives, Governments should attach some strings and require project developers to prepare a project impact statement, whereby the project proponent will put down in writing what that project will bring to the net economic good of the country…the extent to which he intends to involve local industry.[38]

2.52 The ASCI had not considered whether an Australian content policy for new projects would be in compliance with WTO Agreements. The Howe Leather case raised a number of considerations for Australian Governments in determining their industry and exporter assistance packages.[39] We encourage ASCI to look further into the proposal and to discuss the matter with DFAT.

Investment and competition

2.53 The multilateral trading system does not include a comprehensive framework on investment or competition.

2.54 Some WTO Agreements deal with specific investment measures, particularly the Agreement on Trade-Related Investment Measures (TRIMS). The TRIMS Agreement applies to investment measures for trade in goods only, and states that WTO Members must not apply investment restrictions which are in breach of the GATT 1994 (with a few exceptions, listed in the TRIMS Agreement).[40]

2.55 The WTO has a Working Group on the Relationship between Trade and Investment, of which Australia is an active member. The Working Group differs from the WTO's standing committees in that its work is restricted

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37 DFAT, submission no. 222, p. 17.

38 Don McDonald, ASCI, Transcript of Evidence 12 February 2001, p. TR155.

39 WTO Dispute Panel report: Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R, 25 May 1999, available at: http://www.wto.org/english/tratop_e/dispu_e/1343d.pdf.

40 WTO internet site, TRIMS Agreement, available at: http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

to analytical and background information. The Working Group does not facilitate any negotiations or agreements on investment matters.[41]

The Multilateral Agreement on Investment (MAI)

2.56 In the late 1990s the Organisation for Economic Development (OECD) proposed a Multilateral Agreement on Investment (known as the MAI) to deal with rules for international investment.

2.57 The proposed MAI sought to establish a broad multilateral framework for international investment, based on the concept of 'national treatment' – countries were to treat foreign investors in the same way as domestic investors.

2.58 Negotiations opened in 1995, but by 1998 there was growing concern amongst some OECD Members, NGOs, and the broader international community about the breadth and scope of the proposed MAI. There were allegations that the MAI undermined the sovereign right of governments to regulate investment, and that the rights of citizens would be subsumed by the liberalisation of foreign investment.

2.59 In late 1998 the OECD announced that negotiations on the draft MAI had ceased. At the time, it was foreshadowed that the WTO was a more suitable forum for international negotiation of investment issues.

2.60 While some people claim that the OECD and other international groups wish to resurrect the MAI, DFAT assured the Committee this is not the case, stating that it is 'dead'.[42]

Inclusion of investment issues in WTO negotiations

2.61 At the 1999 WTO Ministerial Meeting there were calls for new multilateral negotiations to include a framework agreement on investment rules. While the EC, Japan and Korea favoured this approach, it was strongly opposed by developing nations including India, Malaysia and Indonesia.

2.62 As noted above, the WTO's Working Group on Investment has not investigated or proposed any new agreement on investment.

2.63 DFAT stated that Australia may be prepared to accept some limited work on investment as part of a new WTO round of negotiations, but is not a proponent of fully-fledged investment negotiations. The Australian Government wishes to focus on market access issues for the next round,

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41 WTO internet site: *Trade and Investment*, at: http://www.wto.org/english/tratop_e/invest_e/invest_e.htm, accessed 12 September 2001.

42 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR 53.

and DFAT noted the strong public concern surrounding the proposed MAI and any future investment negotiations.[43] DFAT Deputy Secretary David Spencer told us that the WTO has not made significant progress on investment issues:

> …whilst the general discussion has continued over the past 12 months in the WTO on this general issue of the interlinkage between trade and investment, there has been no meeting of minds, no significant narrowing of the gaps, between on the one hand the Europeans who want to have negotiations on investment as part of a new round and developing countries, on the other hand, who are saying, 'Absolutely no. We are prepared to continue to study the issue, but we are not prepared to say now that we will negotiate new rules.'[44]

WTO and competition policy

2.64 The WTO's Agreements do not cover competition policy issues. The WTO has a Working Group on the Interaction between Trade and Competition Policy, which undertakes broad analysis on competition issues.[45]

2.65 As with trade and investment issues, WTO members are divided over whether to include competition in future negotiations. DFAT noted that Australia has one of the most advanced competition regimes in the world, with comprehensive policies covering all businesses and industries. DFAT stated:

> Australia is not opposed to WTO negotiations on competition as part of a balanced package for a new round. But we remain of the view that proposals for negotiations on competition should be realistic, both in terms of likely level of developing country support and in terms of objectives that are achievable within a reasonably short WTO round of negotiation.
>
> As with investment there are some community concerns about the potential for governments to lose national sovereignty or control under a binding set of international competition rules. Under any possible future competition agreement, companies operating in Australia would continue to be required to adhere to Australia's

43 DFAT, submission no. 222, p. 70.

44 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR53.

45 WTO internet site, *Competition Policy and the WTO*, at: http://www.wto.org/english/tratop_e/comp_e/comp_e.htm, accessed 11 September 2001.

laws and regulations, including environmental or labour standards.[46]

Developing policies for a new WTO round

2.66 The next WTO Ministerial Meeting will be held in Doha, Qatar, in November 2001. It is hoped (by the Australian Government and many other WTO members, but not all) that a new comprehensive round of trade negotiations will be launched at the Doha meeting. As outlined above, the Government's main aims for a new trade round are for increased liberalisation in agricultural trade. The Government is also keen for progress in the services and industrial products markets. The outcome of trade negotiations not only will affect Australian exports, but will result in changes to Australian domestic industries, as trade barriers are lowered.

2.67 Given the potentially substantial impact of further trade liberalisation, it is vital that the Government undertakes adequate community education and consultation leading up to new WTO negotiations. These issues are explored below.

Community education

2.68 Many submissions to the inquiry demonstrated a lack of understanding of the role, capacity and limitations of the WTO. A great number of submissions asserted that Australia's membership of the WTO resulted in a loss of our nation's sovereignty, and that multi-national companies control the WTO and therefore are more powerful than Governments. Submitters were also concerned that the WTO represents 'trade at all costs' – subverting all environmental, social and other interests.[47]

2.69 We believe this demonstrates the need for better communication to the general public about the WTO, its role, and its importance to Australian trading interests – which then has a direct impact on employment and income of many Australians. This issue has been examined before by

46 DFAT, submission no. 222, p. 72.

47 Around 70 per cent of all submissions were from individuals – overwhelmingly against Australia's involvement with the WTO. We also received a number of form letters and several petitions.

previous Parliamentary committees, but there is clearly more work to be done.[48]

2.70 The Queensland Government observed:

> For many people it is difficult to see the relationship between the activities and actions of the WTO and the tangible benefits that they derive, such as higher export volumes or lower consumer prices. This is particularly so as communities struggle to come to grips with understanding the concept and impacts of globalisation. In particular, community misunderstanding centering on a perceived independent role of the WTO, as distinct from the decisions of its members, appears to be prevalent and needs to be addressed.[49]

2.71 Bill Carmichael and Ron Duncan (ANU) stated:

> What we witnessed in Seattle was not a failure of the WTO, as many have concluded, but the failure of participating Governments to provide the support it needs – by promoting greater awareness at home about what is at stake domestically in trade liberalisation. Without that support, domestic pressures will continue to spill over into the international processes of the WTO – which are neither designed nor equipped to accommodate them.[50]

2.72 One submitter, Jonathan Schultz, explained the alienation many Australians feel from trade policy development processes:

> Economic policy in particular is one that the average citizen feels quite powerless to influence. Public cynicism and resentment over decisions made by Government without our knowledge or consent are growing. An informed debate over such an important issue as trade policy is essential to the democratic process.[51]

2.73 Trade consultant Alan Oxley argued that the Australian Government has publicly downplayed the importance of the WTO and trade reform, in response to growing hostility in the Australian public about globalisation:

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48 For example, in 1998 the House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs tabled its report *Adjusting to Agricultural Trade Reform: Australia no longer down under*, recommending that public awareness programs be implemented to demonstrate the benefits of trade reform, particularly to rural and regional communities.

49 Queensland State Government, submission no. 280, p. 2.

50 Bill Carmichael and Ron Duncan, submission no. 306, p. 2.

51 Jonathan Schultz, submission no. 17.

> There is silence about the importance of trade liberalisation and how Australia can benefit from the multilateral trading system in Government policy and statements. In this silence the arguments of others that globalisation has gone too far and runs contrary to Australia's interests acquire currency because they are left uncontested.[52]

2.74 The United Nations Youth Association argued that increased community consultation would serve as an educational tool for the Australian public:

> …community consultation would serve an educative purpose in terms of dispelling some of the myths that are held about the WTO. Whilst public consultation cannot possibly produce consensus on negotiating positions, it can lead to a much more constructive debate about the issues at hand.[53]

Existing community education programs

2.75 In February 2001 the Trade Minister announced the *Exporting for the Future* strategy, a two-year public education campaign about trade liberalisation and its benefits for Australia. The program will include:

- a secondary education component, with kits for teachers in subjects such as Business Studies and Economics;
- government display stands at regional shows and field days;
- a regional radio advertising campaign; and
- an outreach program with DFAT officers visiting local communities to speak about trade liberalisation.[54]

2.76 We welcome these measures as an improvement on the existing public education program. As well as publications and a series of regional visits, there are a number of other programs aimed at increasing public awareness of trade liberalisation and exports.

2.77 DFAT has a program titled *Regional Australia: Exporting to the World*, which gives detailed information on exporting businesses in Australian regions. The aim is to demonstrate the importance of international trade to Australia's regions, and the amount of employment generated by exports (one in four regional Australian jobs). For example, the internet site for this program details how Central Queensland businesses are exporting in

52 International Trade Strategies Pty Ltd, submission no. 124, p. 8.

53 United Nations Youth Association of Australia, submission no. 248, p. 2.

54 DFAT, *Trade Outcomes and Objectives Statement 2001*, at: http://www.dfat.gov.au/toos/archive/2001/5.html, accessed 30 May 2001.

sectors as diverse as materials handling technology; education; coal; industrial services; alumina; beef; cotton; chemicals and explosives and magnesia.[55] We understand this information is also being released in brochure format.

2.78 Austrade (the Australian Trade Commission) is the Commonwealth's export and investment agency, with the primary aim of helping Australian businesses to develop overseas export markets, and to encourage overseas investment for Australian enterprises. Austrade does not provide general information to the Australian public about international exports, but is focused on detailed advice to Australian businesses. Its work falls into three main tiers:

- advice to businesses seeking general information about exporting – to help them through the decision process about whether to pursue export markets;
- selecting, understanding and entering new markets – to help companies who are ready to export decide where and how to begin; and
- expanding overseas business – for those companies with established exports who wish to expand their overseas interests.[56]

2.79 While not responsible for general education about trade liberalisation and the WTO, much of Austrade's work illustrates the benefits of trade reform. We encourage DFAT to continue to work closely with Austrade in developing education material for the Australian public.

2.80 We questioned State governments and industry groups about what they are doing to try to educate the general public, and industry group members, about trade liberalisation and the WTO. Most State governments took the view that this was primarily the mandate of the Commonwealth Government. Industry groups such as the National Farmers' Federation, and smaller groups, appeared to be making a sustained effort to increase their members' awareness of the WTO and its benefit to exporters. The Pork Council of Australia told us:

> Being small actually is a benefit in that we are able to communicate very quickly with our producers. We have an excellent communication system, we are constantly meeting our

55 DFAT, *Regional Australia: Exporting to the World*, at: http://www.dfat.gov.au/regionalexporters/qld.html, accessed 30 May 2001.

56 AUSTRADE, submission no. 288, p. 2.

> producers or ascertaining from them what their position is and where they want to see things go.[57]

2.81 The NFF called for the appointment of a Parliamentary Secretary for Trade, whose job would be to explain the importance of trade to a domestic audience.[58]

2.82 While there are a number of valuable publications and programs being run by DFAT in an attempt to educate the Australian community about trade liberalisation, its benefits, and how the WTO works, they do not appear to be well coordinated. As outlined below, there are many resources available on the internet but they are not well organised. There are no obvious links between the Commonwealth and state governments to coordinate any public information programs. Industry groups are undertaking their own education programs, aimed primarily at educating their own members and encouraging them to access the Government's trade advisory services and the Dispute Investigation and Enforcement Mechanism (outlined further in this report).

57 Kathleen Plowman, Pork Council of Australia, Transcript of Evidence 9 March 2001, p. TR219.

58 National Farmers' Federation, submission no. 223, p. 5.

Recommendation 3

COMMUNITY INFORMATION

2.83 **The Committee recommends that the Minister for Trade review all existing Commonwealth Government community information programs about international trade to ensure that the facts of trade liberalisation and the World Trade Organisation are addressed in a coordinated and well-targeted manner. Specifically, the Minister should:**

- **ensure that such programs present consistent messages across the whole of government;**
- **ensure that such programs are delivered in a way that reaches their target audiences;**
- **work with State and Territory governments and industry groups to develop complementary programs and to maximise the impact and reach of such programs; and**
- **encourage industry sectors to undertake their own education programs in coordination with government trade information initiatives.**

Internet access

2.84 We heard a number of arguments that DFAT's internet site covering trade matters could be more comprehensive. Corrs Chambers Westgarth Lawyers asked for more information to be posted onto DFAT's internet site, about disputes, negotiations, and industry concerns. According to Corrs, Australian submissions to WTO committees considering issues such as transparency are not available, nor is the agreement between Australia and China in the lead-up to China's proposed accession to the WTO.[59]

2.85 Amnesty International Australia also called for more information to be available to the public, particularly regarding ongoing negotiations:

59 Lisa Barker, Corrs Chambers Westgarth Lawyers, Transcript of Evidence 29 January 2001, pp. TR77-78.

> …a lot of the substantive negotiations are still not publicly available. The first that we, as a representative of civil society, see of those discussions is when they are released as decisions or as formal policy positions, which makes it very difficult for us to interact in the debate or to contribute except at quite a late stage in the process.[60]

2.86 We note that since the beginning of this inquiry the DFAT internet site has been updated to include much more detailed information about Australia's WTO activities.[61] Information now available on DFAT's WTO internet site includes:

- overview of the WTO and Australia's involvement in it;
- overview of WTO dispute settlement;
- most Australian submissions to dispute panels and Appellate Body hearings, including third-party submissions;
- Australian Government's approach to negotiations in agriculture and services, including access to Australia's negotiating proposals for GATS;
- information on accession negotiations and agreements, including broad overviews of the ongoing negotiations with China, Russia, Saudi Arabia and Vietnam;
- information about consultation mechanisms, including a call for public submissions on the Doha meeting in November 2001; and
- answers to frequently asked questions.[62]

2.87 We commend DFAT's efforts to publish a much wider scope of information about Australia and the WTO. However, while many documents are now available online, they are often difficult to find, and often require a specific knowledge of Australia's participation in recent WTO events (for example, Australia's current proposals to the GATS negotiations are not easily found – they are in a sub-section three levels down from the main WTO page).

2.88 The WTO section of the internet site is not linked to broader trade information such as the *Regional Australia: Exporting to the World* program or to the Trade Minister's *Trade Wins* newsletter about recent benefits of

60 Rory Sullivan, Amnesty International Australia, Transcript of Evidence 29 January 2001, p. TR88.

61 The DFAT WTO internet site is at: http://www.dfat.gov.au/trade/negotiations.

62 Information current at September 2001.

trade to Australia.[63] The availability of this type of basic information is important as a public education tool.

2.89 Access to information is a key element in building community understanding of the WTO and confidence in the role Australia has chosen to play international multilateral trade. While the internet does not meet the information needs of all Australians, increasingly it is an effective tool for disseminating comprehensive information to the Australian community.

2.90 DFAT's WTO internet site should be redesigned to allow easier access to basic information about the WTO, how it operates, and the benefits of trade liberalisation for Australia. There also needs to be better access to information such as Australian submissions to panels and ongoing negotiations. Many NGOs and individuals told us that this type of information is of most interest.

Recommendation 4

AUDIT OF INTERNET SITE

2.91 **The Committee recommends that the Minister for Trade ensure that the Department of Foreign Affairs and Trade undertake an audit of its WTO internet site, with a view to improving access to information about the benefits of trade liberalisation, the role of the WTO system, dispute cases, and ongoing negotiations.**

Community consultation

2.92 The second important element in ensuring Australian citizens understand and participate in trade policy development is community consultation. The 1999 consultations prior to the Seattle meeting included a call for submissions from the public, which attracted more than 130 papers, and a round of public hearings in all states and territories and in five regional centres. Following the hearings DFAT published a discussion paper summarising the views expressed throughout the consultation and responding to frequently asked questions.

63 DFAT internet site, *Regional Australia: Exporting to the World*: http://www.dfat.gov.au/regionalexporters/index.html, and *Trade Wins*: http://www.dfat.gov.au/trade/mdtf/index.html.

2.93 There were also a number of formal consultative bodies, which had high-level access to the Trade Minister and senior departmental officials:

- the Trade Policy Advisory Council - comprising business representatives;
- the National Trade Consultations – annual meetings between the Minister for Trade and State and Territory counterparts; and
- the Agriculture Trade Consultative Group – involving agriculture industry bodies and representatives from all main production sectors.

2.94 DFAT claimed that the 1999 consultations were effective:

> …consultations and exchanges of views have proved valuable to the department in providing trade policy advice to the Government and have helped ensure that Government policy and priorities takes into account the interests of Australian industry and the broader community.[64]

2.95 However, many submissions were critical of the consultations leading up to the Seattle meeting. A large volume of the evidence presented to us spoke of the need to improve community consultation in developing Australia's trade policy, particularly our approach to WTO negotiations and Agreements. For example, Ms Terrie Templeton wrote that at DFAT's Brisbane hearing in 1999:

> …there was no effort made to record the proceedings, minimal notes were taken of the points being raised, and indeed the officer seemed to see his role as 'refuter of the arguments raised', rather than as 'recorder of the arguments raised'.[65]

2.96 The Brisbane hearing in particular seems to have been viewed in a negative light by many of those who attended.[66] However, problems were encountered throughout Australia. AFTINET told us:

> The form of consultations in 1999 (submissions and meetings) did not give much confidence to community organisations. Submissions were received and summarised but there was no indication of how, if at all, they would influence policy. At the meetings DFAT officials appeared reluctant to listen and argued against critical points put to them by community organisations. In

64 DFAT, submission no. 222, p. 19.

65 Ms Terrie Templeton, submission no. 252.

66 The views expressed by Ms Templeton were echoed in a number of other submissions from Queensland.

> some cases the process appeared as DFAT's opportunity to tell community groups what policy should be rather than vice versa.[67]

2.97 The Law Council of Australia recognised that full community consultation on complex WTO issues will always be difficult:

> It is difficult to combine efficient negotiation strategies with fully democratic rights for all interested sectors of the Australian community. WTO negotiations are particularly complex dealing with all goods sectors together with services, intellectual property and some investment issues. In this kind of environment it is difficult to develop a clear and open negotiation mandate with input from all sectors of Australian society.[68]

2.98 Some submitters questioned the value of extensive community consultations. The Australian Chamber of Commerce and Industry (ACCI) praised the DFAT 1999 consultations but questioned the net benefit of holding such hearings:

> …the Chamber would question the depth and quality intellectual contribution made by some of the participants, many of whom to our direct observation demonstrated a distinct lack of informed understanding of the World Trade Organisation purpose, objectives, structures and operations.[69]

2.99 The Australian Food and Grocery Council (AFGC) argued:

> The mere assertion by a community group of a right to be consulted should not confer an obligation on the Government to extend that right. Community groups should be obliged to demonstrate how their interests relate to the business of the WTO before the right to be consulted is granted.
>
> Indeed, the AFGC considers that non-government organisations (NGOs) who claim to be representative of 'civil society' or a particular section of it, (including business and industry organisations), should be required by Government to satisfy accreditation criteria, particularly demonstrating a bona fides and mandate to represent a particular sector of the community. This could be comparable to the accreditation processes adopted by Codex Alimentarius Commission.[70]

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67 AFTINET, submission no. 41.1, p. 6.

68 Law Council of Australia, submission no. 283, p. 2.

69 ACCI, submission no. 184, p. 10.

70 AFGC, Transcript of Evidence 9 March 2001, p. TR214; and submission, no. 302, p. 13.

2.100 The National Association of Forest Industries wrote that while they are pleased to be consulted on trade matters, they do not automatically expect consultation from Government, nor should other groups:

> We do not, however, regard these consultations as anything more than a specialised and welcome supplement to the role of the elected Government in determining the proper conduct of Australia's relations with the rest of the world, including through intergovernmental fora such as the WTO.
>
> We do not count these consultations as a 'right', and we do not count ourselves as representatives of some mystic entity, called "civil society" in some quarters, which without consulting Governments' actions somehow lack legitimacy.[71]

A different approach

2.101 Bill Carmichael and Ron Duncan (ANU) argued that DFAT is taking the wrong approach to community consultations:

> While they provide ample opportunity for community involvement, their principal focus is on securing access to external markets rather than on the domestic issues involved in liberalising our own.[72]

2.102 Carmichael and Duncan cited the Productivity Commission as an ideal institution to undertake Australia's preparation for WTO negotiation rounds. The Commission would report on the effects on our economy of liberalising our own markets, and its charter requires public involvement in the process through submissions, public hearings and the like.[73] This approach has also been advocated in the international arena in forums such as UNCTAD, the Brookings Institute (Washington), and a GATT

The Codex Alimentarius Commission was established in 1961 by the United Nations' World Health Organisation (WHO) and the Food and Agriculture Organisation (FAO) to develop a set of international food standards and codes for hygienic food processing. The WTO's SPS Agreement recognises the Codex Alimentarius Commission's measures as the preferred international standards for international trade in foods. The Commission has international membership and allows NGO observer status based on accreditation criteria. More information is available at: http://www.codexalimentarius.net/Manual/ingos.htm, accessed 10 June 2001.

71 NAFI, submission no. 224, p. 1.

72 Bill Carmichael and Ron Duncan, submission no. 306.1 (supplementary submission), p. 12.

73 Productivity Commission, internet site: http://www.pc.gov.au/commission/inquiryprocess.html, accessed 29 May 2001.

study group formed during the Uruguay Round.[74] The advantage of this approach is that it –

> …makes transparent to domestic constituents the basis for decisions about protection and domestic adjustment as they are being made, not after the event.[75]

Consultations for Doha, November 2001

2.103 In April 2001 the Trade Minister announced the Government's consultation program leading up to the WTO's next Ministerial meeting in Doha, Qatar, in November 2001. The 2001 community consultations include:

- a call for submissions from members of the public (due by July 2001);
- a new formal consultative body, the WTO Advisory Panel, including industry, NGOs, unions and academia;
- the Trade Policy Advisory Council, consisting of representatives of the Australian business community;
- National Trade Consultations, between the Commonwealth's Minister for Trade and State and Territory counterpart ministers; and
- NGO Roundtables, held in May 2001 and later in the year.[76]

2.104 Several of these mechanisms are an improvement on the previous consultations. We note that DFAT does not intend to hold public meetings, as it did in 1999 (and which attracted much criticism, outlined above).

2.105 The establishment of a WTO Advisory Panel, including representatives of NGOs, unions, industry groups and academia, may resolve the criticism that DFAT's 1999 consultations focused on business and industry groups, largely ignoring the concerns of other organisations.[77] For example,

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74 Bill Carmichael and Ron Duncan, submission no. 306.1 (supplementary submission), p. 14.

75 Bill Carmichael and Ron Duncan, submission no. 306.1 (supplementary submission), p. 12.

76 DFAT internet site, at http://www.dfat.gov.au/trade/negotiations/consultations_australians.html, and http://www.dfat.gov.au/grade/negotiations/ministerial/doha_brief_01.html, accessed 24 April 2001.

77 The WTO Advisory Group includes representatives of: The Allen Consulting Group; The Australian Film Commission; the National Farmers' Federation; Mallesons Stephen Jaques lawyers; Australian Information Industry Association; ANZ Bank Ltd; Australian Conservation Foundaton; Australian Food and Grocery Council; Australian Council of Trade Unions; Australian Women in Agriculture; Australian Chamber of Commerce and Industry; Australian Industry Group, Australian Council for Overseas Aid; Melbourne Business School;

ACFOA's submission (made prior to the announcement of the new WTO Advisory Panel), recommended the establishment of a Ministerial Trade Advisory Committee on Social and Environmental Sustainability, noting that business and industry views were represented on the existing Trade Policy Advisory Council, but that no such committee existed for those who represent social and environmental concerns.[78]

2.106 The establishment of the WTO Advisory Panel has generally been welcomed by NGOs. However, some NGOs participating in a Committee round-table forum in April 2001 criticised the short timing for the WTO Advisory Panel's input (starting in June/July for a Government negotiating position that will need to be determined before November).

2.107 Organisations also want more feedback on how the consultations have influenced trade policy. The NSW Farmers' Association asked for more feedback, particularly to the organisations and individuals who participate in consultations, about the outcomes reached and the policies developed.[79]

NGOs on Australian delegations

2.108 Most NGO submissions to the inquiry called for NGOs to be included on official Australian delegations to WTO Ministerial meetings.

2.109 ACFOA stated that it has attended WTO and UNCTAD meetings in Seattle and Geneva, and ACFOA representatives have spent some time with DFAT officials at these meetings discussing their concerns. However, ACFOA argued:

> Notwithstanding the goodwill and cooperation between Government and ACFOA…NGOs still have not been invited to be part of Australia's official trade delegations to the WTO or to other major trade forums such as APEC or UNCTAD. This represents a political bias in favour of business interests as if other sections of the Australian community did not also have legitimate interests in the outcomes of trade decisions.[80]

Environment Management Industry Association of Australia; and Professor Michael Pryles, Bond University. The Advisory Panel is meeting twice before the November Doha meeting, and Panel participants have been invited to participate in the Australian Official Delegation to the WTO meeting. More information is available at: http://www.dfat.gov.au/trade/negotiations/consultations_australians.html#advis, accessed 1 August 2001.

78 ACFOA, submission no. 304, p. 15.

79 NSW Farmers' Association, submission no. 212, p. 6.

80 ACFOA, submission no. 304, p. 17.

2.110 Liberty Victoria argued that to deny NGOs standing as part of the Australian delegation is undemocratic:

> The Australian Government clearly and deliberately favoured the corporate sector in its delegation despite the fact that the WTO system has been greatly expanded by the inclusion of 'non-tariff barriers' affecting the everyday lives of citizens from all ranks of society.[81]

2.111 APHEDA Union Aid Abroad told us:

> Currently, trade negotiations only involve Government and business interests hardly representative of ordinary Australians. Organisations representing civil society should be involved in briefings and consultations before and during the negotiating processes and be represented on Government delegations to WTO meetings.[82]

2.112 On the other hand, the AFGC argued that many NGOs are not relevant to Government policy, and therefore should not be included in official delegations. Commenting on the Seattle delegation, AFGC stated:

> The Australian Government was not keen about having trade and environment on the agenda. The Australian Government was not having trade and labour on the agenda. In other words, why would you take a stack of people who are going to give you technical advice…on something that was not part of the Government's policy.[83]

2.113 We note that the number of Government and NGO participants for the Doha meeting may be limited, because of the city's limited capacity for accommodation, meeting spaces and the like. NGO groups have raised concerns that visas for NGO groups wishing to attend the Doha meeting will be issued only to those groups accredited by the WTO. The right of the WTO to 'sanction' which NGOs attend its meetings is questioned by some groups.

2.114 We also note the complaints of NGOs who attended the 1999 Seattle meeting that despite the Australian Government's assurance that they would be given full briefings after each day's negotiations, this did not eventuate. The AMWU's Doug Cameron told us:

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81 Liberty Victoria, submission no. 214, p. 2.

82 APHEDA Union Aid Abroad, submission no. 116, p. 8.

83 Mitchell Hooke, AFGC, Transcript of Evidence 9 March 2001, p. TR231.

> There were supposed to be consultations set up for the full week of the WTO between Australian NGOs and Australian [Government] in Seattle. These were an absolute farce. There was one meeting and after that meeting, because of the generally chaotic nature of the WTO forum, we were told that there was no time for any consultations with NGOs. Even though the NGOs turned up every night at the Australian delegation headquarters, there was no consultation and no communication as to the Australian Government's position.[84]

2.115 However, DFAT submitted:

> Daily briefings for non-Government organisations by the Minister and / or senior officials were conducted in Seattle over the duration of the Conference. Daily reports were also provided to State and Territory Governments.[85]

2.116 We acknowledge that the confusion surrounding the meeting at Seattle may have contributed to the Australian Government's alleged lack of consultation with Australian NGOs. However, it would be clearly preferable that such a situation not occur again.

2.117 The WTO Advisory Panel includes three NGOs from the environment, union and overseas aid sectors.[86] The Government has stated its intention to invite all WTO Advisory Panel members to participate on the formal Australian delegation to the Doha meeting. We welcome this move to ensure NGO representation on the delegation.

Recommendation 5

COMMUNITY REPRESENTATION AT WTO MINISTERIAL MEETINGS

2.118 **The Committee recommends that the Commonwealth Government invite NGO members of the WTO Advisory Group to participate as community representatives on the official Australian delegation to the WTO Ministerial Meeting in Doha in November 2001.**

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84 Doug Cameron, Australian Manufacturing Workers Union, Transcript of Evidence 29 January 2001, p. TR115.

85 DFAT, submission no. 222, p. 21.

86 The Australian Conservation Foundation, the Australian Council of Trade Unions, and the Australian Council for Overseas Aid. For full membership of WTO Advisory Panel see footnote 77.

Parliamentary scrutiny

2.119 There were calls for increased Parliamentary scrutiny of Australia's relationship with the WTO, particularly in debating any future WTO Agreements before they are ratified by Government:

> The Federal Government should establish a Joint Parliamentary Committee to scrutinise and report to both Parliament and the general public on all issues relating to the WTO.
>
> To avoid the current secretive process where trade negotiations are undertaken behind closed doors then presented to the Australian people as a fait accompli, any future negotiations on trade issues should in principle be made public unless there is genuine national interest reasons for doing otherwise. This would include all negotiations on the WTO's proposed agenda to examine investment liberalisation, Government procurement of goods and services, free trade in services such as health, education, etc and the free movement of natural persons.[87]

2.120 The Search Foundation and the Rail, Tram and Bus Union called for Parliamentary debate prior to WTO negotiations:

> …the Australian Government should hold a formal public consultation process about possible positions to take in WTO negotiations, and then hold a formal parliamentary debate on these issues, before sending negotiating teams to specific sessions or to the Ministerial Meetings.[88]

2.121 Mike Moore, Director-General of the WTO, has also recognised the importance of Parliaments as instruments of accountability for WTO member Governments. In April 2000 Moore wrote:

> Ultimately, Parliaments remain the most effective route for those who correctly want to scrutinise, criticise and influence the decisions taken by the members in the WTO. This fact needs to be emphasised and I would urge Parliamentarians to occasionally recall to your public this important role and responsibility of Parliamentarians.[89]

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87 APHEDA Union Aid Abroad, submission no. 116, p. 8.

88 Search Foundation, submission no. 65; Australian Rail, Tram and Bus Union, submission no. 289.

89 Mike Moore, 'Parliaments and the WTO – Accountability in the new global trading system', in *The Parliamentarian*, Commonwealth Parliamentary Association, v. 81(2), April 2000.

2.122 While the Government has improved considerably the extent to which it consults with interested parties during the development of WTO negotiating positions, there are few opportunities for parliamentary involvement in these debates.

2.123 The Joint Standing Committee on Foreign Affairs, Defence and Trade has for many years operated a Trade sub-committee which has an impressive record in considering general trade issues, especially from the perspective of Australia's bilateral trade relationships. Beyond the work of the Trade sub-committee, Parliament's role in reviewing trade policy is limited to *ad hoc* scrutiny through the Senate Estimates process and occasional debates and questions.

2.124 In view of the impact that global trade has on the lives of Australian citizens, Parliament should take a more prominent role in debating the many trade related issues of concern to the community.

2.125 The appointment of a Joint Standing Committee on Trade Liberalisation would allow Parliament to play an active role in reviewing the manner in which Australia engages in the multilateral trading system managed by the WTO.

2.126 Such a committee could, on behalf of the Australian community, consider and comment on the Government's negotiating position before WTO negotiations begin. The committee could undertake extensive community consultations on trade policy and WTO matters. We note that a Canadian Parliamentary committee undertook such examination prior to the 1999 Seattle WTO meeting (see paragraph no. 2.200).

2.127 As noted earlier, much of the focus of Australia's engagement with the WTO seems to be on the opportunities for Australian exporters seeking to trade globally. The appointment of a parliamentary committee solely dedicated to international trade matters would help redress this balance, allowing Parliament to examine and report on the domestic impact of trade outcomes being sought by the Government.

2.128 The activities of such a committee would encourage a far greater level of transparency in Australia's international trade relations than is apparent at present.

Recommendation 6

PARLIAMENTARY SCRUTINY

2.129 **The Committee recommends that the Commonwealth Government propose the establishment of a Parliamentary Joint Standing Committee on Trade Liberalisation to monitor and review the impact of trade agreements on Australia, opportunities for trade expansion, and trade negotiation positions developed by the Government.**

Recommendation 7

ANNUAL REVIEW OF WTO POLICY

2.130 **The Committee recommends that the proposed Joint Standing Committee on Trade Liberalisation undertake an annual review of Australia's WTO policy, including negotiating positions, current or proposed dispute cases, compliance, and structural adjustment.**

2.2 AUSTRALIA AND THE WTO DISPUTE SETTLEMENT PROCESS

DFAT's current approach

2.131 DFAT is the lead Commonwealth agency for WTO matters. Within DFAT a Trade Negotiations Division has responsibility for all matters relating to WTO dispute settlement.

2.132 The Trade Minister decides whether Australia should formally challenge the conduct of another WTO Member through the dispute settlement system. DFAT supports the Trade Minister in these decisions by providing briefings and advice as appropriate. DFAT's Deputy Secretary David Spencer outlined the criteria considered by DFAT in recommending WTO dispute action to the Trade Minister:

- Our share of world trade – the customary approach in the WTO is that if you have one per cent of the market share and someone else has got 90 per cent of the market, you do not take the initiative. You usually take the initiative when you are a principal supplier;
- Bilateral relationships – if Australia has a major trade deficit with a country, our propensity to initiate a dispute with that country will be different than if we had a trade surplus;
- Degree of private sector support – it would be unlikely that the Australian government would initiate a dispute unless it had the support of industry;
- Strength of the claim – the Government will only engage the dispute settlement process if there are good prospects of success; and
- Domestic sensitivities – the Government has to be conscious that an attack on another Member's conduct does not leave Australia vulnerable in other industry sectors.[90]

2.133 Obviously, if there is an action against Australia, we have no choice but to participate in consultations and dispute panel hearings, where necessary.

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90 David Spencer, DFAT, Transcript of Evidence 18 June 2001, p. TR518.

Australia's involvement in WTO disputes

2.134 To date, Australia has been party to 25 WTO disputes, either as a complainant (5 cases), respondent (5 cases involving 3 separate matters), or as a Third Party (18 cases). DFAT's internet site includes an up-to-date overview of Australia's involvement in WTO cases.[91] Two high-profile cases in which Australia was a respondent are briefly outlined below. The US Lamb case, initiated by Australia, is the subject of a case study in Chapter 2.3 (see p. 110).

Canadian Salmon

2.135 The Canadian Salmon case attracted widespread attention within Australia, as the Australian salmon industry and the Tasmanian Government did not support the actions of the Australian Government throughout the case (this is discussed further in Chapter 2.5).

2.136 In 1995, the Canadian government initiated a complaint against Australia, claiming that our ban on salmon imports was in breach of the WTO's Sanitary and Phytosanitary (SPS) Agreement. A dispute panel was formed in April 1997, with the United States, EU, India and Norway participating as Third Parties. The Dispute Panel report (June 1998), and subsequent Appellate Body report (November 1998), upheld Canada's complaint against Australia.[92]

2.137 In response to the WTO's findings, Australia undertook an Import Risk Assessment (IRA) for salmonid products (this process is outlined at Chapter 2.4). The IRA resulted in Australia lifting its ban on salmon imports, but increasing the quarantine requirements for fish products in general.[93]

2.138 In July 1999 Canada filed a new complaint against Australia, arguing that the new quarantine requirements for fish products amounted to a failure to comply with the WTO findings. Canada also noted that the Tasmanian Government had implemented its own ban on salmon products, thereby contravening the WTO's dispute findings. Canada sought approval to

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91 DFAT internet site: *Australia and WTO Dispute Settlement*, at: http://www.dfat.gov.au/trade/negotiations/wto_disputes.html#oz.

92 Dispute Panel report: Australia – Measures Affecting Importation of Salmon, WT/DS18/R, available at: http://www.wto.org/english/tratop_e/dispu_e/18r00.pdf.
Appellate Body report: Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R, 20 October 1998, at: http://www.wto.org/english/tratop_e/dispu_e/ds18abr.pdf.

93 DFAT internet site: http://www.dfat.gov.au/trade/negotiations/disputes/wto_disputes-Australia_salmon.html, accessed 3 August 2001.

undertake retaliatory measures against Australia for its non-compliance with the salmon ruling.

2.139 The new WTO Dispute Panel found that 10 of the 11 quarantine measures implemented by Australia were consistent with WTO rules. The last measure, stating that imported salmon must be 'consumer-ready' was found to be inconsistent. The Tasmanian Government's actions were also found to be inconsistent with WTO rules.

2.140 In May 2000 the Australian and Canadian governments announced they had come to an agreement about implementation of the original WTO panel's findings. Australia kept 10 of its new quarantine measures for fish products, as approved by the WTO, and modified the 11th in line with the SPS Agreement. Australia agreed to continue to seek observance of the WTO findings by Tasmania. Canada agreed not to pursue any retaliatory measures against Australia.

2.141 The Canadian salmon case highlighted Australia's vulnerabilities on the issues of quarantine and retaliation. Our quarantine policies must comply with the provisions of the SPS Agreement, or come under fierce scrutiny. The result of non-compliance may be retaliation. The Department of Agriculture, Fisheries, and Forestry Australia (AFFA) outlined the possible consequences of retaliatory measures against Australian industries:

> In either compensation or retaliation cases, the costs are likely to be borne by industries other than the one involved in the dispute. This means that penalties can be onerous if WTO dispute findings are not addressed or if full implementation of remedies is delayed. Any retaliatory measures cannot be applied pending arbitration on the level of retaliation.
>
> Industries affected by retaliation, including industries other than those which were found to be in breach of international commitments, could potentially suffer impacts far beyond the original removal of any concessions, including:
>
> - needing to either find new markets or receive lower returns on the domestic market for these goods;
> - permanent loss of market share in important markets as competitors fill the gap created by the effective removal of Australian product, even if market access is only lost for a short period;
> - undermining development and expansion into export markets;

- short to medium term falls in their profitability and returns with obvious consequences on rural producers could reasonably be expected.[94]

Howe Leather

2.142 The Howe Leather case demonstrated how a WTO decision can affect an individual company. In November 1997 the United States initiated a complaint against Australia about subsidies provided by the Australian Government, in the form of a grant and a loan, to the Howe and Company leather manufacturer, a small company which is the only dedicated producer and exporter of automotive leather in Australia.

2.143 A WTO Dispute Panel was formed in June 1998 and the panel report was handed down in May 1999. The United States successfully argued that the grants to Howe leather were in breach of the WTO Subsidies and Countervailing measures (SCM) Agreement.[95]

2.144 Australia then proposed an implementation scheme for complying with the WTO's finding, which involved withdrawing $8 million of the original $30 million grant to Howe leather, and instead providing Howe with a new non-commercial loan of around $13 million.

2.145 The US appealed Australia's implementation plan, and a new WTO Dispute Panel was formed to investigate the proposed implementation. In January 2000 the dispute panel upheld the US Government's complaint that Australia's proposed implementation was not in accordance with WTO rules, and furthermore ruled that Howe & Company should repay the grant monies it had already received from the Australian government.[96]

2.146 DFAT trade lawyer Gavin Goh notes that the Dispute Panel's 'retrospectivity ruling' attracted much criticism from other WTO Members. Past GATT and WTO rulings had not punished Members for past actions, but sought to secure future trade opportunities.[97]

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94 AFFA, submission no. 311, pp 11-12.

95 WTO dispute panel: Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R, 25 May 1999, available at: http://www.wto.org/english/tratop_e/dispu_e/1343d.pdf.

96 WTO dispute panel: Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States, 21 January 2000, WT/DS126/RW.

97 Gavin Goh, *Australian Contributions to the Development of WTO Law*, paper presented to the Australia-New Zealand Society for International Law (ANZSIL) Conference, June 2001, Canberra; at: http://www.dfat.gov.au/trade/negotiations/disputes/aus_contribution_wto_law.html.

2.147 In June 2000 the Australian Government reached a settlement with the United States for implementation of the Dispute Panel's findings. The settlement involved Howe & Company repaying $7.5 million to the Australian Government, over a period of 12 years. Australia also agreed to drop automotive leather from eligibility for export assistance schemes, and to remove customs duty on a range of leather products. In announcing the agreement with the United States, Trade Minister Vaile commented:

> We have never been happy with the way the US has pursued this globally successful Australian company, while at the same time handing out billions of dollars in assistance to its own agricultural producers. It highlights the real inequities in WTO rules between manufactures and agriculture which is why the Government strongly supports a new WTO round to rectify the situation.[98]

2.148 Other disputes involving Australia as a complainant or respondent have been resolved at the consultation stage, prior to the formal dispute panel process.[99]

Third Party participation

2.149 Australia has also been a frequent participant in disputes as a Third Party. The WTO allows third party countries to participate in disputes if they have a legitimate reason for doing so. While not launching a full-scale case, third party participants make written and oral submissions to the Dispute Panel, which must be taken into account by the panel members. According to DFAT:

> For smaller countries like Australia, third party participation is a cost-effective means of ensuring Australia's trade interests are protected in any dispute, particularly in circumstances where we are not a leading supplier of the product in question and/or there are significant systemic interests in the interpretation of the rules.[100]

2.150 An example of a success for Australia as a third-party participant was the United States shrimp/turtle dispute. The US had placed a ban on shrimp (prawn) imports from countries that did not trawl for shrimp using Turtle

98 Hon. Mark Vaile MP, Minister for Trade, Press release: *Settlement reached with U.S. on Howe leather dispute*, 21 June 2000, at: http://www.dfat.gov.au/media/releases/trade/2000/mvtjoint2106_00.html, accessed 3 August 2001.

99 DFAT, submission no. 222, p. 51.

100 DFAT, submission no. 222, p. 49.

Protector Devices (designed to prevent the catching of endangered turtle species). India, Malaysia, Pakistan and Thailand initiated a dispute against the US, claiming that the ban contravened WTO Agreements which limit restrictive trade measures.[101]

2.151 Australia entered the dispute as a third party because our prawns were banned from the US market, despite the fact that the turtles the US was trying to protect do not live in Australian waters. Australia argued that turtle protection should be achieved through other means – such as international collaboration on marine protection – rather than trade barriers. The WTO Dispute Panel agreed, and the US was forced to accept shrimp imports from countries which pose no threat to turtle life – including Australia.

2.152 When we questioned whether Australia should concentrate on participating as a third party in WTO disputes, rather than expending considerable resources as the primary complainant, DFAT forecast that Australia will continue to initiate dispute cases, as well as participate as a third party where appropriate:

> …mostly it will be determined on what our commercial interest in it is. If we are a principal supplier of the product in the market concerned, that will be a very important issue in determining whether we should be in there as a complainant or whether we should be a third party.[102]

How Australia prepares for a WTO dispute

2.153 Whether prosecuting or defending a WTO dispute, DFAT takes a 'taskforce' approach. Acting as lead agency, DFAT assembles a team including officers from its Trade Negotiations Division, other relevant DFAT branches, and officers from other Government agencies such as the Attorney-General's Department and relevant policy agencies (eg AFFA, DISR, Environment Australia). Industry representatives are also included on each taskforce.

2.154 For example, in the Canadian salmon case the taskforce included officers from the Commonwealth agencies DFAT, AFFA, Prime Minister & Cabinet, Attorney-General's Department, and the Australian Government Solicitor, as well as representatives from the Victorian and Tasmanian Governments. The industries represented on the taskforce included the

101 WTO dispute: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998). The Appellate Body report is available at: http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf, accessed 28 May 2001.

102 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR49.

Tasmanian salmon industry, Victorian trout industry, South Australian tuna industry, Western Australian lobster industry, South Australian pilchards industry, the pet-food industry, and Recfish (a recreational fishing organisation).[103]

2.155 Meat & Livestock Australia, which has been involved in Australia's two biggest prosecutorial cases thus far (the Korean Beef and US Lamb disputes), supported the DFAT-led team approach:

> DFAT contains a highly specialised staff group well versed in WTO rules and procedures. The talents of these individuals can be maximised when mixed with the market knowledge of Australian industry participants.
>
> A combined use of DFAT/industry resources was put to great effect in the Korea Beef Dispute. DFAT staff planned and wrote the Panel submissions, but in doing so extensively used technical resources of MLA and the wider meat industry. DFAT regularly provided detailed and highly regarded briefings on the developments of the case to key Australian meat and livestock representatives. These regular communications provided the opportunity for industry input and feedback. It was a very effective team effort.[104]

Dispute Investigation and Enforcement Mechanism (DIEM)

2.156 An issue that was extensively canvassed by the Committee was how industry can more effectively access the WTO system. In essence, we asked 'how easy is it to get the Australian Government to pursue a case?'. It appears to a certain extent that thus far, only the larger Australian industries have successfully convinced the Australian Government to take up their case before the WTO.

2.157 In 1999 the Government established the Disputes Investigation and Enforcement Mechanism (DIEM). DFAT describes the DIEM as:

> …a challenge to the private sector to use the leverage of the Australia's WTO membership for the benefit of Australia, and individual Australian exporters.[105]

2.158 The DIEM is intended as a mechanism for all Australian exporters to access DFAT and work with DFAT officials in developing a case for WTO

103 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR48.

104 Meat & Livestock Australia, submission no. 221, p. 9.

105 DFAT, submission no. 222, p. 56.

prosecution to take to the Trade Minister. It is a structured process involving an initial submission from the exporter or industry, followed by a series of assessments by DFAT and, if deemed appropriate, negotiations with the WTO member against whom the exporter/industry wants to take action.[106]

2.159 If, at the end of the DIEM process, the exporter/industry wishes to pursue the matter through WTO dispute settlement processes, they must then make a formal petition to the Trade Minister to action their request.

2.160 There are no charges to the private sector in accessing the DIEM, but DFAT does expect exporters to meet some costs such as travel and document translation expenses. Exporters are also required to undertake preliminary work on the dispute case:

> Part of that dispute investigation mechanism was to say to industry and Australian corporates, 'If you believe that there is something that is affecting your interests, you go and do some work yourself. You go and employ a consultant or a lawyer to come up with a prima facie case. Because if you can do that, it is, to a certain extent, a load off our mind and you can present us with a much more professional case'.[107]

2.161 This aspect of the DIEM, which requires companies to have undertaken some preliminary work before approaching DFAT, caused some concern amongst submitters. According to the Queensland Government:

> Current arrangements for access by Australian companies to the dispute process are a matter of concern. The requirement for companies to have undertaken a measure of prior preparation before the Department of Foreign Affairs and Trade will provide support has the effect of pre-qualifying, on the basis of their size and resources, those companies that can realistically pursue such action. This can be discriminatory against smaller companies.[108]

2.162 However, DFAT rejects the suggestion that the exporter must bring a highly polished case to the department for consideration:

> Having regard to the principle of equity of access for all Australian exporters to Government support and assistance under the DIEM, the department would not support a requirement that an exporter

106 The DIEM process is detailed in *The WTO Disputes Investigation and Enforcement Mechanism – A Government-Industry Partnership*, December 1999, available on the DFAT internet site: http://www.dfat.gov.au/trade/negotiations/wto_disputes.pdf, accessed 20 March 2001.

107 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR59.

108 Queensland State Government, submission no. 280, p. 5.

> present a fully-documented WTO case under the DIEM as is the case under the US Section 301 process.[109]

2.163 The DIEM has gained support from private industry. ACCI wrote:

> The DIEM will be particularly useful for both newer and/or smaller exporters, and those engaged in trading outside the traditional sectors, who may otherwise feel unable to obtain redress against an improper trade conduct by another WTO member Government.
>
> Commerce and industry does not consider the DIEM to be a platform for 'picking fights', but rather one for ensuring our rights under the WTO system are respected, and the obligations of other contracting parties are honoured.[110]

2.164 While we commend the DIEM as a worthy mechanism, the reality is that it is, as yet, unused. We sought information from DFAT about the level of industry access to the DIEM, and were told:

> There has not yet been a case in which an enterprise has formally used the DIEM to seek action by the Department to address specific concerns. We are confident that awareness of the DIEM will increase over time.[111]

2.165 DFAT believes that an increase in the number of 'hits' to its internet site covering the DIEM and WTO dispute settlement indicates a growing awareness of the DIEM. The Department is also looking at upgrading the DIEM's prominence on the DFAT website and holding seminars to further promote the mechanism.

2.166 We commend this action and encourage Australian companies to make use of the DIEM where appropriate. We also note some moves by the legal profession to increase their clients' awareness of the DIEM.

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109 DFAT, submission no. 222, p. 57. 'US Section 301' refers to Section 301 in the United States Trade Act, which requires the US Trade Representative (USTR) to pursue WTO dispute action if an exporter or business presents a well-documented case for doing so.

110 ACCI , submission no. 184, p. 17.

111 DFAT, submission no. 222.2 (supplementary submission), p. 2.

Taking a more proactive approach

2.167 There were calls for Australia to become more proactive in engaging the WTO dispute settlement system. The NSW Farmers' Association told us that its members want to see the WTO's dispute process work for them:

> Australia needs to get a lot more street smart at using the rules. We do not seem to have been at all tough in articulating our position or pursuing it. That may be just the fact that it is mind numbingly slow compared to how immediate the issues are that our members deal with when they walk out the back door.[112]

2.168 Similarly, the AFGC felt that industry and Government have not yet grasped the opportunities presented by the WTO:

> I am not sure industry really fully appreciates the opportunities of the system's capabilities. You only have to have a look at how we are tracking, in terms of disputes, on the front foot as distinct from the back foot and how are trading partners in the United States, Europe and Canada are travelling.[113]

2.169 DFAT acknowledged that while high-profile Australian industries which have organised industry groups, such as lamb, beef, dairy and sugar, understand the WTO system very well, other smaller companies may not. However, DFAT insists that its information and consultation channels, including the DIEM, are open and accessible to all Australian companies. DFAT's David Spencer told us:

> I am sure that there is a degree of ignorance amongst many Australian companies as to what the rules are in the WTO and I would not discount that for a moment. But the fact that there is no basis on which they can find out what the rules are to come and talk to us or that they need some intermediary to come and talk to the Government seems very strange to us.

DFAT resourcing

2.170 A number of submitters argued that for Australia to be more proactive in the WTO system, DFAT's resourcing needs to be increased, and perhaps restructured. Professor Jeffrey Waincymer, an experienced WTO panellist, argued that while DFAT's bureaucrats are very good at their jobs, they are

112 Xavier Martin, NSW Farmers' Association, Transcript of Evidence 29 January 2001, p. TR102.

113 Mitchell Hooke, AFGC, Transcript of Evidence 9 March 2001, p. TR216.

under-resourced to cope with the number of WTO disputes and associated issues.

> There are too many Chinese walls in the Australian structure. There is a bit of expertise in DFAT and a bit in AG's, the Department of Industry desperately wants to know the rules so that they can come up with some sensible, sustainable industry development policy for Australia, and there is Agriculture, et cetera. So it is all over the place.
>
> [DFAT] has excellent people, but a small number, given Australia's level of interest in this area. They not only run these cases…so they are doing all the legwork on a lot of cases – but they are meant to be advising a lot of other Government departments on specific questions.[114]

2.171 The AFGC also expressed concern that Australia's current resourcing level will not be able to cope with an increasing WTO work load:

> It appears that the United States, the European Union and, to a lesser extent Canada have significantly increased their resources and skills to manage the WTO disputes processes.
>
> Unlike these and other important members of the WTO, Australia appears not to have markedly increased its level of expertise or resources utilised to handle WTO issues. This must affect adversely Australia's capacity to advocate and defend its interests in the WTO system.[115]

2.172 The Pork Council of Australia called for a restructuring of DFAT's resources, to allow more focus on taking a proactive approach to the WTO system:

> The lack of a specialist office in international law with overriding responsibility for dealing with international legal matters also critically weakens Australia's position in WTO dispute settlement procedures. To date, Australia's resources in this area have been effectively tied up with defending our position rather than pursuing our interests as aggressively as other WTO member countries.[116]

2.173 Similarly, Effem Foods called for changes in DFAT:

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114 Professor Jeff Waincymer, Transcript of Evidence 9 March 2001, p. TR269.

115 Australian Food and Grocery Council, submission no. 302, p. 16.

116 Pork Council of Australia, submission no. 80, p. 2.

> Australia has not significantly increased its resources to manage the new demands of this system. Other countries are approaching the WTO disputes system now much more as a system which requires legalist representation and advocacy and are recruiting specially trained lawyers to handle dispute cases.
>
> Australia still depends on the use of policy officers to hand WTO disputes issues, as it always has. Australia's ability to defend and advance national trade interests will diminish unless capacity to manage dispute settlement is enhanced.[117]

2.174 There were calls for DFAT to strengthen its expertise in areas such as environment, labour, human rights, and gender issues.[118] We recognise that in managing WTO dispute cases, the Department calls upon officials from the relevant departments including Environment Australia, Industry Science and Resource, and AFFA.

Senate review

2.175 In 2000 the Senate Rural and Regional Affairs and Transport Legislation Committee undertook an inquiry into administration of Australian quarantine in light of the Canadian salmon case.[119] The report included a brief overview of the Australian Government's administrative arrangements for WTO matters, and questioned the role of DFAT as the lead agency in WTO litigation matters. The Senate Committee concluded that DFAT resources did not include the specialist expert litigation skills required for engagement in WTO dispute settlement, and also that the Attorney-General's Office of International Law was not adequately resourced to fulfil that function.

2.176 The Senate Committee recommended that an International Legal Adviser's Office be established to provide high quality international legal advice on Australia's relationship with other countries and international organisations [including the WTO].[120] The Committee envisaged this office

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117 Effem Foods Pty Ltd, submission no. 256, p. 8.

118 For example, the International Womens' Development Agency called for DFAT to employ a 'gender expert' to advise on trade issues and marginalised groups, particularly women. International Womens' Development Agency, submission no. 286, p. 6.

119 Senate Rural and Regional Affairs and Transport Legislation Committee, *An Appropriate Level of Protection? – The Importation of Salmon Products: A case study of the Administration of Australian Quarantine and the Impact of International Trade Arrangements*; Parliament of the Commonwealth of Australia; June 2000.

120 Senate Rural and Regional Affairs and Transport Legislation Committee, *An Appropriate Level of Protection? – The Importation of Salmon Products: A case study of the Administration of Australian Quarantine and the Impact of International Trade Arrangements*; Parliament of the Commonwealth of Australia; June 2000; p. 195.

as a statutory authority located within the Attorney-General's portfolio. The Government has not yet responded to the Senate Committee's report.

Committee comment

2.177 The need for a better-coordinated approach to WTO issues at the bureaucratic level is apparent to the Committee. We note that DFAT recently established a Trade Law Branch within its Trade Policy Division, but this does not cover the breadth of issues covered by the WTO Agreements.

2.178 Our recommendations to improve education, communication and consultation programs (outlined above), and other recommendations to strengthen our interaction with the Dispute Settlement Body (in forthcoming sections) indicate a need for a better-coordinated response to WTO issues.

2.179 We propose that the Government establish an Office of Trade Advocate within the foreign affairs and trade portfolio, drawing on existing DFAT resources and adding to them as necessary. The approach of the Government in establishing the Australian Greenhouse Office to deal with the Kyoto Protocol, greenhouse warming and associated issues is a useful model.

2.180 The establishment of an Office of Trade Advocate within the trade portfolio would also provide a high-profile contact point for industries, community groups and individuals when dealing with WTO and other trade matters.

Recommendation 8

OFFICE OF TRADE ADVOCATE

2.181 **The Committee recommends that an Office of Trade Advocate be established within the portfolio of Foreign Affairs and Trade. The Office of Trade Advocate should have responsibility for:**

- **community education programs about trade liberalisation and the WTO;**
- **supporting the development of proposed WTO negotiating positions, including consultation with Sectoral Advisory Committees (recommendation 9);**
- **management of Australia's participation in WTO dispute cases, including the use of private sector legal practitioners where appropriate (recommendation 10);**
- **promoting access for small and medium-sized Australian industries to the Government's Dispute Investigation and Enforcement Mechanism (DIEM);**
- **consultation mechanisms with State/Territory governments (recommendation 16); and**
- **assessment of new structural adjustment and other industry assistance programs to ensure their compliance with WTO Agreements.**

Engagement of private sector lawyers

2.182 A number of private sector lawyers argued that their firms should be used by the Government to either assist or run Australia's WTO dispute cases.

2.183 Under the provisions of the Judiciary Act 1903, the Attorney-General has issued Legal Services Directions which spell out how legal services are to be provided to the Commonwealth Government. While private sector lawyers may represent Commonwealth clients in most situations, legal work relating to Constitutional and Cabinet issues, national security and public international law must be undertaken by Government providers of legal services. This includes participation in the WTO disputes process.

2.184 International litigation work (Government-to-Government matters) is tied to the Attorney-General's Department, the Australian Government Solicitor (AGS), and DFAT. The Attorney-General's Department commented:

> By tying these areas to Government providers, the Government seeks to achieve a consistent, whole of Government approach and to protect the Commonwealth's financial and legal interests.[121]

2.185 However, Lisa Barker, of Corrs Chambers Westgarth Lawyers, told us:

> The reality is that it is a rules based system, the processes are quasi-judicial and there is extensive involvement of lawyers in the preparation of cases by our trading partners. It would be highly counterproductive for Australia to adopt anything other than a course that involved lawyers.[122]
>
> The difficulty is that, since the commencement of the WTO in 1995, we have had almost double the number of members that we had under GATT. We now have 140 markets – in our case, we have 139 other markets we can look at an scrutinise – and we have many more areas of trade covered by the vastly increased number of agreements.
>
> . …for an Australian Government department with its [DFAT's] resources to be responsible for looking at all of those markets for all of those industries is an almost impossible task. I think it is a reality that private sector expertise will be needed if we are to represent the broad brush of Australian industry in a really effective way.[123]

2.186 Phillips Fox Lawyers argued that while private lawyers could run WTO cases, the Government would clearly still be in charge:

> The increased involvement of external lawyers would have the following benefits:
>
> - Australia's case would be prepared and argued by lawyers who would be able to call on both highly skilled litigators and experts in international law used to working as a team;
> - we have access to litigators of international standing;

121 Attorney-General's Department, submission no. 297, p. 6.

122 Lisa Barkers, Corrs Chambers Westgarth Lawyers, Transcript of Evidence 29 January 2001, p. TR86.

123 Lisa Barker, Corrs Chambers Westgarth Lawyers, Transcript of Evidence 29 January 2001, p. TR 76.

- the responsibility for the conduct of the dispute would fall, as it should, on professional experts and would not therefore be perceived as adversely affected by perceived conflicts of policy interest; and
- we can assist in the necessary role of progressively developing the general principles of international law relating to trade, and for Australia to take a proactive role in that regard.

Such external lawyers would, of course, need to be instructed by the client, in this case the Commonwealth represented by the Minister of Foreign Affairs and Trade and in fruitful collaboration with the Departmental WTO team and Government lawyers.[124]

2.187 Private industry, through the ACCI, also called for the involvement of private sector lawyers:

> While commerce and industry has high regard for the diplomatic, strategic and trade negotiations skills of senior DFAT officers, the increasing legal complexity of international trade law, and the legal demands of the WTO panel system, may necessitate strengthening the legal skills available to the Department.[125]

2.188 Private sector lawyers were involved in Australia's case in the recent Lamb dispute with the United States. The lawyers were employed by the industry body, Meat & Livestock Australia (MLA), not the Government. MLA engaged a Washington-based law firm to advise the industry, and Australian Government, on US law relevant to Australia's case. MLA's Peter Barnard described how the arrangement worked:

> We retain a firm of lawyers in Washington to monitor trade issues in the United States for us and to provide advice on those matters. DFAT did utilise the services of those lawyers to a certain degree.
>
> All the basic drafting – all the initial grunt – was done at this end, in Canberra, but our lawyers in Washington certainly assisted with some of the more technical issues by providing a second opinion more than anything else.[126]

2.189 To date, private sector lawyers have not been engaged by DFAT to help prepare for the conduct of WTO disputes. DFAT argued:

> DFAT officers have extensive experience in formal dispute proceedings, both in the WTO and its in predecessor the GATT.

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124 Phillips Fox Lawyers, submission no. 251, p. 11.

125 ACCI, submission no. 184, p. 17.

126 Peter Barnard, Meat & Livestock Australia, Transcript of Evidence 29 January 2001, p. TR 131.

> Departmental trade law experts bring multi-disciplinary policy skills to the pursuit of dispute settlement in the WTO.[127]

2.190 DFAT's David Spencer further stated:

> The department …is not closed minded to the question of whether there may be circumstances with a particular case where we would wish to engage outside assistance. If we had a case where we wanted to do some investigation on a particular dispute, I could well envisage that we could employ a firm of consultants with legal training – I do not want to say lawyers – to give us some specific help.
>
> …we have not yet been convinced that we did not have the resources within the department and within the Commonwealth to successfully defend or prosecute a case. When you compare the private sector knowledge base with, say, that of the United States or Canada in terms of their knowledge of the WTO rules, obligation laws and practices, we do not have a tremendous base here in Australia.[128]

2.191 DFAT sees the role of private lawyers as assisting industry in preparing their cases to be brought to the DIEM, rather than assisting the Department directly.

Other countries' approaches to dispute settlement and community consultation

United States of America

2.192 The United States of America (US) is the most active participant of the WTO dispute system, both as a complainant and respondent. The Office of the United States Trade Representative (USTR) administers US involvement in the WTO. Private sector groups (particularly businesses) have powerful leverage to petition the US Government to take action about a complaint. The United States Trade Act (Section 301) states that the USTR must have strong reasons to reject a petition from the private sector to take WTO action.

2.193 According to DFAT, USTR does not contract out work to legal firms. However, it does draw heavily on input from private practitioners, provided by (and paid for) businesses and industry associations. There is also 'cross fertilisation' between USTR and the private sector, with trade

127 DFAT, submission no. 222, p. 55.

128 David Spencer, DFAT, Transcript of Evidence 27 November 2000, pp. TR58-59.

law practices usually headed by former USTR staff.[129] Professor Jeff Waincymer commented on the 'revolving doors' system in the US:

> …in USTR as long as you have a reasonable overlap they are happy with the five-year deal. The brilliant young law students know, 'I'll do a great masters at a top 10 university with John Jackson [leading US trade academic]. I'll do three to five years in Government, do fascinating work in Geneva and, after that, I'll walk straight into a Wall Street law firm and just keep going round.' As long as there are 10-year more senior people at USTR that can teach the juniors and keep that institutional history, it all works much better.[130]

2.194 The USTR seeks public comment on WTO issues through Federal Register notices, which are issued for each WTO dispute in which the US is a party.[131] There is an Industry Consultations Program comprising 17 sector advisory committees and four 'functional' advisory committees which advise on intellectual property, electronic commerce, customs and standards.

2.195 Corrs Lawyers argued that the US comprehensive industry program results in a more proactive approach to WTO matters.

> It is worth noting that the close partnership between US industry and their trade administrators has resulted in something of 'first mover advantage', whereby the US industry is gaining access to previously closed markets before any of their international competitors and thus are able to obtain a significant share of the market.[132]

2.196 The USTR also publishes its submissions to WTO panels, and the submissions of other countries (with their permission).[133]

2.197 While some commentators point to the US system as a model for Australia's approach to WTO advocacy, there are fundamental differences in our governmental systems which would make application of the US system as outlined in the US Trade Act unworkable in Australia. DFAT's David Spencer commented:

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129 DFAT, submission no. 222, p. 58.

130 Professor Jeff Waincymer, Transcript of Evidence 9 March 2001, p. TR271.

131 Office of the United States Trade Representative, Federal Register: http://192.239.92.165/fr/index.shtml, accessed 15 May 2001.

132 Corrs Chambers Westgarth Lawyers, submission no. 79, p. 9.

133 Office of the United States Trade Representative, WTO submissions: http://192.239.92.165/enforcement/briefs.shtml, accessed 29 April 2001.

> …it is not always useful to make the comparison [because] the United States trade policy is shared between the administration and the legislature.
>
> …people can point to the fact that they have got [US Trade Act Sections] 301, 201, et cetera. We have a cabinet. The cabinet can take that decision at any time it likes.[134]

Canada

2.198 Canada's Department of Foreign Affairs and International Trade (DFAIT) is responsible for Canada's interaction with the WTO. Similar to the US, Canadian industries often employ lawyers to monitor and assist in WTO cases. DFAT states that Canada has employed foreign lawyers to provide specialist advice – for example, the Canadian Government employed an Australian lawyer to provide advice about Australian quarantine law during the salmon dispute.[135]

2.199 Twelve Sectoral Advisory Groups on International Trade report to the Minister for International Trade on a quarterly basis, about trade issues affecting their particular industry or sector. Each Advisory Group comprises representatives of businesses, industry associations, labour/environment groups and academia. The Government also holds Federal-Provincial-Territorial Trade Meetings (federal/state Government meetings) on a regular basis.[136]

2.200 Prior to the 1999 Seattle WTO meeting the Canadian Government asked the House of Commons Standing Committee on Foreign Affairs and International Trade to undertake a series of public consultations to canvass the views of Canadians about issues related to the WTO.

2.201 The Committee found that Canadians had a number of key messages for their Government to consider when determining WTO policy, and made 45 recommendations for improving Government consultations prior to WTO meetings, and about the issues Canadians wanted taken into consideration in preparation of WTO policy.[137]

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134 David Spencer, DFAT, Transcript of Evidence 18 June 2001, p. TR517.

135 Canadian Department of Foreign Affairs and International Trade: http://www.dfait-maeci.gc.ca/, accessed 24 April 2001; DFAT, submission no. 222, p. 59.

136 Canadian Department of Foreign Affairs and International Trade, Sectoral Advisory Committees: http://www.dfait-maeci.gc.ca/tna-nac/sagit-e.asp, accessed 29 April 2001.

137 Canadian House of Commons Standing Committee on Foreign Affairs and International Trade: http://www.parl.gc.ca/infocomdoc/36/1/fait/studies/reports/faitrp09-e.htm, accessed 29 April 2001.

2.202 Canada publishes its negotiating positions on various WTO agreements, including its position for the 1999 Seattle meeting.[138]

European Union

2.203 The 15 European Union (EU) members trade as a single bloc, through the European Commission (EC).[139] While the EU Council of Members formally opens trade negotiations and adopts trade agreements, the EC is empowered to negotiate trade agreements (under the direction of the EU Council of Members). Throughout negotiations the EC consults with its member states through a committee system. The EC's trade negotiations are administered by the Directorate-General of Trade.[140]

2.204 The level of the EU's involvement in WTO disputes is second only to the US. The EU states that it believes in taking the initiative in WTO trade disputes. Between January 1995 and July 1999, 175 disputes were initiated in the WTO's DSB. Of these, the EU was actively involved in 103 cases (almost three-fifths of the total).[141]

2.205 According to DFAT, the EU does not generally contract outside lawyers to undertake WTO litigation, but it may employ consultants (such as academics) to undertake special projects.[142]

2.206 Similar to the United States Trade Act, the European Union has a formal mechanism for businesses to bring complaints to the attention of the Government – the Trade Barriers Regulation. Under this regulation, businesses may submit a formal complaint to the EC about foreign trade barriers which inhibit the interests of the EU business. The EC will usually take up the issue with the country concerned, initiating WTO action if necessary.[143]

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138 Canadian negotiating position for 1999 Seattle meeting: http://198.103.104.118/minpub/publication.asp?FileSpec=/Min_Pub_Docs/102811.htm, accessed 30 May 2001.

139 The European Union currently consists of Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland and Sweden.

The EU is considering enlarging its membership by a further 13 countries – Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia and Turkey. EU internet site, http://europa.eu.int/comm/enlargement/intro/index.htm, accessed 20 March 2001.

140 EU Internet site, http://europa.eu.int/comm/trade/misc/tib1_en.htm, accessed 23 March 2001.

141 EU Internet site, http://europa.eu.int/comm/trade/miti/dispute/overview.htm, accessed 23 March 2001.

142 DFAT, submission no. 222, p. 59.

143 Corrs Chambers Westgarth Lawyers, submission no. 79, p. 10.

2.207 There is also a Market Access Database, through which EU Governments, businesses and the Commission can add information about trade barriers, to ensure a coordinated approach to finding a solution. Corrs Lawyers argue this is a good model for Australia:

> In our view these consultation forums foster a level of awareness regarding ways in which the WTO can be utilised to benefit national industry, which would be immensely useful for Australian industry.[144]

New Zealand

2.208 In New Zealand, WTO matters are dealt with exclusively by the New Zealand Ministry of Foreign Affairs and Trade. While NZ has only been involved in a small number of WTO disputes, the Ministry of Foreign Affairs and Trade has engaged private sector lawyers to assist in preparing its cases.[145]

2.209 NZ publishes its written and oral submissions to WTO dispute panels, and other papers such as commentary made to the WTO Committee on Trade and Environment.[146]

2.210 Prior to the 1999 Seattle WTO meeting the New Zealand Government undertook a round of public consultations similar to those conducted in Australia (including a call for public submissions and public hearings). The Government also conducts specific consultations with the Maori population.[147]

Alternatives to the current approach

2.211 As outlined above, we heard argument that DFAT's resources need to be boosted by the expertise of private sector lawyers, to enable more effective engagement with the WTO system. There were also arguments that Australia should adopt some of the consultation mechanisms used in other countries, to build industry support and awareness of the WTO disputes process.

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144 Corrs Chambers Westgarth Lawyers, submission no. 79, p. 10.

145 DFAT, submission no. 222, p. 59.

146 New Zealand Ministry of Foreign Affairs and Trade publications section: http://www.mft.govt.nz/publications/discus.html , accessed 17 April 2001.

147 New Zealand Ministry of Foreign Affairs and Trade: http://www.mft.govt.nz/foreign/wto.html, accessed 17 April 2001.

> …it is in Australian industry's best interests that the resources available in the private sector be marshalled in some way and developed in this area of the law so that DFAT are not trying to handle every case completely on their own, which is the situation at present.[148]

2.212 One proposal for boosting DFAT's expertise in WTO trade disputes is to form a panel of outside lawyers, to be on call as the need arises. Professor Mary Hiscock (Bond University), told us:

> You cannot just wait for the crisis before you call people. You need to have an integrated unit – perhaps a panel of people – that is there available to be called upon in the [event?] of a crisis.
>
> I do not think that our Government can afford to maintain – nor should it – staffing at crisis level. What you need is a small competent group of people that can be enlarged as the situation emerges.[149]

2.213 The Law Council of Australia also recognised the need to bring together experts as the need arises:

> The very tight time frames in WTO litigation also suggest that increased resources are necessary to develop appropriate capacity. For a country like Australia that is unlikely to be involved in a large number of ongoing disputes, capacity may mean the need to bring together ad hoc expert teams at short notice.[150]

2.214 We believe there is merit in the arguments of lawyers and industry groups that Australia's WTO involvement will increase significantly over the coming years, and inevitably DFAT's capacity to deal will the workload will be stretched.

2.215 It is important that the Government constantly and closely review the level of resources committed to Australia's WTO involvement and advocacy. It would be an extraordinarily false economy if our capacity to engage constructively and forcefully in advocacy and dispute resolution were limited by poor resourcing.

2.216 Other than agreeing with those who argue that it is important for the views of all other stakeholders to be represented when preparing for cases

148 Lisa Barker, Corrs Chambers Westgarth lawyers, Transcript of Evidence 29 January 2001, p. TR81.

149 Professor Mary Hiscock, Bond University, Transcript of Evidence 19 October 2000, p. TR 40.

150 Law Council of Australia, submission no. 283, p. 5.

before the WTO, we have an open mind on the personnel that should be involved on Australia's behalf.

2.217 Generally speaking, we think the approach taken by DFAT has been appropriate. To date, the case-by-case creation of a task force bringing together the expertise available with government and industry seems to have been successful and sufficiently adaptable to the circumstances of each case.

2.218 We recognise also that there are valuable and complementary roles to be played by government and private lawyers in supporting Australian cases before the WTO. It is open to the Government to employ both government and private practitioners to ensure that an appropriate mix of international law experience, whole of government consistency and litigation experience is brought to bear.

Ongoing advisory panels

2.219 Corrs Chambers Westgarth Lawyers and Meat & Livestock Australia called for the establishment of panels, perhaps on a sectoral basis, for ongoing discussions about WTO issues (as is undertaken in Canada, the US and EU, outlined above). Rather than comprehensive consultation only happening in the lead-up to new WTO Ministerial meetings, regular meetings would be held in order for industry to be updated about latest developments, and for DFAT to hear the concerns of industry. The panels would include industry groups, private lawyers, accountants and economists.[151]

2.220 Similarly, the ACTU called for an ongoing forum made up of labour, employer, environment groups and other NGOs. According to the ACTU,

> …the current ad-hoc system of soliciting views, preparing 'issues papers' and having spasmodic public consultations is ineffective and only serves to reinforce the belief that there is no serious attempt being made to achieve a representative input to Australia's submissions at the WTO.[152]

2.221 Effem Foods (producers of the Mars, Uncle Ben's and Masterfoods food brands) also argued for better timing of consultation:

> If anything business is overconsulted. Nevertheless, there are occasions when consultation should occur but doesn't. The issue in

151 Lisa Barker, Corrs Chambers Westgarth Lawyers; Peter Barnard, Meat & Livestock Australia Transcript of Evidence 29 January 2001, p. TR76 and p. TR133.

152 ACTU, submission no. 179, p. 7.

> Australia is not whether consultation is frequent enough, but whether or not it is conducted at the relevant time.[153]

2.222 We note that the Trade Policy Advisory Council (TPAC), which includes business interests and heads of relevant Government departments, meets on an ongoing basis, with more frequent meetings leading up to WTO meetings. The TPAC provides advice directly to the Minister for Trade on Australian business interests in trade and investment issues. In 2000, TPAC's membership was reduced from 24 to 13, to 'tighten further the business focus of the Council'.[154]

2.223 Similar to the TPAC, the Agriculture Trade Advisory Group (ATAG) advises the Ministers for Trade and Agriculture on issues surrounding agricultural trade reform. It meets annually, and includes representatives of the major Australian agricultural industries.[155]

2.224 As outlined above, the Government has also established the WTO Advisory Panel, but this seems to be intended to provide advice in the lead-up to the WTO meeting in Doha, rather than acting as an ongoing forum on trade issues.

2.225 We believe there is merit in exploring a different approach to industry consultation, more along the lines of the mechanisms employed by Canada and the United States. While the size of Australia's industries and service sectors probably does not warrant the establishment of 17 or more committees, as in the United States, it seems that the Agriculture Trade Advisory Group and the Trade Policy Advisory Council may not be comprehensive in capturing the views of all Australian industries and other interested groups.

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153 Effem Foods Pty Ltd, submission no. 256, p. 7.

154 The Trade Policy Advisory Council membership includes representatives of the following businesses and other groups: Allen Consulting; University of Melbourne; Toyota Motor Corporation Australia; Rio Tinto Australia; Evans Deakin Industries Ltd; BHP Company Limited; Nicholson International; Supermarket to Asia; Macquarie Bank Ltd; Telstra Corporation Ltd; Queensland Sugar Corporation; and Orica Ltd. The heads of departments from DFAT, AFFA, DISR, Austrade, and the Export Finance & Insurance Corporation are also on the Council. TPAC internet site: http://www.dfat.gov.au/trade/opening_doors/tpac.html.

155 AFFA internet site: *World trade negotiations on agriculture*, at: http://www.affa.gov.au/docs/market_access/wto_ag_negotations/wto_proposals.html, accessed 31 May 2001.

Recommendation 9

SECTORAL ADVISORY COMMITTEES

2.226 **The Committee recommends that the Minister for Trade establish a series of sectoral advisory committees on multilateral trade, to include representatives from all major Australian exporting industries.**

The committees should also provide for consultations with representatives of environment, labour, human rights and community groups, when such issues are material to their deliberations.

The sectoral advisory committees should meet at least biannually and prepare reports to the Trade Minister on sectoral priorities for Australia's trade policy, WTO negotiations and issues of WTO compliance.

Recommendation 10

EXPERT LEGAL PANELS

2.227 **The Committee recommends that the Minister for Trade establish a WTO advisory panel of legal advisers with trade expertise from the private profession and from academia. The legal advisory panel would:**

- **provide advice about the WTO compliance of domestic policies and programs, associated risks and in relation to breaches and possible dispute actions by Member countries; and**
- **constitute a panel of legal experts in trade issues upon which the Government can draw to supplement and augment the resources of Commonwealth agencies, when required.**

Recommendation 11

LEGAL PROFESSIONAL PARTICIPATION

2.228 **The Committee recommends that Minister for Trade examine the feasibility of a secondment program between private practice lawyers and the Department of Foreign Affairs and Trade.**

The secondment program should allow at least two lawyers from private practice to spend a period of rotation in DFAT, and conversely for two DFAT officials to spend a period of rotation in private legal practice; in order to broaden their understanding of the operations of the dispute settlement system and the demand for private sector advice on WTO compliance and risk management.

2.3 AGRICULTURAL TRADE REFORM

Agriculture's importance to Australia

2.229 Agricultural exports play a vital role in Australia's economy:

- agricultural products, including processed foods and beverages, account for one-quarter of all export volume;
- in 2000, our total exports were valued at $143 billion. Agricultural exports comprised $25 billion of this amount (just under 18 per cent);
- the Australian farm sector ships 65-70 per cent of total production to overseas markets.[156]

2.230 History acknowledges that Australia 'rode on the sheep's back' from the early 1800s, with wool and other exports (wheat, beef) providing prosperity for the early Australian economy. While agricultural exports continue to flourish, a recent DFAT study highlighted the changes in agricultural exports over the last decade:

- in 1989-90, the top three items – wheat, beef and wool – accounted for 60 percent of total agricultural exports by value;
- by 1999-2000 the total share of wheat, beef and wool had fallen to 37 per cent, due to the rise of other exports including dairy, wine, horticulture and seafood.[157]

2.231 The increase in agricultural exports across a range of commodities is important for jobs growth. AFFA noted that direct employment in agriculture has increased in the eight years since 1992-93, particularly in sectors such as dairy (a 36 per cent increase) and horticulture (16 per cent increase).[158]

2.232 The importance of agriculture to regional Australia is illustrated by the NFF's statistics on just one area of NSW:

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156 DFAT, *From Sheep's Back to Cyberspace: Trade and Regional Australia in Changing Times*, Commonwealth of Australia, 2001, p. 29.

157 DFAT, *From Sheep's Back to Cyberspace: Trade and Regional Australia in Changing Times*, Commonwealth of Australia, 2001, p. 29.

158 AFFA, submission no. 310, p. 7.

> The Macquarie Valley in NSW, for example, is a $600 million a year trade basket producing beef $162m (70 per cent exported); sheep meat $138m (70 per cent exported); wool $132m (95 per cent exported); wheat $120m (80 per cent exported); cotton $77m (95 per cent exported); and oats, barley and oilseed $50m (70 per cent exported). Given the multiplier effect of four or five times the export dollar you are looking at $2 billion being injected into the Central-West of NSW from trade. All of this export action is underpinned by the global trading system.[159]

World agriculture prior to Uruguay Round

2.233 World agriculture since World War II has been characterised by an increasing volume of international trade, coupled with rapidly increasing protectionism.

2.234 One of the most influential policies has been the EU's Common Agricultural Policy (CAP). Introduced in 1962, the CAP was intended to ensure that the EU, until then a food importer, could become self-sufficient. The CAP introduced the European Common Market – free trade amongst EU members, and provided subsidies and incentives to produce more crops. High tariffs ensured that the EU's domestic product could compete with imports.[160]

2.235 The EU achieved its goal of self-sufficiency by the mid-1970s, and began stockpiling excess production, thereby sustaining production at unrealistic levels. The excess was later dumped onto the world market, severely depressing prices. The CAP has been through a number of reforms aimed at increasing farmers' efficiency, and many export subsidies have been replaced by direct payments to farmers, to maintain their income levels.

2.236 The ongoing support of the EU's inefficient farming practices has had a severe impact on world prices and export opportunities for efficient producers such as Australia. The NFF describes the CAP's impact on the world market:

> The result is a wasteful and complex system of farm policies that include almost every support measure known to governments. In addition to price-support and tariff protection, intervention buying is augmented by export subsidies; farmers receive direct income payments; and supply constraints range from on-farm

159 National Farmers' Federation, submission no. 223, p. 8.

160 European Commission, Agriculture Directorate-General, at: http://europa.eu.int/comm/dgs/agriculture/hist_en.htm, accessed 25 July 2001.

> quotas for milk and sugar, through set-aside for arable crops to limits on the number of cattle and sheep eligible for headage subsidies.[161]

2.237 High levels of agricultural support have also prevailed in the US, Japan and some other Asian nations (such as Korea) since the 1950s. The US has continued to support its farmers in producing surplus crops, through export subsidies and import quotas. Japan has protected its farmers, particularly rice growers, and minimised its dependency on food imports through a series of import protection measures and domestic commodity programs.[162]

2.238 By the mid-1980s, world agricultural support was at an all-time high:

- a group of importing countries, such as Japan, Korea, Norway, Switzerland, Austria, Sweden and Finland had an extremely high level of protection – between 65-75 per cent of total agricultural production;
- the United States, Canada and most EU countries occupied the middle of the protection 'ladder', with levels between 25 and 45 per cent of total agricultural production;
- at the bottom of the spectrum were the exporting countries such as Australia and New Zealand, who had support levels at 10 per cent or under.[163]

2.239 The majority of agricultural support was delivered in measures that generated market price support – such as tariffs, variable levies, quotas and import bans. The OECD Secretariat's Carmel Cahill comments:

> The purpose and the effect were to isolate many producers from world prices, removing from them any need to be responsive to the real underlying market conditions. The costs imposed on agricultural exporters that were unwilling or unable to join in competitive subsidisation were enormous.[164]

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161 National Farmers' Federation, submission no. 222, p. 3.

162 Bruce Hocking and Steven McGuire, *Trade politics: International, domestic and regional perspectives*, Routledge, London, 1999.

163 Carmel Cahill, Head of Country Studies and Structural Adjustment Division, OECD Secretariat, *Support to agriculture: Where is it going in OECD countries?*, address to the ABARE Outlook 2001 Conference, 28 February 2001, Canberra, Australia.

164 Carmel Cahill, Head of Country Studies and Structural Adjustment Division, OECD Secretariat, *Support to agriculture: Where is it going in OECD countries?*, address to the ABARE Outlook 2001 Conference, 28 February 2001, Canberra, Australia.

2.240 Agricultural exporters such as Australia are not the only losers from high agricultural protection. Domestic consumers also pay inflated prices for food. For example, a 1998 OECD study found:

- the EU's Common Agricultural Policy costs an average European family around $1500 per year in artificially higher prices. The family also pays $100 per head in tax to subsidise farmers;
- a US program to protect the domestic sugar industry in the early 1980s cost each consumer $15.50 per year; and
- in 1995, Japanese farmers received subsidies to the value of 77 per cent of total production – this resulted in very high domestic food prices.[165]

2.241 The inclusion of agriculture in the Uruguay Round negotiations was a major achievement for Australia and other countries reliant on agricultural exports. The Cairns Group played a vital role in ensuring agriculture was included in the WTO negotiations, and in shaping the WTO Agriculture Agreement.

The WTO Agriculture Agreement

2.242 The WTO Agriculture Agreement includes phased reductions, or limits on, all forms of agricultural support that are market distorting. The reductions include three main elements:

- tariffication - The Agriculture Agreement included the conversion of non-tariff measures into a tariff equivalent (tariffication). The Agreement then stipulated that tariffs were to be cut by an average of 36 per cent;
- a 20 per cent cut in non-exempt domestic support measures (see green and blue box, below), for agriculture as a whole; and
- a 21 per cent reduction in volumes of subsidised exports and a 36 per cent cut in the value of export subsidies on a commodity-by-commodity basis.[166]

2.243 In developed countries, the cuts were to be applied over six years, from 1994-2000. Developed countries have a longer timeframe – 10 years for

165 OECD, *Open Markets Matter: the Benefits of Trade and Investment Liberalisation*, OECD, Paris France, 1998, p. 139.

166 Australian Bureau of Agricultural and Resource Economics (ABARE) and Rural Industries Research and Development Corporation (RIRDC), *Reforming Domestic Agricultural Support Policies through the World Trade Organisation*, ABARE Research Report 01.2, 2001, p. 19.

implementation, and the cuts are two-thirds those of the developed countries.

Green and blue box exemptions

2.244 The Agriculture Agreement includes a number of exemptions, designed to allow countries to use some forms of protection (least trade-distorting measures) to assist their farmers.

2.245 The 'Green Box' includes programs which have no, or little, trade-distorting effect. Allowable Green Box measures include:

- government service programs – including research, pest and disease control programs, training and extension services, health and production inspections, infrastructure needs, storage for food security purposes, and food aid to populations in need;
- direct payments to producers – these are allowed provided they are not linked to a farmer's decisions about the type and volume of crop produced (decoupling). These payments may include structural adjustment packages, disaster relief, environment protection payments, and income-insurance packages.[167]

2.246 The 'Blue Box' also provides exemption for direct payments to producers under production limiting programs - based on fixed areas of yield, or fixed livestock numbers.

2.247 There are a number of other exemptions for developing countries.[168]

2.248 All domestic support measures that do not fall into the green or blue box provisions – ie those that are considered to be market distorting and are subject to the reductions included in the Agriculture Agreement – are tagged as 'Amber Box' support.

The 'Peace Clause'

2.249 The 'peace' provisions in the Agriculture Agreement are designed to ensure that countries' domestic support programs allowed under the Agreement (such as green box and blue box measures) are not subject to action under other WTO Agreements. For example, a domestic program in

167 WTO internet site, *Agriculture: Domestic Support*, at: http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic.htm#green, accessed 23 July 2001.

168 Exemptions for developing countries are outlined in the WTO internet site, *Agriculture: Domestic Support*, at: http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic.htm#other_exempt.

the green box cannot be the subject of an action under the auspices of the Agreement on Subsidies and Countervailing Measures (SCM). The peace clause is in place for nine years (beginning 1994).

Criticisms of the current Agreement

2.250 While the Agriculture Agreement represented a significant milestone in agricultural trade reform, it is widely recognised that the Agreement is just the first step in agricultural trade reform. DFAT's David Spencer commented:

> …we have a two-tier set of rules. We have a set of rules that look after industrial products and services, and they are comparatively open and fair. We have a group of products called agriculture where the rules are different from those on industrials and services. We have always regarded the rules on agriculture as the poor cousins. That just so happens to be an area where we have a large comparative advantage internationally.[169]

2.251 There is still much work to be done in each of the 'three pillars' of the Agriculture Agreement – to increase market access, reduce export subsidies, and reform domestic support measures. The NFF's Director of Trade and Quarantine policy, Lyall Howard, told us:

> As we saw last time around, the European Union, Japan and the United States forced through an agreement in the WTO that is full of loopholes. So what should Australia do about it? The first thing that we should not do is hoist the white flag. Uruguay was a milestone. It was the first time in 45 years of global trade talks that agriculture made it to the table at all. Despite the loopholes, it is now accepted that agriculture is part of the main game and by using the Uruguay framework we do have a chance to meet the anti-reformers head on.

2.252 Domestic support is perhaps seen as the area most in need of reform. It is widely acknowledged that some forms of domestic support in the Agriculture 'Green Box' are in fact market distorting.

2.253 Xavier Martin, of the NSW Farmers' Association, described market-distorting domestic support programs as 'perhaps some of the most insidious and difficult to root out from some of the other members of the WTO'.[170]

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169 David Spencer, DFAT, Transcript of Evidence 18 June 2001, p. TR510.

170 Xavier Martin, NSW Farmers' Association, Transcript of Evidence 29 January 2001, p. TR101.

2.254 A 2001 ABARE report looked at the need for reforming domestic support policies. The report summed up the problems of the Agriculture Agreement:

> The present arrangements in the WTO Agreement on Agriculture for limiting the market distortions arising from domestic support are highly aggregated, allowing substantial tradeoffs between levels of support between individual commodities.
>
> Many of the forms of support that are defined in the agreement as being minimally market distorting and that are exempted from limitations on those grounds are in fact market distorting.
>
> The ability to change forms of support and to obtain credits for additional support in other areas and for other commodities permitted in the present Agreement on Agriculture, means that some of the largest countries that are signatories to the agreement have the flexibility not only to maintain market distorting support, but to increase it.[171]

2.255 Another problem is that the 'base levels' from which the Agriculture Agreement cuts to tariffs and export subsidies were taken, were at record high levels at the time the Uruguay Round was completed. AFFA told us:

> The USA and EU have huge capacities to provide domestic support to their agricultural industries because of the high levels of support negotiated at the starting point of the Uruguay Round reform process. Australia does not have a treasury the size of the US or Europe to match the support provided to their agricultural industries even if it wished to do so. This highlights the weak rules and disciplines on domestic support in the Agriculture Agreement and the need to further address fundamental agricultural reform in multilateral trade negotiations to ensure a truly level playing field.[172]

2.256 Ivan Roberts, from ABARE's Trade and Industry Directorate, told this year's Agricultural Outlook Conference (February 2001):

> While the negotiated cuts [in the Agriculture Agreement] look large, they were undermined by the minutiae covering the application of the arrangement.

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171 Australian Bureau of Agricultural and Resource Economics (ABARE) and Rural Industries Research and Development Corporation (RIRDC), *Reforming Domestic Agricultural Support Policies through the World Trade Organisation*, ABARE Research Report 01.2, 2001, p. 44.

172 AFFA, submission no. 311, p. 15.

> From 1995 to 1997 the Agreement on Agriculture appeared to have markedly reduced agricultural protection around the world. However, this was a false dawn, because support rose sharply in 1998 and again in 1999, reaching levels similar to those in the mid 1980s when the Uruguay Round negotiations began. The levels in the mid-1980s were the highest in at least the past half century.[173]

2.257 Community Aid Abroad / OXFAM also commented on the high levels of protection enjoyed by farmers in (mainly) European countries, arguing that export subsidies result in unfair competition for domestic producers in developing countries. Other effects of protection, such as depressing the world market price, reduce earnings for those in developing countries.

> The Uruguay Round Agreement on Agriculture did little to reduce or remove these high levels of subsidy by some Northern countries but at the same time it is obliging developing countries to liberalise their markets. The EU dairy industry for example remains one of the most expensive and least competitive in the world but, thanks to subsidies, it has captured half the global market in dairy produce.[174]

2.258 Similarly, the Australian Council for Overseas Aid (ACFOA) argued that developing countries were left 'behind the baseline' in the Uruguay Agreement:

> The EU, Japan and the US have manipulated the conversion of their non- tariff barriers to tariff barriers by overestimating the original value of non-tariff barriers.
>
> Many developing countries have very few non-tariff measures. Developing countries according to the agreement are forbidden from ever using these measures and therefore in essence have been denied the flexibility of using instruments which could lead to increased production. This is grossly unfair and directly threatens food security in these countries.
>
> The Special Safeguard provision can only used by those countries which have converted their non-tariff barriers to tariffs. Countries that did not maintain non-tariff barriers (mainly developing countries) cannot use this provision.[175]

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173 Ivan Roberts, ABARE, *WTO agricultural reforms: Issues and requirements for a successful agreement*, address to the Outlook 2001 Conference, 28 February 2001, Canberra.

174 Community Aid Abroad / OXFAM, submission no. 187, p. 9.

175 ACFOA, submission no. 304, pp. 23-24.

A new round including Agriculture

2.259 The existing Agriculture Agreement includes in-built negotiations for further agricultural reform, which began in 2000. In February 2001 the Director-General of the WTO, Mike Moore, commented on the issues under discussion at the new negotiations:

> Improvements in market access are a common feature in the negotiating proposals submitted by Members, although there are clearly differences in the levels of ambition, the approaches and the details.
>
> The existing disciplines in export subsidies were a significant achievement of the Uruguay Round, not least for exports of processed agricultural products. But there is still a lot of work to be done.
>
> Domestic support is another area where much work remains to be done. The Uruguay Round rules and commitments in this area are unique to the agriculture sector. In no other sector are there scheduled commitments to reduce trade-distorting domestic support, or commitments to keep support not covered by Green Box or other exceptions within certain levels.[176]

2.260 While the agriculture negotiations currently underway look promising, we were told that it is vitally important that a new, comprehensive round of trade liberalisation be launched at Qatar in November 2001. Without a new round, the chances of the agricultural negotiations achieving real reform are not promising. Dr Dennis Gebbie, General Manager of Trade Policy at AFFA, told us:

> It is essential that we get agreement on a comprehensive trade round because, without that, we will not have the opportunities for trade-offs in other sectors that some of the protectionist agricultural countries will need - countries like Japan, Korea, the European Union and so forth. If we are left with solely an agriculture negotiation, it is going to be extremely difficult to achieve an ambitious outcome.[177]

176 Mike Moore, Director-General of the WTO, Speech: *Agriculture's stake in WTO trade negotiations*, 22 February 2001, at: http://www.wto.org/english/news_e/spmm_e/spmm53_e.htm, accessed 24 July 2001.

177 Dr Dennis Gebbie, AFFA, Transcript of Evidence 18 June 2001, p. TR494.

What Australia should be arguing for

2.261 The need for Australia to push for a new, comprehensive round of WTO negotiations to be launched at Qatar in November 2001 was supported by all submitters from the agricultural industries. Several submitters also made more specific suggestions about how Australia should approach the new agricultural negotiations.

2.262 The sugar industry was keen to highlight the importance of new agricultural reforms being applied on a commodity-by-commodity basis. Many commentators agree that one of the weaknesses of the existing agreement is that it allowed for cuts in aggregate tariff and export subsidy levels. This allowed countries to tailor their cuts sector-by-sector, continuing high levels of protection for politically sensitive industries (such as the US sugar industry). Bruce Vaughan, the Chair of the Global Alliance for Sugar Trade Reform and Liberalisation, comments:

> There is little doubt that the main battles in the present negotiations will be over the elimination of export subsidies, achieving significant increases in market access and the removal of trade distorting domestic supports. As important as this will be, for individual commodities such as sugar, the success of the round will depend on new disciplines being applied on a commodity-by-commodity basis.[178]

2.263 The Australian Wheat Board (AWB) called for Australia to push for the total removal of 'Blue Box' support arrangements in the Agriculture Agreement, and a comprehensive review of Green Box provisions:

> Even with the green box, we would question decoupling of income supports is in fact possible. Any form of support to producers is likely to influence cash flow and hence production decisions. Support payments may provide additional capital to fund investment and in this way, influence production. Such payments may also prevent longer term structural adjustment and result in long term over production.[179]

2.264 The AFGC asked that in a new round, particularly agriculture negotiations, Australia pay more attention to achieving market access and eliminating domestic support arrangements:

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178 Bruce Vaughan, Chair, Global Alliance for Sugar Trade Reform and Liberalisation, *A global sugar alliance: Efforts to obtain trade liberalisation internationally*, address to the Outlook 2001 Conference, 28 February 2001, Canberra.

179 Australian Wheat Board (AWB), submission no. 208, p. 9.

> We have had a concentration in our agricultural negotiations on eliminating export subsidies, more so than we have on the market access and domestic support arrangements, understandably, in many instances.[180]

2.265 The NFF argued that Australia needs to work inside protectionist countries to bring about change, as well as lobby their trade negotiators:

> …we need to find friends inside the protectionist agricultural countries and we need to help them lobby their governments. The hundreds of billions of dollars that are transferred to farmers each year are extracted from reluctant contributors and we know who they are.
>
> They are consumers and taxpayers, non-farm small businesses, treasuries, importers and exporters, food processors, some environment groups and aid agencies. Each of these groups has an interest in reform but on their own none of them can overcome the political power of the farmers. If Australia is ever going to crack this nut of agricultural protection we need to be active both inside and outside the protectionist countries.[181]

Multifunctionality

2.266 In recent years, several countries such as the EU and Japan have argued that agriculture serves more than one purpose – as well as food production, it is an important element in rural development, environmental protection, protection of cultural heritage, and in ensuring food security. This argument has been tagged the 'multifunctionality' argument. Proponents of multifunctionality argue that these issues need to be taken into consideration when negotiating the next round of the Agriculture Agreement.

2.267 A publication by the Japanese Government, outlining its WTO negotiating proposal 'for the coexistence of various types of agriculture', includes that country's view of multifunctionality:

> The multifunctionality of agriculture is a concept which explains that agriculture is an economic activity that not only produces food and fibre but also crease both tangible and intangible values.

180 Mitchell Hooke, AFGC, Transcript of Evidence 9 March 2001, p. TR216.

181 Lyall Howard, National Farmers' Federation, Transcript of Evidence 9 March 2001, p. TR210.

> These values, however, are not tradeable and cannot be reflected in the market prices.[182]

2.268 Other countries, such as Australia, believe the multifunctionality argument is a disguised push for further protectionism. The DFAT submission commented that many of the issues linked with multifunctionality are wider social, economic and environmental issues that can be dealt with through non-trade distorting policies:

> Current agricultural support and protection policies, notably in Europe, sometimes exacerbate, rather than alleviate, the concerns covered by multifunctionality (for example with respect to the environment).[183]

2.269 The OECD Secretariat is undertaking research on the implications of multifunctionality. While she did not comment on the final outcomes of the research, in February 2001 the OECD's Carmel Cahill told the Outlook Conference:

> Many factors suggest that blanket measures that support the prices or the revenues from specific commodities are unlikely to ensure that the desired multiple outputs of agriculture are provided in the right places and in the right quantities or at reasonable cost to taxpayers and consumers.
>
> …the risk of conflict between multifunctionality and further trade liberalisation is likely to be relatively minor if countries develop efficient domestic policies that seek to internalise all the costs and benefits associated with agriculture, rather than applying blanket production related and trade measures.[184]

2.270 Australia and the Cairns Group have taken a strong stance against multifunctionality. DFAT's David Spencer told us:

> I can assure you that the country that has been most assiduous in trying to reject the arguments of multifunctionality has been Australia…we have been the ones who have tried to convince our Cairns Group colleagues that multifunctionality is the danger that it is. We have coopted them in undertaking research, in participating in conferences, in making speeches and in otherwise

182 Inquiry Exhibit No. 9: Government of Japan, *WTO Agricultural Negotiations: Negotiating Proposal by Japan for the Coexistence of Various Types of Agriculture,* 2000.

183 DFAT, submission no. 222, p. 79.

184 Carmel Cahill, Head of Country Studies and Structural Adjustment Division, OECD Secretariat, *Support to agriculture: Where is it going in OECD countries?*, address to the ABARE Outlook 2001 Conference, 28 February 2001, Canberra, Australia.

> contributing to a challenge to those who have argued that multifunctionality is a new ground for protectionism.[185]

2.271 AFFA confirmed this view:

> We recognise that many of the issues that are being raised, such as rural development, environmental protection and food security are serious non- trade concerns - all countries face difficulties in these areas. We argue that distorting forms of agricultural support are less effective and efficient than targeted policies de-linked from production and trade.[186]

2.272 The NFF warned that the proponents of multifunctionality are lobbying hard to achieve their aims:

> This time around the Europeans and the Japanese are on the front foot…both countries have captured the public debate by pushing red herrings like the precautionary principle and multifunctionality onto centre stage. These countries have also launched international outreach programs to reassure the developing countries that such concepts pose no threat to agricultural trade reform. They are promoting their position more professionally with glossy documents…targeted at a general readership to influence public opinion.[187]

Recommendation 12

AGRICULTURE

2.273 **The Committee recommends that the Commonwealth Government take a leadership role, acting with like-minded countries, to advance agricultural trade reform through the Cairns Group and with developing countries, to push for a new negotiating round in the WTO and to seek improved market access opportunities for Australia's agriculture and food industries.**

185 David Spencer, DFAT, Transcript of Evidence 27 November 2000, p. TR60.

186 AFFA, submission no. 311, p. 19.

187 Lyall Howard, National Farmers Federation, Transcript of Evidence 9 March 2001, p. TR210.

Case Study: Australian lamb dispute

Facts of the case

2.274 In July 1999 the US Government introduced import tariffs and quotas on overseas lamb products, as a result of a US International Trade Commission finding that imports of lamb threatened to cause serious injury to US sheep farmers and the US lamb industry. The measures included:

- a 9% tariff on all imports up to an annual quota of 31,851 tonnes – to be reduced to 6 % in July 2000 and 3% in July 2001;
- a 40% tariff on above-quota imports – to be reduced to 32 % in July 2000 and 24 % in July 2001; and
- a US $100 million support package to help US farmers cope with increased competition.[188]

2.275 Two portions of the total lamb quota were allocated specifically to the Australian and New Zealand markets, with the remainder allocated to imports from all other countries. Canada, Mexico, Israel, and some developing countries, were excluded from the quotas and tariffs.[189]

2.276 The US sought to justify the quotas as a 'safeguard measure' to protect its lamb industry in extreme circumstances.

2.277 US exports are vital to the Australian lamb industry. The US market constitutes around one-quarter of all Australian lamb exports, is worth around US $100 million per year. Despite the tariffs introduced in 1999, Australian lamb exports to the US have continued to increase. The Sheepmeat Council of Australia attributes the steady increase to a high consumer demand for Australian product, and the weakened Australian dollar.[190]

188 DFAT internet site: http://www.dfat.gov.au; accessed 1 August 2001.

189 United States: Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS178, available at:
DFAT internet site: http://www.dfat.gov.au/trade/negotiations/disputes/wto_disputes-US_lamb.html

190 Sheepmeat Council of Australia, *Sheepmeat Market Update 2000/2001*, February 2001, available at: http://www.farmwide.com.au/nff/sheepmeat/Market_Update.htm, accessed 21 August 2001.

Australia's approach to the dispute

2.278 Australia immediately sought WTO consultations with the US Government about the import restrictions. Following the failure of consultations, a Dispute Panel was established in November 1999 to consider the Australian and New Zealand complaints together. Canada, the EU, Iceland and Japan participated as Third Parties to the dispute.

2.279 Australia and New Zealand argued that the US actions were in contravention of the GATT (Article XIX) and the Safeguards Agreement. GATT XIX (a) provides:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[191]

2.280 Australia and New Zealand argued that the US could not adequately demonstrate that the US lamb industry was suffering from serious injury, and that the increased competition from overseas markets did not amount to 'unforseen developments' in the trading environment.

2.281 In December 2000 the Dispute Panel ruled in Australia and New Zealand's favour, finding that the import quotas were inconsistent with WTO rules. The US appealed the panel's report, but in May 2001 the Appellate Body upheld the initial decision. [192]

2.282 The US lamb case is seen as a major win for Australia. The DFAT internet site states:

> Apart from the commercial benefits, winning this case is also important in ensuring that countries do not abuse so-called safeguards measures – WTO rules which allow for the introduction of temporary import restrictions in exceptional

191 General Agreement on Tariffs and Trade (GATT 1986), Article XIX, available at: http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

192 United States: Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS178, available at:
DFAT internet site: http://www.dfat.gov.au/trade/negotiations/disputes/wto_disputes-US_lamb.html.

> circumstances – for protectionist purposes. All countries, including the US because of its major stake in global trade, have a substantial interest in avoiding setting a precedent to other countries who may be under similar domestic protectionist pressures.[193]

Time taken to resolve the dispute

2.283 The US Government's tardiness in implementing the WTO's findings has illustrated a weakness in the dispute settlement system – the length of time for disputes to be finalised. In September 2000 Meat & Livestock Australia commented:

> The US Lamb Dispute has…uncovered one serious flaw with the WTO dispute settlement procedures, namely, the delay in achieving an outcome from the process. If the US chooses to taken the Panel's finding to appeal, the final Panel decision may not be known until mid 2001 – two years into the three-year life of the TRQ safeguard measures. This is clearly an unsatisfactory situation – the time taken by the dispute settlement process, particularly in safeguard cases, must be shortened.[194]

2.284 By August 2001 the US Government had still not decided on a plan for removing the lamb import restrictions, due to domestic pressures from sheep farmers. The Australian Government granted further time to the US to finalise its implementation, but warned that if this final timeframe was not met, the Government would call in a WTO arbitrator to settle the matter.

2.285 On 1 September 2001 Trade Minister Vaile announced that US Government had agreed to lift all tariff-rate quotas on lamb imports by 5 November 2001. While Australian lamb producers welcomed the agreement, they criticised the length of time taken to finalise Australia's win in the WTO. NFF President Ian Donges commented:

> Australian farmers acknowledge that the WTO was the only process that would allow us to have a fair right of appeal under international trading rules, but the time frame to achieve an outcome is obviously an area that needs reform when a new WTO round is launched – hopefully in November this year.[195]

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193 DFAT internet site: *WTO Lamb: Questions and Answers*, at: http://www.dfat.gov.au/trade/negotiations/disputes/wto_lamb_faq.html, accessed 3 August 2001.

194 Meat & Livestock Australia, submission no. 221, p. 9.

195 National Farmers' Federation, Press Release 1 September 2001: *Spring finally back in Aussie lamb producers' steps*, release no. 107/2001, at http://www.nff.org.au, accessed 3 September 2001.

2.286 The NFF estimates that the US restrictions have cost the Australian lamb industry more than $30 million since July 1999. The ongoing dispute has also cost Australian taxpayers – since 1999 the Commonwealth Government has spent $18.2 million on levy relief payments to lamb producers.[196]

2.287 Trade Minister Vaile has acknowledged that Australia's win in the US lamb case has been soured by the time taken for implementation:

> It's one thing to have a set of rules but when the remedies take so long to implement, it is unacceptable, we have got to improve that process.[197]

Reviewing the Dispute Settlement Understanding

2.288 The dispute settlement rules provide for a tight timetable for the conduct of disputes before a Panel and before the Appellate Body. However the 'reasonable period of time' allowed to a losing party to consider ways to bring measures into compliance, and the procedures under Article 21.5 which provide for the involvement of yet another panel and appointment of an arbitrator, have attracted criticism.

2.289 It has been said that winning in the WTO is just the beginning of a process that may ultimately address non-compliant measures but not any time soon. The difficulties of ensuring timely compliance and enforcement have been thought to render nugatory favourable Dispute Panel or Appellate Body rulings.

2.290 Notwithstanding the criticisms it is important to recall that the DSU provides a rules based system capable of delivering a result against a reluctant Member. The rules provide a significant improvement on the old GATT procedures that were reliant on diplomacy and able to be thwarted by losing party members through the 'negative veto' process.

2.291 However, the Committee is of the view that the DSU would benefit from a review of the timetable and procedures for compensation, enforcement and retaliation. It is recognised that consultation and cooperation between Members, and willingness to comply with Panel and Appellate Body rulings underpins the success of the dispute settlement system and the effectiveness of the WTO. It is also recognised that accommodations extended to a Respondent Member in a particular case may be asked in return when the 'boot is on the other foot'.

196 Fleur Leyden, 'Industry hails lifting of US lamb tariffs, in *The Sunday Age* newspaper, 2 September 2001, p. 3.

197 Hon. Mark Vaile MP, Minister for Trade, quoted in AAP newswire report 15 August 2001.

2.292 Taking these considerations into account there appears to be an under-utilisation of Article 5 of the DSU, which provides for good offices, conciliation and mediation to achieve more realistic timetables allowed for implementation. In particular the Director-General of the WTO may act in an ex-officio capacity to offer good offices, conciliation or mediation, and this can, by agreement, continue at the same time as the panel process proceeds.

Recommendation 13

DISPUTE SETTLEMENT UNDERSTANDING

2.293 **The Committee recommends that the Commonwealth Government take a proactive role in review of the Dispute Settlement Understanding, in particular:**

- **to advocate a more responsive timeframe for compliance and enforcement; and**
- **to identify opportunities for more effective use of the mediation and conciliation provided in Article 5 of the Dispute Settlement Understanding to assist with appropriate and timely compliance with rulings.**

2.4 QUARANTINE AND THE WTO

Playing by the rules

2.294 The benefits of including agriculture in the Uruguay Round came with some trade-offs, particularly surrounding quarantine issues. A 'zero risk' approach to quarantine management is no longer an option under the WTO. While other countries cannot 'hide' behind false quarantine barriers, therefore allowing Australian exports into new overseas markets, we must also be prepared to open our markets to new agricultural products, where there is a minimal risk of allowing disease into the country. AFFA commented on the impact this has had on Australian industry:

> At the same time that Australia has used the WTO rules-based framework to open new markets, we need to play by the same rules and when we receive import requests from other countries, this has put pressure on our conservative approach to quarantine and on some domestic industries which have previously not had to contemplate competition from imports.[198]

2.295 We heard from the Pork Council of Australia that, although the introduction of the SPS Agreement had resulted in difficult times for the pork industry, in the long run it has been beneficial:

> The trade impact of quarantine changes in the past decade has led to fundamental changes in the domestic market. As quarantine policy moved from 'no risk' to 'managed risk' in line with Australia's international obligations, pork imports surged causing serious injury to the industry. In response, the industry shifted focus and began to develop export awareness and activity. Today the industry has excellent export growth prospects. It has made the transition from a defensive domestic industry to one of Australia's fastest growing agricultural export industries.[199]

2.296 In this inquiry, we looked at how Australia can balance the need to 'play by the rules', and ensure that local industries are supported and consulted during quarantine decision-making processes. We acknowledge that this issue was examined in-depth in June 2000, by the Senate Standing

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198 AFFA, submission no. 311, p. 14.

199 Pork Council of Australia, submission no. 80, p. 1.

Committee on Rural and Regional Affairs and Transport.[200] We encourage readers with an interest in these issues to review the Senate Committee's report.

The SPS Agreement

2.297 Australian agricultural products have enjoyed an enviable 'clean and green' status as a result of our strict quarantine measures. As an island nation, we have been protected from many diseases such as Foot & Mouth Disease (FMD) which have badly affected the agricultural industries of Europe and North America. The ability to trade on our disease-free status has given Australia an important competitive advantage over other producers. The Western Australian Government commented:

> We like to promote ourselves as being the most pest and disease free region in the cleanest country in the world.[201]

2.298 Quarantine measures are now subject to a WTO agreement – the Sanitary and Phytosanitary Agreement (SPS Agreement). The SPS Agreement is designed to prevent countries using unjustified quarantine measures as defacto trade barriers.

2.299 The sovereign right of countries to choose the level of quarantine protection they wish to give to their human, plant and animal life is protected (the Appropriate Level of Protection, or ALOP), but the SPS Agreement states that all decisions must be science based. The SPS Agreement also says that the restrictions chosen by each country may only be applied to the extent necessary to protect human, animal and plant life and health.[202]

2.300 Unlike tariff measures, SPS measures cannot be used as bargaining chips in WTO negotiations – Australia could not agree to drop its quarantine levels for, say, imported grains, in return for a lower tariff rate in another country.[203]

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200 Senate Rural and Regional Affairs and Transport Legislation Committee, *An Appropriate Level of Protection? - The Importation of Salmon Products: a case study of the Administration of Australian Quarantine and the Impact of International Trade Arrangements*, June 2000, Parliament of Australia, available at: http://www.aph.gov.au/senate/committee/rrat_ctte/salmon_final/index.htm.

201 Robert Delane, Agriculture Western Australia, Transcript of Evidence 20 April 2001, p. TR326.

202 The SPS Agreement, available on the WTO internet site: http://www.wto.org/english/tratop_e/sps_e/sps_e.htm, accessed 25 May 2001.

203 AFFA, submission no. 311 (Annex B), p. 25.

2.301 The SPS Agreement and its impact on quarantine policy was highlighted in the Canadian salmon case. This case significantly increased the profile of the WTO within the Australian agricultural and wider community.

Australian quarantine measures

Appropriate Level of Protection

2.302 As outlined above, each WTO Member country may set its own Appropriate Level of Protection (ALOP). Australia has set its ALOP, but it is a set of principles rather than a clearly stated position. AFFA told us:

> The policy is the entirety of quarantine policy and operations. There is no specific one or two line statement.
>
> It is an instruction from government to us as to how we will conduct policy and operational procedures. It exists in no more words that I have explained.[204]

2.303 In the recent past AFFA has made general statements about what constitutes Australia's ALOP. For example, AFFA told a Senate Committee:

> Successive Australian Governments have maintained a highly conservative (ie cautious) approach to management of quarantine risks. This is reflected in the strictness of Australia's import policies and in the way that quarantine procedures are undertaken at the border.
>
> The Government's approach is based on the application of sound scientific principles and practices to identify and to manage pest and disease risks associated with trade in animals, plants and goods and human travel.
>
> Australia has not confined itself to relying on its quarantine measures on international standards, guidelines and recommendations because to do so would result in a number of instances of an unacceptably high level of risk of disease or pest entry or establishment. Across the range of animals, plants and related products, measures more stringent than the relevant international standard have been adopted. Where there is

204 Dr David Wilson, Biosecurity Development and Evaluation, AFFA, Transcript of Evidence 18 June 2001, p. TR500.

> significant uncertainty resulting from gaps in the scientific information available, in common with quarantine authorities of other countries, a precautionary approach in risk analysis is taken.[205]

2.304 The NFF supports Australia's current quarantine approach, noting that if Australian producers want access to overseas markets, they must be prepared for foreign imports where appropriate:

> The WTO's SPS Agreement will be even more important to Australia in the future. As tariffs fall under a new round of WTO trade negotiations, some countries will respond to protectionist pressures by introducing new health and safety barriers. If Australia is to prevent the replacement of 'traditional' trade barriers with SPS barriers it is essential that we have a strong SPS Agreement in the WTO.
>
> The Agreement is important to Australian exporters because it ensures that their access to markets is not undermined by importing country quarantine barriers, which are not based on science. This being so, it follows that our trading partners will use the SPS Agreement to demand the same from us. We can't expect a clear run for our own exports and then use quarantine as a barrier against other countries' products.[206]

2.305 We heard some arguments that the ALOP should be more clearly defined. The Pork Council of Australia argued that:

> As the ALOP currently stands, it is too vague a concept with no real guidance as to what it is in reality and how it is determined. Credible ALOP assessment means that a range of important factors, including the ability of diseases to be contained or eradicated, the potential impact on industries, the environment and biodiversity, should also be taken into account, as the WTO rules allow.
>
> …there appears to be a strategy where Australia wants to lead by example in its approach to quarantine. The rationale, presumably, is that our trading partners will respond on kind on similar decisions that could affect Australia. Such a policy approach is

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205 AFFA submission to the Senate Rural and Regional Affairs and Transport Legislation Committee, *Inquiry into All aspects of the Consideration and Assessment of Proposed Importation to Australia of Fresh Apple Fruit from New Zealand*, at: http://www.affa.gov.au/corporate_docs/publications/pdf/market_access/biosecurity/plant/appnzsenate_sub.pdf, accessed 31 May 2001.

206 National Farmers Federation, submission no. 233, p. 7.

> misguided and out of step with the practices of our trading partners; as they have consequently demonstrated, they will use any legal measure they can to advance their own trade agenda.[207]

2.306 The Tasmanian Government called for a regional approach to Australia's ALOP, to reflect differing climates, species and ecosystems:

> The Commonwealth has tended to treat the Australian response to WTO requirements as requiring one set of quarantine measures to apply throughout Australia. Quarantine issues relating to salmon diseases are an example of where this is totally inappropriate in our view. Tasmania has a wide range of ecosystems from tropical to Antarctic and these are variably sensitive to the risks of introduction and consequences of disease in exotic species posed by trade.[208]

2.307 The Tasmanian Government asked for far greater input from regional and state Governments in setting quarantine policy and ALOP levels, in cooperation with the Commonwealth Government.[209] In our view, such an approach would be inconsistent with section 51 (ix) of the Australian Constitution, which provides the Commonwealth with responsibility for quarantine matters. While the Commonwealth's mechanisms in determining quarantine policy should include consultation with State Governments, it is not appropriate to assign the states quarantine powers.

Import Risk Assessments

2.308 An important part of the Australian Government's maintenance of the ALOP is the conduct of Import Risk Assessments.

2.309 Biosecurity Australia is a new agency (established 2000) within the AFFA portfolio, responsible for developing or reviewing quarantine policy on imports of animals, plants, and related products. The development and review process is known as an Import Risk Analysis (IRA).

2.310 An IRA is required if there is no existing quarantine policy for a proposed import, or a significant change in policy may be required – for example,

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207 Kathleen Plowman, Pork Council of Australia, Transcript of Evidence 9 March 2001, p. TR218.

208 Kim Evans, Tasmanian Department of Primary Industries, Water and Environment, Transcript of Evidence 27 April 2001, p. TR399.

209 Kim Evans, Tasmanian Department of Primary Industries, Water and Environment, Transcript of Evidence 27 April 2001, p. TR400.

when the import request comes from a different country with different disease / pest status.[210]

2.311 The IRA is a scientific process, aimed at:

- determining risks for entry, establishment and spread of pests and diseases, and their potential impacts;
- allowing importation only when such risks can be managed in a manner consistent with Australia's very conservative approach to acceptance of pest and disease risk; and
- ensuring that stakeholders are fully informed, are satisfied with the process and understand the reason for the decision.[211]

2.312 Some IRAs are considered 'routine' – that is, checks of similar species have been done before – and are undertaken by an in-house AQIS team. These routine IRAs usually take a short time to complete. Other assessments which are more complicated have a longer process, involving the establishment of an independent panel, consultations with stakeholders, and the contribution of technical working groups.

2.313 The IRA process includes an appeals process, should stakeholders disagree with the process through which the IRA was conducted.

2.314 The AFFA submission reports that since 1993 / 94, AFFA has made 173 IRAs. Of these determinations:

- 9 per cent have resulted in imports which are in direct competition with Australian domestic products;
- 3 per cent have resulted in counter-seasonal imports, which are not in direct competition with Australian products; and
- 88 per cent have resulted in benefits to the Australian domestic industry (some have been at the request of Australian industry, some have brought genetic material to enhance Australian product, and some have resulted in tighter import conditions).[212]

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210 A comprehensive overview of the IRA process is available on the AFFA internet site, at http://www.affa.gov.au/docs/market_access/biosecurity/iraoverview.html, accessed 14 April 2001.

211 The AQIS Import Risk Analysis Process Handbook, p. 8, at: http://www.affa.gov.au/corporate_docs/publications/pdf/market_access/biosecurity/risk.pdf, accessed 28 May 2001.

212 AFFA, submission no. 311, p. 16.

2.315 The IRA process is currently under internal AFFA review, to fine tune procedures since the implementation of the new process two years ago (as a result of the Nairn review).[213]

2.316 AFFA acknowledged that IRAs can give rise to strong adverse reactions from Australian domestic industry and State Governments (as has occurred in the Canadian salmon case and the New Zealand apples case), and disaffected overseas Governments (US table grapes, Philippine bananas). AFFA argued that its procedures and consultations are adequate, and that more education is needed to try to appease those unhappy with IRA decisions:

> …the challenge arising from increased market access is increased understanding among stakeholders, including affected industries, policy makers and politicians, of the international framework in which IRAs and risk management operate.[214]

2.317 However, the Department conceded that adversely affected industries will remain concerned about new imports.

2.318 We are pleased to note that the 2001-2002 Commonwealth Budget included funds for 'raising community awareness of the economic and environmental importance of quarantine to Australia, and to promote the concept of shared responsibility, whereby all Australians have a role to play in maintaining Australia's internationally recognised quarantine status'.[215]

Just the science?

2.319 Several submissions argued that, despite the rhetoric in the SPS Agreement about decisions being based on science alone, Australian quarantine decisions can be influenced by other trade factors. The Tasmanian Government commented:

> The Tasmanian Government has noted that trade-based considerations (for unrelated products) have in the past had the potential to interfere with science-based quarantine decision making. The Government is of the view that trade based decision making should not take precedence over scientific or environmental decisions with regard to traded commodities.

213 AFFA, submission no. 311, p. 17. Nairn Review (1996), *Australian Quarantine: a shared responsibility*, Department of Primary Industries and Energy, Canberra.

214 AFFA, submission no. 311, p. 17.

215 AFFA, Portfolio Budget Statements 2001-2002: http://www.affa.gov.au/corporate_docs/about_affa/budget/20012002/aqis/prbudget.html, accessed 23 May 2001.

> On this basis the Tasmanian Government has sought to ensure that the Commonwealth take a regional approach to quarantine which recognises that the appropriate level of protection for a disease-free State like Tasmania is different from those required for other areas in the nation.[216]

2.320 The Pork Council of Australia also felt that other factors can come into play:

> Quarantine import risk analysis must be able to go through a full and due process without trade and/or WTO pressures eroding the integrity of Australia's import risk analysis process.[217]

2.321 A group of academics from the Institute for Comparative and International Law at the University of Melbourne argued that IRAs should not be determined along scientific lines alone. The inability of farmers, consumer groups and others to add their on-the-ground expertise to the determination of quarantine protection is a loss of fundamental democratic rights, according to the academics:

> …participation in decision-making about public health and safety issues is radically constrained by the SPS Agreement. The requirement that [WTO members] privilege scientific knowledge over the knowledge of local consumers, workers, industry groups or farmers operates to limit the scope for debating particular policies and laws. Only scientific experts, often working for multinational corporations, are recognised as legitimate sources of authorised knowledge.[218]

The precautionary principle

2.322 The SPS Agreement states that where scientific evidence is insufficient to determine quarantine measures, member countries may adopt a cautious approach based on current information, until more scientific information is available. This is known as the 'precautionary principle'.

2.323 Phillips Fox Lawyers pointed out that while the precautionary principle has been referred to since the 1980s, it has only more recently gained international support. While there is not one agreed definition of the

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216 Tasmanian State Government, submission no. 170, p. 7.

217 Pork Council of Australia, submission no. 80, p. 5.

218 Dr Anne Orford, Ms Sundya Pahuja, Ms Jennifer Beard, and Mr John Howe, Centre for Comparative and International Law, submission no. 249, p. 4.

precautionary principle, it has been described in a number of international agreements.[219]

2.324 Australia has domestically recognised the principle in the Environment Protection and Biodiversity Conservation Act 1999, which states:

> if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[220]

2.325 The potential misuse of the precautionary principle, particularly in regard to the Cartagena Protocol, is discussed in Chapter 3.2.

Recommendation 14

QUARANTINE

2.326 **The Committee recommends that the Commonwealth Government, in consultation with State and Territory governments and the community:**

- **develop written policy guidelines and operational procedures that describe Australia's 'Appropriate Level of Protection' for quarantine; and**
- **that the guidelines involve benchmarks for determination of environmental factors and the application of the Precautionary Principle.**

Allocating risk

2.327 An issue raised with the Committee throughout the inquiry was that of allocating risk in the new quarantine environment. Given that Australia (and all other WTO members) have moved from a 'no risk' to 'low risk'

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219 The precautionary principle is defined in the Convention on Biological Diversity (1992); Framework Convention on Climate Change (1992); Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks (1995); Convention to Ban the Importation of Hazardous and Radioactive Wastes (1996) – Phillips Fox Lawyers, submission no. 251, pp. 6-7.

220 Environment Protection and Biodiversity Conservation Act 1999, Section 3A, available from the Austlii internet site: http://www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588.txt.

approach to quarantine management, who is responsible if something goes wrong?

2.328 This was a major argument of the Tasmanian Government in disputing the Commonwealth's approach to the Canadian salmon case. Tasmania argued that, in the event that importing Canadian salmon did result in disease to the Tasmanian salmon industry, it would be a disaster to that industry and the state's economy.

2.329 Dr Sali Bache (Centre for Maritime Policy, University of Wollongong) and Dr Marcus Haward (University of Tasmania) sought to find a way that the WTO can address the issue of loss, associated with the acceptance of risk as part of the SPS Agreement:

> If the WTO has insisted on the importation of fresh salmon and a new pathogen enters the Australian environment as a result then Australia faces the prospect of a significant financial loss. The issue of what happens if a panel decision - based on scientific evidence - has been proven wrong has not been considered.
>
> Perhaps one alternative, as espoused by trade expert Steve Charnovitz, is that of the provision of financial insurance by the WTO system, for Australia. That is if the panel is wrong on a SPS decision then the nation that has been forced to open it boarders to a previously prohibited import will be insured in the unlikely event that such an outbreak occurs.[221]

2.330 Phillips Fox Lawyers also looked at the question of risk in WTO decisions, at the request of the Committee. Phillips Fox found that the parties to be considered as possibly liable if a WTO dispute finding resulted in serious new disease entering a country could be:

- the WTO organisation itself;
- the Member States of the WTO who join together as the Dispute Settlement Body to make the final decisions of the WTO in dispute matters; and
- the Member State or States that have used the dispute settlement procedures to bring about the imports which have caused damage.

2.331 The possibility of Australia (or any other country) seeking damages from the WTO itself, or all member states of the WTO, was quickly ruled out by Phillips Fox.

221 Drs Sali Bache and Marcus Haward, submission no. 46, p. 9.

2.332 International law has established that countries have a right to protection of their territory from real and grievous injury.[222] However, the opinion of Phillips Fox is that other findings of the International Law Commission would preclude Australia from seeking damages from other states, as Australia has become a Member State of the WTO and agreed to be bound by the DSB decisions. Phillips Fox also questioned whether there was a court or international tribunal that has jurisdiction to give a ruling on such matters. In summary, Phillips Fox concluded:

> …the question of State Responsibility is a contentious and difficult area and there seems to be no clear answer as to how a situation of grave injury suffered as a result of a DSB ruling should and could be dealt with.[223]

2.333 The Pork Council of Australia emphasised the importance of our 'clean and green' status for our exports, arguing that allowing disease into the country would cost our exports dearly:

> The high quarantine status of Australian agriculture has enormous immediate and long-term value for this nation. Australia commands a premium position in the international market for food product as a result of its disease free status. This is certainly true of the pork industry…the Singapore market was built on the fact and we captured it, and were strategically ready to capture it because our competitor suffered an outbreak of exotic disease.[224]

2.334 Our the importance of our 'green' status has been illustrated recently with the high demand for Australian red meat products as a result of the outbreak of Foot and Mouth Disease (FMD) across Europe.

2.335 The Deputy-Director of the WTO, Andy Stoler, told us that countries bringing SPS disputes do shoulder some risk, by holding their products up to a high level of scrutiny.

> If a WTO panel were to come out and say, 'there's something really wrong with this salmon', chances are that Canadian consumers would get wind of it. That would then blow back on the Canadians who brought the case against you in a way that might prove damaging to market prospects in other areas.[225]

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222 International Court of Justice, Nuclear Tests Case, ICJ Reports 1974, 253 at 361. See ICJ internet site: http://www.icj-cij.org/icjwww/icj002.htm, accessed 17 September 2001.

223 Phillips Fox Lawyers, submission no. 251.1 (supplementary submission).

224 Kathleen Plowman, Pork Council of Australia, Transcript of Evidence 9 March 2001, p. TR217.

225 Andrew Stoler, World Trade Organisation, Transcript of Evidence 12 September 2001 (private briefing), p. TR8.

Challenges to the current system

2.336 Submitters argued that the pressure from overseas countries for Australia to relax our strict quarantine rules, is placing the current quarantine regulation system (with its IRA assessments) under stress. Corrs Lawyers told us:

> There can be no doubt that Australia is being pressed by other countries to change our quarantine standards to lower international standards. While AQIS is doing its best to manage the IRAs, this number of IRAs demonstrates clearly that potentially Australia is on the precipice of a large number of WTO actions.[226]

2.337 The AFGC noted that if our agricultural exports increase (as they will do if there is further agricultural trade reform in a new WTO round), the challenges to our system will increase:

> Historic changes in the pattern of Australia's trade are exposing Australia more to trade challenges. Australia's exports of manufactures are expanding steadily, attracting attention in markets where previously they were disregarded. Howe Leather had been receiving export subsidies (which are illegal under the WTO) for a decade. US importers only acted against Howe when it started to make an impact in the US market.
>
> The second trend is the adoption of risk assessment to underpin quarantine restrictions and the creation of rights under the WTO for members to contest how quarantine controls are administered. Administration of quarantine controls is now a greater focus of interest for importers.[227]

2.338 The Western Australian Government argued that Australian producers don't understanding the thinking behind Government quarantine decisions:

> The issue is that Australia is faced with dozens of import risk assessment applications and is under great pressure from its trading partners for bilateral negotiations. There is poor

226 Corrs Chambers Westgarth Lawyers, sub no. 79, p. 8.

227 Australian Food and Grocery Council, submission no. 302, p. 16.

> international recognition of Australia's freedom from pests and diseases. There is generally ignorance and parochialism within Australia about the understanding of that approach, so there tends to be a very simplistic attitude towards it.[228]

2.339 Drs Bache and Haward argued that other countries also do not understand the SPS Agreement:

> Increasingly Australia's quarantine decisions will come under close scrutiny in a similar manner to that which occurred in the salmon decision. While most developed nations and a number of developing nations have embraced the SPS principles the penetration of this message has not been as deep through developing nations and emerging Asian economies as had been hoped. Many simply do not understand their obligations and the links with relevant international standards and many do not have the scientific capacity to enable them to meet their obligations.[229]

2.340 The 1998 WTO Trade Policy Review of Australia highlighted the hostility from other countries about our quarantine system. Among other issues, WTO member nations raised concerns about 'the continuing restrictive nature of Australia's SPS system, under which import of many food products was virtually impossible'. Australia countered this argument by stating that it stuck by the WTO's SPS rules in determining our quarantine policies. Australia argued that import penetration to Australia's agricultural market is actually very high, but that the entry of imported pests could have devastating consequences for Australia's trade.[230]

US Government criticism

2.341 We note that the US Government recently was critical of Australian quarantine measures. The US is angry at long delays in the IRA process for proposed US access to the Australian table grape, poultry, apple and citrus industries. According to some reports, the US table grape industry is considering asking the USTR to consider WTO action against Australia's import policy for table grapes.[231]

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228 Robert Delane, Agriculture Western Australia, Western Australian Government, Transcript of Evidence 20 April 2001, p. TR327.

229 Drs Sali Bache and Marcus Haward, submission no. 46, p. 10.

230 WTO Trade Policy Review Body: *Review of Australia (1998) – Evaluation*, at: http://www.wto.org/english/tratop_e/tpr_e/tp79_e.htm, accessed 18 May 2001.

231 Brendan Pearson, *Australian Financial Review*, 2 May 2001, p. 3.

2.342 Such moves by the US are designed to place pressure on the Australian Government to speed up the IRA process, or to make decisions that favour US imports.

Assistance to exporters

2.343 The Western Australian Government called for the Commonwealth Government to assist exporters through reducing quarantine charges. While we cannot assist our industries through direct export subsidies and the like, the Government could agree to lower or abolish export inspection fees:

> …we do need to play by all the rules and think of innovative ways in which Australia can do that. As a simple example, in this country we still have substantial export inspection charges imposed by AQIS through the Commonwealth. It would be WTO compliant to reduce those inspection charges and provide a direct facilitation to exports. We need to think about those sorts of measures – whether we have the assistance to agriculture, for example, in the right place under the new operating environment.[232]

Committee comment

2.344 Clearly the issue of Australia's quarantine policies is sensitive for many Australian producers. Australia trades on its 'clean and green' status and the risk of introducing foreign disease must be minimised. However, the SPS Agreement allows for a low-risk approach to quarantine protection, which the Australian Government has pursued.

2.345 We recognise the pressures Australia's quarantine system will continue to face, particularly as agricultural trade reform becomes a central plank of a new WTO round of trade negotiations.

232 Robert Delane, Agriculture Western Australia, Western Australian Government, Transcript of Evidence 20 April 2001, p. TR325.

2.5 WHOLE-OF-GOVERNMENT APPROACH TO WTO POLICY

2.346 As noted throughout this report, the WTO Agreements have far-reaching implications for Australian trade and other policies such as industry assistance, employment, quarantine, the environment, and social issues. Many of the issues touched by the WTO are predominantly the responsibility of State and Territory Governments. As such, it is important that Australia's WTO policy is developed with a whole-of-government approach at the Commonwealth level and involves all State governments.[233]

2.347 In undertaking the inquiry, we were keen to hear from State governments about their experiences in WTO issues, from developing Australia's WTO policy to involvement in cases such as the Canadian Salmon case. We received submissions from the NSW, Western Australian, Tasmanian and Queensland Governments. At public hearings we spoke to officers representing the Western Australian and Tasmanian Governments, and at Commonwealth level, officers representing DFAT, AFFA, Attorney-General's Department, Department of Communication, Information Technology and the Arts (DCITA), and the Department of Employment, Workplace Relations and Small Business (DEWRSB).

2.348 The NSW Minister for Small Business highlighted the challenges facing State Governments in their policy decisions:

> …assistance programs aimed at attracting investment could, given recent WTO dispute rulings, hinder a company that seeks to export some time in the future. State Governments, therefore, can unwittingly be hindering the future business expansion of businesses they have tried hard to attract.
>
> Decisions taken at the Commonwealth level in regard to Australia's WTO commitments have important ramifications for states. I believe it is important that the Commonwealth consult with the states in the development of Australia's negotiating position on WTO matters.[234]

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233 Throughout this chapter, the term 'State Governments' also refers to the Governments of the Northern Territory and the Australian Capital Territory.

234 Hon. Sandra Nori MP, NSW Minister for Small Business and Tourism, submission no. 235.

2.349 Similarly, the Western Australian Government has been keen to make sure its programs for attracting investment in major infrastructure are WTO compliant:

> We are particularly interested in the operations of the WTO due to its impact on the provision of assistance by Governments to major projects. We believe Australia should maximise its role with the WTO to ensure that local industry and export initiatives are not compromised.[235]

2.350 The Queensland Government expressed concern that the WTO Agreements can have far-reaching implications for all Australian industries and States:

> Of particular concern is that the impact of a decision can be directed to a totally unrelated sector of the Australian economy, including in a different State, through the countervailing measures applied. There is an element of fundamental inequity about such a system, which serves to undermine the intentions of the process.[236]

2.351 The Tasmanian Government has had the most direct involvement with the WTO and its dispute processes, through the Canadian Salmon case. The Tasmanian Government submission commented:

> …the potential effects of WTO policies can be wide reaching with regard to industries that are at the centre of Tasmania's economy. It is therefore important that the State has an appropriate vehicle by which to voice its concerns over major trade issues.[237]

2.352 Evidence from State Governments indicated a lack of adequate communication channels between the Commonwealth and State bureaucracies. DFAT argued to the contrary, outlining its Commonwealth-State consultation mechanisms. A representative of the WA Government rightly observed:

> We work in a complex structure in a federation. WTO issues are complex and evolving. It is going to require a lot more attention probably than all Governments are able to apply to it. [238]

2.353 Those outside the bureaucracy also have a perception of lack of communication channels. Professor Mary Hiscock (Bond University) told us that information about WTO matters needs to be communicated across Australia, at all levels of Government and within the private sector:

235 Petrice Judge, Western Australian Ministry of the Premier and Cabinet, Transcript of Evidence 20 April 2001, p. TR318.

236 Queensland State Government, submission no. 280, p. 4.

237 Tasmanian State Government, submission no. 170, p. 2.

238 Robert Delane, Agriculture Western Australia, Transcript of Evidence 20 April 2001, p. TR329.

> …the number of people who can get into trouble, because of our membership of the WTO, is really quite considerable and they are very scattered and very diverse. Many of the people who are engaged in those activities do not realise the WTO implications that follow.
>
> To take a very simple example, people who work at the state level are not necessarily attuned to these things, especially given the expansion of activities of the WTO over the last 10 years. It has moved way beyond traditional areas of trade. We then have, obviously, a problem of management and communication – those are the skills that are the problem.[239]

2.354 Hugh Morgan of WMC Limited also called for greater linkage between Government policies:

> …much more consideration needs to be given to relating other policy decisions to this fundamental and overarching policy [WTO interests]. Governments should avoid policies which, either explicitly or implicitly, threaten the future of the WTO.
>
> If it is still our view that the WTO is essential not only to Australia's future prosperity but also to a more peaceful and prosperous Asian region, then the structure and disposition of Government, both in its political and bureaucratic manifestations, should reflect that strategic view.[240]

2.355 Within the Commonwealth sphere, this is an issue particularly (but not exclusively) for the Department of Industry, Science and Resources, which develops industry assistance programs. The Department's submission did not describe how it ensures that its programs are WTO-compliant, save to say that the department liaises with DFAT about WTO issues.[241]

239 Professor Mary Hiscock, Bond University, Transcript of Evidence 19 October 2000, p. TR30.

240 WMC Limited, submission no. 52, p. 3.

241 Department of Industry, Science and Resources, submission no. 281, p. 3.

Recommendation 15

WTO COMPLIANCE

2.356 **The Committee recommends that the Minister for Trade (in consultation with other relevant Ministers) devise a WTO compliance checklist to be used by all Ministers and their officials when developing new industry support programs.**

Existing communication mechanisms

2.357 The primary conduit for Commonwealth-State communications on WTO matters is via the National Trade Consultations (NTC). Commonwealth and State trade ministers meet annually to discuss Australia's trade policy, including WTO policy. The last NTC was held in July 2001.

2.358 Meetings are also held at the bureaucratic level on a twice-yearly basis, involving Commonwealth and State officers and some industry groups. An officer-level meeting was held in May 2001 and DFAT told us that ongoing NTC meetings will be held in the lead-up to the Doha meeting.

2.359 The Standing Committee on Treaties (SCOT), coordinated through the Department of Prime Minister and Cabinet, is another Commonwealth-state forum for departmental officers to discuss treaties including WTO agreements. The SCOT meets at least twice a year. According to DFAT, WTO issues such as subsidies and investment schemes have been raised in this forum.

2.360 As well as these formal consultation channels, DFAT maintained that it has effective informal communication networks with relevant State agencies and officials:

> DFAT also maintains an informal network of contacts in Commonwealth agencies and State departments to discuss the impact of WTO agreements on current and new policy development. In the lead-up to the Doha Ministerial Conference, extensive consultations with Commonwealth agencies will be conducted through a series of inter-departmental committees and informal meetings. Prior to Doha, the Department will prepare a cabinet submission, which will include input from all relevant

> Commonwealth agencies to ensure a coordinated Australian Government approach.[242]

2.361 Several State governments seemed either unaware of the existing consultation mechanisms, or unhappy with their operation. The Western Australian Government felt that they were informed of the final result of trade negotiations, rather than consulted in a meaningful way:

> Because of the importance of trade to the Western Australian economy, we think we should be involved in determining the negotiating position as well as informed of the outcome. [243]

2.362 The WA Government called for the establishment of a Commonwealth-State forum to discuss WTO issues:

> …there is no dedicated forum to look at the WTO issues as there is with other treaties. It would be beneficial if we had a regular consultation mode with DFAT so that we could pull together all our agencies at state level and, in a consistent fashion, bring up issues of concern to the state and have a forward work plan from the Commonwealth's point of view.[244]

2.363 The Tasmanian Government called for much more inclusive consultation methods, and for the Commonwealth to allow for State and regional differences when determining trade and quarantine policies.[245]

2.364 While not criticising current consultation mechanisms, the Queensland Government called for full consultation from the Commonwealth in all trade matters, including WTO disputes:

> The Federal Government is solely responsible for Australia's relationship with the WTO, but should consult fully with the States, Territories and other external bodies, particularly in advance of major trade-related events or discussions, including disputes.[246]

Dispute settlement

2.365 The Tasmanian Government was particularly unhappy with the extent of consultation afforded to them by the Commonwealth during the Canadian

242 DFAT supplementary submission (no. 222.2), p. 4.

243 Hazel Kural, Western Australian Treasury, Transcript of Evidence 20 April 2001, p. TR319.

244 Petrice Judge, Western Australian Ministry of the Premier and Cabinet, Transcript of Evidence 20 April 2001, p. TR329.

245 Tasmanian State Government, submission no. 170.

246 Queensland State Government, submission no. 280, p. 6.

salmon dispute. Officials told us that Tasmanian Government representatives were not part of the official Australian delegation arguing the case before the WTO dispute panel:

> I went to Geneva twice when the dispute settlement proceedings were on. The DFAT representatives there said that we simply were not allowed in the building on the first occasion.
>
> On the second occasion we got into the building, but we were told that were not part of the Australian delegation and we could not go into the room.[247]

2.366 In the Canadian Salmon case domestic political factors also came into play. Unlike cases in which Australia has been the dispute initiator (US Lamb, Korean Beef), the Commonwealth Government did not have industry or State Government support for the line of argument it used in the Canadian Salmon case.

2.367 The Tasmanian Government called for the inclusion of state representatives on all WTO delegations, particularly those dealing with dispute settlement processes. The Government argued that inclusion of such representatives would bring a much greater degree of regional knowledge to the table.

2.368 We agree that the views of State Governments should be taken into account when determining WTO negotiating positions, domestic implementation of WTO policies, and when undertaking dispute cases before the WTO. Nevertheless, it is important to recognise that the Australian Constitution clearly sets out the Commonwealth's overarching responsibility for international trade and commerce, quarantine and external relations.[248]

2.369 Improvement of consultation mechanisms, as recommended above, would go a long way towards resolving State governments' concerns. However, we believe that in dispute cases before the WTO the Commonwealth should make use of State Government expertise – just as it has made use of industry expertise in cases such as the US Lamb Dispute. Clearly, in some instances the Commonwealth and State governments will not agree on the direction taken by Australia in the dispute. In such cases, the policy

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247 Roger Hall, Tasmanian Department of Primary Industries, Water and Environment, Transcript of Evidence 27 April 2001, p. TR411.

248 Section 51 of the Australian Constitution empowers the Commonwealth Parliament to make laws with respect to: Trade and commerce with other countries, and among the States (s. 51(i)); Quarantine (s.51(ix)); and External Relations (s. 51(xxix)). Section 109 determines that where a State law and Commonwealth law clash, the Commonwealth shall always prevail. The Australian Constitution is available at: http://www.aph.gov.au/senate/general/constitution/index.htm.

of the Commonwealth Government must always prevail, and State government representatives must fully support the Commonwealth's position when engaging in negotiations or dispute case argument.

Recommendation 16

COMMONWEALTH / STATE CONSULTATIONS

2.370 **The Committee recommends that the Minister for Trade ensure that the Department of Foreign Affairs and Trade places a high priority on consulting with State and Territory Governments on trade related matters. The relationship between the Commonwealth and State governments should involve:**

- **regular, at least annual, ministerial level meetings;**
- **the establishment of a Commonwealth/State forum at the officials level to regularly discuss WTO matters, including trade policy, current and possible disputes, and industry/assistance programs;**
- **inclusion of State and Territory representatives on WTO consultation taskforces, where special understanding or expertise can be brought to bear; and**
- **inclusion of State and Territory representatives on official WTO delegations, where special understanding or expertise can be brought to bear and where there is a willingness on the part of the State or Territory governments to recognise over-riding international obligations.**